WAIKANAE

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Report on Te Ātiawa/Ngāti Awa Claims

WAI 2200

WAITANGI TRIBUNAL REPORT 2022

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CONTENTS

LIST OF TABLES

LIST OF MAPS

Waitangi Tribunal
Te Rōpū Whakamana i te Tiriti o Waitangi
Kia puta ki te whai ao, ki te mārama

The Honourable Willie Jackson
Minister for Māori Development

The Honourable Kelvin Davis
Minister for Māori Crown Relations: Te Arawhiti

The Honourable Andrew Little
Minister for Treaty of Waitangi Negotiations

The Honourable Damien O'Connor
Minister for Land Information

The Honourable Poto Williams
Minister of Conservation

Parliament Buildings
WELLINGTON

14 December 2022

E ngā Minita o te Karauna

Tēnā koutou i ngā tini aitua kua heke ki te wahangūtanga i ngā marama, i ngā tau ka hori ake nei.

Nō tēnei tau ka tae mai te rongo kua riro atu nei a Kuini Irihapeti i tō tātou Kaihanga. He wahine rangatira a ia. Koia te mana o te karauna i tōna wa. He wahine rongonui, otirā ko te nuinga o tōna rongo nā te nui o āna mahi pai. Nō reira, ko mātou ka tangi atu nei ki a koe e te Kuini i tēnei pito o te

Ministers of the Crown

Greetings in the wake of the many dead who have gone down into silence in the past months and years.

This year news came of the passing of Queen Elizabeth II. She was a chiefly woman. The authority of the Crown in her time. A famous woman, because of the many good things she did. Therefore, we grieve for you, O Queen from the uttermost end

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MINISTRY OF JUSTICE
Tāhū o te Ture

ao, ōu iwi i honoa nei e te Tiriti o Waitangi. Haere, haere e te Kuini i te huarahi i haere atu ai ō mātua, ō tīpuna, me tō hoa tāne a Piriniha Piripi.

Nō te tau 2009 i whakatūria tēnei taraipiunara hei titiro ki te āhua o ngā nawe a Te Āti Awa/Ngāti Awa, te iwi nā tō rātou tūpuna i whakataukitia rā, 'Ka ngahae ngā pī, ko Waikanae.' Tekau mā whitu ngā rā mātou e uiui ana me tētahi rā anō e whakarongo ana ki ngā kōrero tuku iho. Kia mārama katoa tātou, kua oti kē atu e mātou te pūrongo atu hei titiro mā koutou ngā Minita me te ao whānui.

Nā, ka kitea kua hē te tikanga ki a Te Āti Awa/Ngāti Awa. Koirā ka hāngai atu ngā tono ki mua i te Rōpū Whakamana i te Tiriti o Waitangi.

Heoi, me mahi tonu e koutou tāu whakaaro kia whakatikaina ngā nawe nei. Koutou ko te Paremata katoa e tū mai i te Whanganui-a-Tara nei e whakatinana.

of the earth, your people who have been joined by the Treaty of Waitangi . . . Farewell, farewell, O Queen! You have taken your departure by the route already traversed by your parents, grandparents, and your beloved husband, Prince Philip.

In 2009, this tribunal was established to inquire into the grievances of Te Ātiawa/Ngāti Awa the people whose ancestor made the proverbial saying, 'Staring in amazement, hence Waikanae.' For 17 days, we were occupied in hearing evidence and one day listening to oral history. Let us all be clear on the matter, our report is now complete and is presented to you and the general public for your consideration.

Now, the evidence adduced confirms the fact that Te Ātiawa / Ngati Awa have been unfairly treated. That is why they have prosecuted their claims before the Waitangi Tribunal.

However, it is for you to progress in your own manner our recommendations around redressing these grievances. You and all of Parliament who are established here in in Wellington.

This report is presented to you and to the claimants in pre-publication form, and it will later form a volume of the Porirua ki Manawatū report. In 2020, we completed the *Kārewarewa Urupā Report*, which provided early findings and recommendations on an urgent aspect of the Te Ātiawa/Ngāti Awa claims. Those findings and recommendations should

be considered alongside the findings and recommendations contained in this present report, which are summarised in chapter 10.

Te Ātiawa/Ngāti Awa migrated to the Kāpiti coast in the 1820s and 1830s, settling in the Waikanae district. André Baker, chair of Te Ātiawa ki Whakarongotai Charitable Trust, gave the following whakataukī: 'Mai Kūkūtauākī ki Whareroa, tatu atu ki Paripari. Rere whakauta ngā tini tapu ko Wainui, Ko Maunganui, Pukemore, Kapakapanui, Pukeatua ūngutu atu. Ki te pou whakararo ki Ngawhakangutu, Ko Āti Awa ki Whakarongotai e.' The rohe of Te Ātiawa/Ngāti Awa thus stretches from the Kukutauaki Stream (which is their boundary with Ngāti Raukawa) south to the Whareroa and Wainui blocks, where they have shared interests with Ngāti Toa. In the 1850s, the Crown breached the principles of the Treaty (and its own nineteenth-century purchase standards) in its acquisition of the Whareroa and Wainui blocks. The Crown's purchase officer failed to investigate title prior to purchasing, imposed the purchase on non-sellers, and provided extremely inadequate reserves. When Te Ātiawa/Ngāti Awa supported the Kīngitanga in the 1860s in response to the pressures of Crown purchasing, settler self-government institutions, and the outbreak of war in Taranaki, the Crown compelled the iwi to relinquish the King in 1864 with direct threats of confiscation. This, too, was a breach of Treaty principles.

Following the Crown's purchase of Whareroa, Wainui, and Ngarara East (Maunganui), Te Ātiawa/Ngāti Awa were left with about 28,000 acres of land in 1874 (the Ngarara West block). They had little choice but to put their lands through the Native Land Court in 1873, after which they suffered the prejudicial effects of the individualised title imposed by the Crown's native land laws. The Crown conceded in this inquiry that individualisation of title made the lands of Te Ātiawa/Ngāti Awa susceptible to fragmentation and alienation, and contributed to the undermining of traditional tribal structures, in breach of the Treaty. The Crown also conceded that the cumulative effect of its acts and omissions left the iwi virtually landless, and had a 'devastating impact on their economic, social and cultural well-being and development'. The Crown's failure to ensure the retention of sufficient land was, it was conceded, a breach of Treaty principles. We welcomed those concessions but considered that they did not go far enough to capture the many breaches suffered by Te Ātiawa/Ngāti Awa in the nineteenth and twentieth centuries.

In particular, the Governments of the day failed to provide any (or any adequate) remedies to the grievances raised by the claimants in the 1880s

and 1890s. Two crucial matters – the omission of many individuals from the title in 1873, and the power accorded individuals to apply for partition of the tribal estate – resulted in a decade of petitions and litigation. The remedies provided by the Crown in response were limited and flawed. One such remedy, the Ngarara and Waipiro Further Investigation Act 1889, was in breach of Treaty principles because (among other things) it empowered the court to divide all the remaining interests compulsorily. The attempts of Wi Parata and other tribal leaders to stop this extreme form of individualisation in 1891, including by going to the Supreme Court, were unsuccessful. The prejudicial consequence was twofold: bitter division within Te Ātiawa/Ngāti Awa, the legacy of which was still evident at our hearings in 2018; and the removal of all community controls on alienation, resulting in the rapid sale of individual interests in the 1890s and the early decades of the twenieth century. Most Te Ātiawa/Ngāti Awa owners had been rendered virtually landless before 1930.

Following the 1890–91 court process, Te Ātiawa/Ngāti Awa had tried to prevent this loss of land by petitioning Parliament and supporting Kotahitanga, seeking the empowerment of a Māori parliament and a statutory ban on all land sales (with the mutual benefit promised by the Treaty to come from settlement through leasing only). Wi Parata's speech to the Legislative Council Native Affairs Committee in 1893 outlined the Crown's many Treaty breaches and appealed to the Treaty partner for remedies. The Crown and Kotahitanga did reach agreement on a compromise solution, the Māori Lands Administration Act 1900, but its crucial protections were soon watered down and then abandoned altogether in 1905–09. The Crown argued in this inquiry that the Native Land Act 1909 and its successors gave sufficient protection against landlessness, and that any failure to protect Te Ātiawa/Ngāti Awa was the responsibility of the independent judges charged with implementing the legislative protections. In our view, the abandonment of the 1900 Act without negotiation, the weakening of statutory protections from 1909 onwards, and the removal of Māori from any representation in the 1909 Act's Māori land boards, breached Treaty principles. In addition, the Crown failed to reform the private purchase system for Māori land in the early twenieth century, despite the Stout–Ngata commission's recommendations, and also failed to provide Te Ātiawa/Ngāti Awa with the same access to cheap development finance as settlers. These Crown omissions breached the principles of the Treaty and resulted in excessive land loss for Te Ātiawa/Ngāti Awa, exacerbating the problems already

caused by the removal of community controls and the individualisation of title.

Rating was also a key issue for the claimants, including the compulsory vesting of some land in the Māori Trustee for sale to recover rates arrears. The focus in this report was on the role of the Crown, which failed to exempt Māori land that did not produce revenue from rates, despite legislative provision for the Crown to do so. In the case of compulsory vestings for sale, the Ministerial veto was not used to protect Te Ātiawa/Ngāti Awa owners despite circumstances which ought to have justified its use. These Crown omissions were in breach of Treaty principles. The Crown conceded that one of the examples provided in this inquiry, the compulsory vesting and sale of Ngarara West A78E2, was not consistent with Treaty principles.

In addition to these land issues, the Te Ātiawa/Ngāti Awa claimants presented several specific grievances.

First, in the case of the Parata Native Township, the Crown breached the Treaty in a number of ways, including by breaking faith with the original agreement and changing the law in 1910, which allowed the inalienable township sections to be sold.

Secondly, the Crown failed to provide an appropriate form of title for taonga such as rivers, including the Waikanae River, depriving the Te Ātiawa/Ngāti Awa owners of possession and control of the bed of the Waikanae River. The flood works introduced by the Crown in the twentieth century further reduced Te Ātiawa/Ngāti Awa control of the river, and the compulsory taking of riparian Māori land was discriminatory; all these Crown acts and omissions were in breach of the Treaty.

Thirdly, the Town and Country Planning Act 1953 was inconsistent with Treaty principles because it gave no protection to Māori interests, did not require consultation with Māori, failed to take any account of Māori cultural values in town planning, and gave an extremely wide latitude to take land compulsorily for a district scheme. These flaws in the Act resulted in the inappropriate rezoning of Māori land as commercial, the placing of the town centre on top of the Parata papakāinga, and the acquisition of homestead sites.

Fourthly, the Crown acquired the land for the Hemi Matenga Memorial Park in breach of the Treaty when it accepted without payment a reserves contribution from the Hemi Matenga Estate trustees of 805 acres, when only 46 acres (or less) was required. Despite making what was called a 'very good bargain', the Crown failed to involve the former owners or their

iwi in the management of the reserve until relatively recently, and did not take advantage of statutory mechanisms to place control of the park under a board with iwi representation.

Fifthly, the Crown's native land laws contributed to the landlocked state of Ngarara West C41 lots 1–3 and part lot 4, adjoining the Hemi Matenga Memorial Park, in breach of Treaty principles.

Sixthly, the Crown breached the Treaty in multiple ways with regard to the Paraparaumu Aerodrome lands (see chapter 7 for the details). The Crown conceded in this inquiry that two of the compulory takings (Ngarara West B4 (part) in 1940 and Ngarara West B4 (part) in 1943) were in breach of the Treaty because the owners were not notified or consulted. The Crown also conceded that its acts and omissions breached the Treaty in respect of the failure to offer back land when Paraparaumu Airport Ltd sold Avion Terrace in 1999. We welcomed these concessions but, in our view, they did not go far enough. All of the Crown's compuslory acquisitions for the aerodrome were in breach of Treaty principles for various reasons, including the taking of land instead of the usual arrangement for emergency landing grounds solely because it was Māori land. Also, the failure to consult adequately when the Crown decided to privatise the aerodrome, the failure to choose a Treaty-compliant option for disposal, and the failure to exercise its offer-back obligations prior to disposal, were in breach of the Treaty. In the period following the privatisation of the aerodrome in 1995, the Crown failed to protect the interests of the former owners and their descendants. This was inconsistent with Treaty principles. Finally, the offer-back provisions of the Public Works Act 1981 are also inconsistent with the principles of the Treaty, and the Crown has failed to reform those provisions despite its knowledge of the need to do so (including the failure to proceed with planned reforms in 2005).

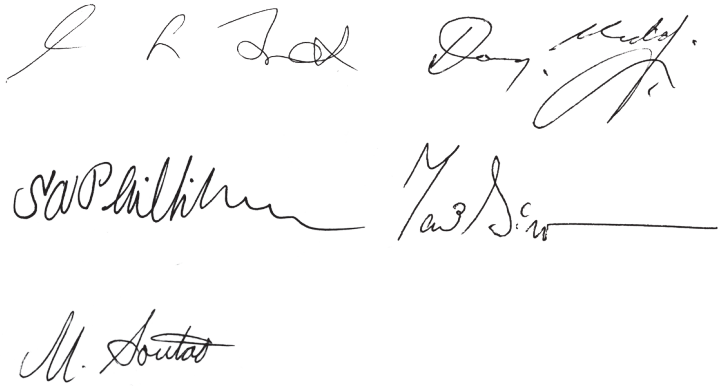
The Crown's Treaty breaches in respect of Te Ātiawa/Ngāti Awa have been serious and sustained over a long period of time, and the prejudicial effects have been highly significant. We recommend that the Crown urgently negotiate a settlement of the claims and reform the offer-back provisions of the Public Works Act 1981. Although we have not made a specific recommendation for the return of Hemi Matenga Memorial Park, we urge the Crown to negotiate a co-governance arrangement and to consider the return of this land. We may also make recommendations about landlocked land after the release of the Taihape priority report on that issue. The full text of our recommendations is located in chapter 10.

Ka tuhia iho e mātou a mātou ingoa hei tohu mo te pono o ēnei kupu katoa, hei tuku atu ki te Paremata o Aotearoa–Niu Tīreni kia mana mai.

Nā mātou te hōnore nui.

We sign our names below as a symbol of the truthfulness of all these words, that it may be forwarded to the Parliament of Aotearoa–New Zealand to be given authority.

It has been our great honour.



Deputy Chief Judge Caren Fox
The Honourable Sir Douglas Lorimer Kidd KNZM
Dr Grant Phillipson
Tania Te Rangingangana Simpson
Dr Monty Soutar

ABBREVIATIONS

AAA	Airport Authorities Act 1966
AHL	Airport Holdings Ltd
AJHR	*Appendix to the Journal of the House of Representatives*
app	appendix
BPP	*British Parliamentary Papers*
CA	Court of Appeal
cl	clause
CMS	Church Missionary Society
DMLB	District Māori Land Boad
doc	document
DOC	Department of Conservation
DOSLI	Department of Survey and Land Information
DSCF	digital still camera Fujifilm
ed	edition, editor
GWRC	Greater Wellington Regional Council
HCC	Horowhenua County Council
JP	justice of the peace
KAH	Kapiti Avion Holdings
KAHL	Kapiti Airport Holdings Ltd
KCDC	Kāpiti Coast District Council
KFMC	Kāpiti Floodplain Management Committee
KRAL	Kāpiti Regional Airport Ltd
LINZ	land Information NewZealand
ltd	limited
MCB	Manawatu Catchment Board
memo	memorandum
MHR	member of the House of Representatives
MLC	Māori Land Court
MOT	Ministry of Transport
MP	member of Parliament
NLC	Native Land Court
no	number
NZCA	*New Zealand Court of Appeal*
NZEnvC	*New Zealand Environment Court*
NZL	New Zealand Loan and Mercantile Agency Company
NZLR	*New Zealand Law Reports*
NZMC	New Zealand Māori Council
NZPD	*New Zealand Parliamentary Debates*
NZSC	*New Zealand Supreme Court*
NZTA	New Zealand Transport Agency

OTS	Office of Treaty Settlements
p, pp	page, pages
PAL	Paraparaumu Airport Ltd
PC	Privy Council
PWA	Public Works Act 1981
QC	Queen's Counsel
RMA	Resource Management Act 1991
RNZAF	Royal New Zealand Air Force
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
SO	Survey Office
SOE	State-owned enterprise
TAKW	Te Ātiawa ki Whakarongotai
TOWPU	Treaty of Waitangi Policy Unit
TPK	Te Puni Kōkiri
v	and (in legal cases)
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2200 record of inquiry. A full copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION

1.1 Mihi

Nau mai, haere atu e tā mātou pūrongo ki te ao mārama, ki te hunga e tatari ana ki a koe. Whākina atu ki te iwi e whaipānga ana ki te whakataunga a te Rōpū Whakamana i te Tiriti o Waitangi. Heoi anō, he mihi noa ake tēnei nā mātou o te Taraipiunara ki a koutou o Te Ātiawa/Ngāti Awa. Tēnei te utanga mō runga i a koutou, mā koutou e whakaatu atu ki ngā iwi, ki te Māori, ki te Pākehā, me te Karauna.

He hokinga mahara ki ngā pūmahara a te rangatira a Wi Parata te Kakakura, 'Whakarongo atu ki ngā tai o Raukawa Moana e pākia mai nei i a rā, i a rā . . .' He tino rangatira atawhai ia ki ōna hapū maha i roto o Waikanae. E kore e kitea anō tērā tū momo tangata i pakeke mai i roto i te ao tahitō, i tū pakari anō hoki i ngā rerekētanga o tēnei ao hurihuri. He whakaaro atu tēnei ki a rātou katoa, te hunga wairua i para te huarahi ki te wāhi ngaro. Nō te tau 2019 i mate ai a Paora Tuhari Ropata. I tēnei tau tonu i hinga ai a Manu Parata. Ko rāua ētahi o ngā kai-kēreme. Tēnei te ngākau te tangi nei te mihi nei ki a rāua. He maha ngā tauira i waihotia e rātou katoa mā tēnei reanga hei āta titiro, hei whai atu. Me kī pēnei te kōrero ki a rātou katoa te hunga mate, 'Hoki wairua atu rā koutou ki te ao o te wahangū, e oki!'

He mihi atu hoki ki ngā kai-kēreme katoa, hāunga hoki koutou i tuku kupu

May this report make its journey into the world of light and to the people who await it. May it be received by the hands of the people who have brought these matters before the Waitangi Tribunal. The Tribunal panel extends its sincere greetings to Te Ātiawa/Ngāti Awa. This report is now with you and available to be considered by Māori, Pākehā and the Crown.

We reflect on the advice of the chief Wi Parata te Kakakura when he said, 'Listen to the tides of Raukawa Moana lapping upon the shoreline day after day . . .' He was a true chief benevolent to his many hapū in the Waikanae district. We will not again see that genre of person, raised in the old world but who also stood confidently in a very different, changing world. We think of them all, the departed spirits who have traversed the path to the hidden realm. In 2019, Paora Tuhari Ropata passed away and just this year we lost Manu Parata. Both were claimants. The heart sheds tears and we farewell them. They all leave behind many examples for this generation to study and follow. Let us now say to them, 'Return to the world of silence and take your rest.'

Our greetings to all of the claimants, and in particular to those who gave voice to their claims. For several weeks you, with the help of your lawyers, outlined your land claims to us, and

whakaora i ā koutou kēreme. He maha ngā wiki i whakaatuatu ai koutou me ā koutou roia ō koutou mate whenua ki a mātou, i ngā raruraru i tupu ake i roto i ngā ture i whakamanahia e ngā kāwanatanga o mua. Mei kore ake hoki koutou i arataki atu mātou ki ngā wāhi tapu, ki ngā wāhi tūpuna.

Tēnā koutou ngā roia o te Karauna. Nā koutou i kōkiri te kaupapa o te Karauna ki aua uiuinga.

Tēnā koutou katoa!

explained the impacts of laws enacted by successive governments. We were also fortunate to have you guide us through your sacred sites and ancestral places.

Thank you also to Crown counsel who delivered the Crown's arguments at the hearings.

Our sincere greetings to you all.

1.2 What this Report is About

Te Ātiawa/Ngāti Awa[1] is an iwi on the west coast of the lower North Island with strong ties to Taranaki. After approximately 1819, Te Ātiawa/Ngāti Awa hapū migrated from Taranaki to the Porirua ki Manawatū region in large numbers, eventually residing in the area between the Kukutauaki Stream in the north and Whareroa in the south, with the Paripari Pā as their southern-most outpost (see map 1). Approximately 27 Te Ātiawa/Ngāti Awa rangatira signed the Treaty of Waitangi, including wāhine, with the largest cluster signing at Waikanae on 16 May 1840 (see chapter 3 for the details). In an 1846 exchange of letters with rangatira who had expressed anxiety about their relationship with the Crown, Governor George Grey made promises of amity and collaboration with Te Ātiawa/Ngāti Awa. Grey foreshadowed a 'partnership' arrangement with the iwi, including the protection of their properties and possessions.[2] The Governor noted Queen Victoria's wishes that he do 'all in [his] power' to ensure their happiness and safety.[3] Despite these assurances, during the nineteenth and twentieth centuries, Crown acts and omissions had a devastating impact on Te Ātiawa/Ngāti Awa, resulting in their virtual landlessness today.

In this phase of the inquiry, we heard 17 claims bought by individuals on behalf of whānau, hapū, and iwi organisations. They concerned a range of issues related to the Crown's alleged interference with and diminishment of Te Ātiawa/Ngāti Awa's tino rangatiratanga, their loss of land, the degradation of the local environment from which they drew sustenance and identity, and the desecration of their cultural sites and wāhi tapu. Such grievances characterised Te Ātiawa/Ngāti Awa's experience with the Crown over the past near two centuries. It is important to note that while many of these allegations will be discussed in this report, not

1. We have elected to use the terminology 'Te Ātiawa/Ngāti Awa' or 'Te Ātiawa/Ngāti Awa ki Kāpiti' in this report. Further discussion of this decision can be found in chapter 2.
2. Tony Walzl, 'Ngatiawa: land and political engagement issues c1819–1900', December 2017 (doc A194), p 350
3. Walzl, 'Ngatiawa' (doc A194), p 183

Map 1: Te Ātiawa / Ngāti Awa inquiry phase.

every grievance heard in this inquiry phase will be addressed in this volume of the report (see our discussion below of the scope of this volume at 1.5).

1.3 The Porirua ki Manawatū District Inquiry

In 2009, the Tribunal established the Porirua ki Manawatū (Wai 2200) district inquiry, severing it from the Taihape district.[4] The inquiry concerns 117 unsettled claims involving three distinct tribal groups: Muaūpoko, Te Ātiawa / Ngāti Awa, and Ngāti Raukawa and affiliated groups.[5] The other three iwi of the district, Ngāti Toa, Rangitāne, and Ngāti Apa, have settled their claims with the Crown.

On 2 July 2010, Chief Judge Wilson Isaac, chairperson of the Waitangi Tribunal, appointed Deputy Chief Judge Caren Fox presiding officer of the Porirua ki

4. Waitangi Tribunal, memorandum, 24 September 2009 (paper 2.5.9), p 1
5. Ngāti Raukawa was originally set to be heard in the Taihape district inquiry.

Manawatū district inquiry.[6] Emeritus Professor Sir Tamati Reedy[7], Dr Grant Phillipson[8], the Honourable Sir Douglas Kidd[9], and Tania Simpson[10] were subsequently appointed as members of the inquiry panel. On 7 June 2017, Dr Monty Soutar was appointed to the panel[11], and on 29 November 2017, Emeritus Professor Sir Tamati Reedy resigned.[12] Dr Soutar was present throughout the Te Ātiawa/Ngāti Awa phase of the inquiry.

On 30 November 2018, during the hearing stage for Te Ātiawa/Ngāti Awa claims, Deputy Chief Judge Fox announced that Sir Douglas had experienced serious health complications. In practical terms, this meant that he was unable to attend the third and fourth hearing. He did attend the fifth hearing in a limited capacity (we discuss the hearing timetable below, in section 1.4.4). Deputy Chief Judge Fox advised that Sir Douglas would receive all transcripts and briefs of evidence electronically. This would enable him to contribute to the report writing process.[13] In a memorandum dated 8 October 2019, Deputy Chief Judge Fox decided that due to the potential for perceived bias arising from Sir Douglas's past role as Minister for State Owned Enterprises, he would be recused from the discussion and writing of any sections of this report that relate to Paraparaumu Airport lands.[14]

In December 2012, the Tribunal outlined its casebook research programme for the inquiry, which envisaged hearings and the production of reports specific to each of the three iwi groups. This was essential because the various iwi and hapū involved in the inquiry wanted their own issues researched, and because the absence of the three settled iwi made a district-wide approach impossible for researching and hearing certain issues, such as land alienation and the political engagement of hapū and iwi with the Crown. Other issues, however, were more readily researched on a district-wide basis, such as waterways, environmental matters, and the socio-economic impacts of land loss. Even then, the focus has been on the matters of significance to the groups who are involved in the inquiry. As a result, the research casebook was composed of both iwi-specific and more general research, and the decision was made to hear and report on each of the main groupings – Muaūpoko, Te Ātiawa/Ngāti Awa, and Ngāti Raukawa and affiliated groups – in phases, to be followed by a district-wide phase to deal with any outstanding issues. This inquiry structure sought to organise a process that:

- is inclusive and equitable to all claimant groups, hapū, and iwi entities;
- respects the mana of established tribal authorities and organisations; and,

6. Waitangi Tribunal, memorandum, 2 July 2010 (paper 2.5.10)
7. Waitangi Tribunal, memorandum, 16 August 2010 (paper 2.5.11)
8. Waitangi Tribunal, memorandum, 16 March 2011 (paper 2.5.26)
9. Waitangi Tribunal, memorandum, 31 October 2012 (paper 2.5.56)
10. Waitangi Tribunal, memorandum, 12 February 2014 (paper 2.5.72)
11. Waitangi Tribunal, memorandum, 7 June 2017 (paper 2.5.148)
12. Waitangi Tribunal, memorandum, 29 November 2017 (paper 2.5.164)
13. Waitangi Tribunal, memorandum, 30 November 2018 (paper 2.6.36), [pp 3–4]
14. Waitangi Tribunal, memorandum, 8 October 2019 (paper 2.6.72)

- ensures that each group is allowed to maintain and enhance its rangatiratanga and identity while telling its own story from its own distinct perspective.[15]

In 2015, the parties involved in the Porirua ki Manawatū inquiry agreed to prioritise the hearing of Muaūpoko claims for early hearing and reporting in advance of the anticipated settlement of those claims (which has since been delayed). The Tribunal released the pre-publication version of *Horowhenua: The Muaūpoko Priority Report* on 30 June 2017, and this will later form a volume of the published district inquiry report.

1.4 The Te Ātiawa / Ngāti Awa Phase of the Inquiry

After the release of *Horowhenua* in June 2017, the Tribunal's attention shifted to hearing and reporting on claims associated with the Te Ātiawa/Ngāti Awa phase. On 31 August 2017, Deputy Chief Judge Fox proposed that the Tribunal would hear the majority of Te Ātiawa/Ngāti Awa nineteenth-century claim issues in this phase, as well as select twentieth century issues.[16] In order to safeguard the interests of other groups, we said that we would not report on:

(a) Any historical acts or omissions of the Crown in respect of the relationships between Te Ātiawa/Ngāti Awa ki Kapiti and Ngāti Raukawa, and between Te Ātiawa/Ngāti Awa ki Kapiti and Muaūpoko;
(b) Any historical acts or omissions of the Crown relating to the respective rights and interests of Te Ātiawa/Ngāti Awa ki Kapiti, Ngāti Raukawa, and Muaūpoko; and
(c) Any district-wide issues that are not specific to Te Ātiawa/Ngāti Awa ki Kapiti.[17]

1.4.1 Completing Te Ātiawa/Ngāti Awa specific research

In July 2016, the Tribunal began assessing gaps in technical research pertaining to Te Ātiawa/Ngāti Awa. The Tribunal commissioned:

- Tony Walzl, to prepare a research report on Te Ātiawa/Ngāti Awa's arrival in the district prior to the signing of the Treaty in 1840. In addition, the report was to consider claims concerning land and political engagement issues with the Crown from 1840 to 1900.[18] This report was received on 13 December 2017.[19]
- Lou Chase, to prepare a Te Ātiawa/Ngāti Awa oral evidence and traditional history report. The report would address the patterns of settlement in the district, the geography of the tribal rohe and significant sites, the nature

15. Waitangi Tribunal, memorandum, 24 December 2012 (paper 2.5.58), p 2
16. Waitangi Tribunal, memorandum, 31 August 2017 (paper 2.5.159), pp 2–3
17. Waitangi Tribunal, memorandum (paper 2.5.159), p 3
18. Waitangi Tribunal, memorandum, 17 October 2016 (paper 2.3.18), p 1
19. Walzl, 'Ngatiawa' (doc A194)

of relationships with bordering iwi and the Crown, and the contemporary impacts of land and resource loss.[20] This report was received on 13 February 2018.[21]

- Dr Barry Rigby and Kesaia Walker, to prepare a research report concerning Te Ātiawa/Ngāti Awa land and political engagement with the Crown from 1900 to present. The report was to provide a narrative of the history of land title, utilisation, and alienation relative to Te Ātiawa/Ngāti Awa in the district.[22] On 10 December 2018, the Tribunal received the report.[23]

In addition to these iwi-specific reports, the Tribunal decided after consultation with parties that the relevant sections of several district-wide research reports would also be included in this phase of the inquiry, along with Dr Terry Hearn's district-wide report, 'One past, many histories: tribal land and politics in the nineteenth century', which had been commissioned by the Tribunal prior to the Muaūpoko phase.[24] We have also relied on the Crown Forestry Rental Trust's document banks filed early in the inquiry for the use of researchers and all parties, which included nineteenth-century Native Land Court minute books and other court records, petitions, and various other documentary sources.

After a casebook review of Te Ātiawa/Ngāti Awa evidence, the Tribunal commissioned Ross Webb to prepare a gap-filling research report on aspects of inland waterways of importance to Te Ātiawa/Ngāti Awa. The commission prescribed a particular focus on the Waikanae River and Pirikawau (also known as Parikawau) Spring.[25] The final copy of the report was filed in September 2018.[26]

1.4.2 The claims heard in the Te Ātiawa/Ngāti Awa phase

On 1 June 2018, Deputy Chief Judge Fox confirmed the final list of claims to be heard in the Te Ātiawa/Ngāti Awa phase of the inquiry.[27] These claims are:

- the Kāpiti Island Claim (Wai 88);[28]
- the Whitireia Block Claim (Wai 89);[29]
- the Hough Whānau Claim (Wai 238);[30]
- the Paraparaumu Airport Claim (Wai 609);[31]

20. Waitangi Tribunal, memorandum, 13 March 2017 (paper 2.3.19), p 1
21. Lou Chase, 'Ngātiawa/Te Āti Awa Oral and Traditional History Report', February 2018 (doc A195)
22. Waitangi Tribunal, memorandum, 7 November 2018 (paper 2.3.37), p 1
23. Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report', December 2018 (doc A214)
24. Waitangi Tribunal, memorandum (paper 2.5.159), pp 3–4
25. Waitangi Tribunal, memorandum, 18 May 2018 (paper 2.3.30)
26. Ross Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205)
27. Waitangi Tribunal, memorandum, 1 June 2018 (paper 2.5.180)
28. Wai 88 amended statement of claim, 21 May 2018 (Wai 88 R01, claim 1.1(f))
29. Wai 89 amended statement of claim, 21 May 2018 (paper 1.1.48(c))
30. Wai 238 statement of claim, 14 October 1991 (paper 1.1.49)
31. Wai 609 amended statement of claim, 20 November 2018 (paper 1.1.50(a))

- the Paraparaumu Airport (No 2) Claim (Wai 612);[32]
- the George Hori Toms and Colonial Laws of Succession Claim (Wai 648);[33]
- the Paraparaumu Airport (No 3) Claim (Wai 875);[34]
- the Paraparaumu Airport (No 4) Claim (Wai 876);[35]
- the Paraparaumu Airport (No 5) Claim (Wai 877);[36]
- the Ngātiawa ki Kāpiti Lands Claim (Wai 1018);[37]
- the Paraparaumu Airport (No 6) Claim (Wai 1620);[38]
- the Baker Whānau Land Alienation Claim (Wai 1628);[39]
- the Parata Township Claim (Wai 1799);[40]
- the Ngarara West A14B1 Block Claim (Wai 1945);[41]
- the Ngati Awa of Taranaki (Moore and Taylor) Claim (Wai 2228);[42]
- the Kāpiti and Motungara Islands (Webber) Claim (Wai 2361);[43] and
- the Takamore Trust Claim (Wai 2390).[44]

In these claims, allegations were raised around a number of issues important to Te Ātiawa/Ngāti Awa, including:

- the impact of the Crown's nineteenth-century native land laws on Te Ātiawa/Ngāti Awa rights and interests in land, particularly in the Ngarara block;
- the Crown's purchase of Te Ātiawa/Ngāti Awa lands in the nineteenth century and the system for private purchases in the twentieth century;
- public works takings of land, notably for the Paraparaumu Aerodrome and Kāpiti expressway;
- the effect of local government and rating regimes;
- environmental degradation and the loss of control and ownership of the Waikanae River and other waterways; and
- ownership and management of sites like Kāpiti Island and the Hemi Matenga Scenic Reserve.

As previously noted, some of these issues will be discussed in a later volume of the report as opposed to this current volume (see section 1.5).

1.4.3 Crown concessions of Treaty breach

We note that the Crown has made Treaty breach concessions relating to four claim issues relevant to this volume of the report: the Crown's native land laws,

32. Wai 612 statement of claim, 26 July 1996 (paper 1.1.51)
33. Wai 648 amended statement of claim, 18 May 2018 (paper 1.1.52(a))
34. Wai 875 statement of claim, 16 June 2000 (paper 1.1.53)
35. Wai 876 amended statement of claim, 14 May 2008 (paper 1.1.54(a))
36. Wai 877 statement of claim, 18 October 2000 (paper 1.1.55)
37. Wai 1018 amended statement of claim, 21 May 2018 (paper 1.1.56(c))
38. Wai 1620 statement of claim, 27 August 2008 (paper 1.1.57)
39. Wai 1628 amended statement of claim, 21 May 2018 (paper 1.1.58(a))
40. Wai 1799 statement of claim, 3 August 2008 (paper 1.1.59)
41. Wai 1945 amended statement of claim, 21 May 2018 (paper 1.1.59(a))
42. Wai 2228 amended statement of claim, 21 May 2018 (paper 1.1.61(b))
43. Wai 2361 amended statement of claim, 1 August 2012 (paper 1.1.62(a))
44. Wai 2390 statement of claim, 29 August 2008 (paper 1.1.63)

landlessness, rating grievances in respect of the Ngarara West A78E2 block, and Paraparaumu Aerodrome.

Regarding its native land laws, the Crown

> accept[ed] that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa/Ngātiawa ki Kapiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngātiawa ki Kapiti. The Crown concede[d] that its failure to protect these structures was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[45]

In relation to landlessness, the Crown conceded that

> the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[46]

In addition, the Crown made some specific concessions about how its statutory regimes applied to particular Te Ātiawa/Ngāti Awa lands. First, the Crown conceded that it failed to take adequate steps to contact the owner of the Ngarara West A78E2 block before this block was compulsorily vested in the Māori Trustee to be sold for rates arrears, in breach of the principles of the Treaty.[47] Secondly, the Crown conceded that it failed to notify or consult the owners of Ngarara West B4 before taking land from this block in 1940 and 1943 under public works legislation for the purposes of the Paraparaumu Aerodrome, in breach of the Treaty.[48] Thirdly, after the closing submissions had been filed, the Crown revised its position on the application of the offer-back provisions of the Public Works Act to Paraparaumu Airport land. Crown counsel submitted that the Chief Executive of Land Information New Zealand (LINZ), not the airport company that had owned Pararaparaumu Airport since 1995, was responsible for making any offer-back decisions.[49] The Crown conceded that it failed to ensure that the requirements of the offer-back provision were fulfilled when the company sold some of the airport land in 1999. As such, the Crown failed to protect the interests of the land's former Puketapu owners and their successors, in breach of Treaty principles.[50]

45. Crown counsel, statement of position and concessions, 3 August 2018 (paper 1.3.1), pp 6–7
46. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), pp 23–24
47. Crown counsel, closing submissions (paper 3.3.60), p 24
48. Crown counsel, closing submissions (paper 3.3.60), p 24
49. Crown counsel, memorandum, 20 November 2020 (paper 3.2.807), p 2
50. Crown counsel, memorandum, 31 May 2022 (paper 3.2.1223), pp 2–3

1.4.4 Hearings for the Te Ātiawa/Ngāti Awa phase

In addition to the Ngā Kōrero Tuku Iho hearing for Te Ātiawa/Ngāti Awa claims, held at Whakarongotai Marae on 22 April 2015,[51] this phase of the inquiry had five hearings over a year, which amounted to a total of 17 hearing days.

On 20 August 2018, the first hearing of the Te Ātiawa/Ngāti Awa phase commenced with a pōwhiri at Whakarongotai Marae in Waikanae. The hearing then took place at El Rancho conference centre at Waikanae Beach. The Tribunal heard from several claimant witnesses for Te Ātiawa/Ngāti Awa, along with technical witnesses Tony Walzl and Lou Chase.[52]

The second hearing for this phase was held from 2 to 4 October 2018, at the Southward Car Museum in Paraparaumu.[53] From 11 to 15 February 2019, the third hearing took place at Whakarongotai Marae.[54] The fourth hearing week commenced on 10 June 2019, again at Southward Car Museum.[55] A range of Te Ātiawa/Ngāti Awa claimant witnesses gave their evidence at these hearings, with a dozen technical witnesses presenting their evidence across hearings two and three.

During the first and second weeks of hearing, the panel visited multiple locations of significance to Te Ātiawa/Ngāti Awa and their claims throughout Waikanae. In a moment of particular significance, the panel went to St Luke's Church and the Ruakohatu urupā, the site of Wi Parata's grave. The Tribunal also visited Kenakena Pā, which we were told was where 20 Waikanae rangatira signed the Treaty in May 1840. The panel visited several other sites, including Kāpiti Coast airport, the Parata native township (now part of Waikanae), the Kārewarewa urupā at Tamati Place, Queen Elizabeth II Park (where the Whareroa Pā was located), and the entrance of the Hemi Matenga reserve.

On 26 April 2019, the panel visited Kāpiti Island.[56] Representatives and staff from Ngāti Toa, Te Ātiawa/Ngāti Awa ki Kāpiti, Crown counsel, the Department of Conservation, and Te Arawhiti were also present. The Tribunal travelled along the coast of the island by boat, and were shown Taepiro, Te Rauparaha's principal pā on Kāpiti, along with Rangatira, the site of an early European whaling station. The Tribunal also made a stop at Waiorua – the site of a significant battle in the history of Te Ātiawa/Ngāti Awa which we discuss further in chapter 2.

The final hearing was held on 22 and 23 August 2019 at the Waitangi Tribunal Unit offices in Wellington. Tony Walzl presented further technical evidence on the life of Wi Parata, and the rest of the hearing was dedicated to Crown witnesses.[57] This hearing was followed by the filing of written closing submissions by the claimants and the Crown, with reply submissions filed by the claimants. The final submission was filed in February 2020, although, as noted above, the Crown changed its position on Paraparaumu/Kāpiti Coast Airport in November 2020. This was

51. Transcript 4.1.10
52. Transcript 4.1.16
53. Transcript 4.1.17
54. Transcript 4.1.18
55. Transcript 4.1.20
56. Transcript 4.1.19
57. Transcript 4.1.21

followed by the filing of Crown concessions in May 2022 and claimant responses in July 2022.

1.4.5 Kārewarewa urupā report

During the third hearing week in February 2019, the Tribunal informed parties it would be considering issues related to Kārewarewa urupā in a priority report, to be released ahead of its main report on Te Ātiawa/Ngāti Awa claims.[58] We decided that this matter should be reported upon early due to the deep concern expressed by the claimants about potential further disturbance of the burial ground. *The Kārewarewa Urupā Report* was released in pre-publication format on 25 May 2020.

1.5 Scope of the Issues to be Addressed in this Volume

In a memorandum dated 31 August 2017, when discussing the scope of the Te Ātiawa/Ngāti Awa phase of this inquiry, Deputy Chief Judge Fox proposed that the Tribunal hear and report on the majority of Te Ātiawa/Ngāti Awa nineteenth-century claim issues, as well as select twentieth-century issues.[59] In doing so, it has been necessary to consider aspects of nineteenth and twentieth-century legislative regimes for Māori land, local government, planning, rating, and public works takings that are relevant to those claims. These regimes will be addressed further in later volumes of this report. Some issues, such as the degradation of waterways and other environmental matters, and the fundamental principles of the public works regime, were best treated in a broader district context and will also be addressed later in the report after all parties have been heard.

For completeness, we note that there are no findings in this report which relate to the Kārewarewa urupā, as we have already issued a priority report on this issue. Other detailed claim issues excluded from this report were those relating to Kāpiti Island and Takamore urupā. We explain these exclusions next.

1.5.1 Kāpiti Island

In addition to Te Ātiawa/Ngāti Awa claims in respect of Kāpiti Island, other groups (including the James Howard Wallace whānau) have claims about the island and its offshore islands. During the Te Ātiawa/Ngāti Awa phase, we received substantial evidence and submissions about Kāpiti, including from the Crown's Department of Conservation witness, Jack Mace.[60] In closing submissions, however, Crown counsel argued that the Tribunal should not report on the specific Te Ātiawa/Ngāti Awa claims in respect of Kāpiti Island until all evidence and submissions in relation to the island have been heard. The Crown submitted that it could 'engage with some aspects of the evidence presented' but not on customary interests because of the existence of other claims, and that it would therefore be 'inappropriate for the Tribunal to make any findings or recommendations

58. Waitangi Tribunal, memorandum, 11 March 2019 (paper 2.6.46), p 2
59. Waitangi Tribunal, memorandum (paper 2.5.159), pp 2–3
60. Jack Sinclair Mace, brief of evidence, 8 July 2019 (doc G5)

concerning the island and the Crown's acts and omissions which may or may not have been in breach of the principles of the Treaty of Waitangi'.[61]

After considering submissions from parties on the matter, we agreed to defer consideration of issues relating to Kāpiti Island until all groups that state they have interests in, and evidence relating to, Kāpiti Island have been heard.[62] Nonetheless, the traditional evidence of Te Ātiawa/Ngāti Awa about their customary interests in Kāpiti Island is covered briefly in chapter 2; no allegations of Treaty breach have been addressed at this point.

1.5.2 Takamore urupā and Kāpiti expressway

The second notable exclusion from this volume is issues relating to the Takamore wāhi tapu and urupā, along with the Kāpiti expressway – including the Crown's consultation process, the associated public works issues, and environmental impacts. Closing submissions on these issues were not filed by claimant counsel, and subsequently not addressed by the Crown in its closings.[63] Given the importance of this issue to the claimants, we have decided to grant leave for claimant counsel to file closing submissions in the district-wide phase, and the Crown will be offered the opportunity to file closing submissions in response at that point.

1.6 Treaty Principles

1.6.1 Jurisdiction

Section 6 of the Treaty of Waitangi Act 1975 provides that any Māori individual or group may make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation or Crown policy, practice, act or omission inconsistent with the principles of the Treaty. If the Tribunal finds a claim to be well-founded, it may – 'having regard to all the circumstances of the case' – make recommendations to the Crown as to how it might compensate for or remove the prejudice, or prevent others from being similarly affected in the future.[64]

In determining whether a claim is well-founded, the Tribunal must have regard to both the Māori and English Treaty texts. For the purposes of this Act, the Tribunal has 'exclusive authority to determine the meaning and effect of the Treaty', and to decide any issues raised by the differences between the texts.[65] The Māori and English texts, as reproduced in schedule 1 of the Act, are as follows. The Māori text reads:

> Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua

61. Crown counsel, closing submissions (paper 3.3.60), pp 149–150
62. Waitangi Tribunal, memorandum, 3 March 2020 (paper 2.6.90), [p 2]
63. Crown counsel, closing submissions (paper 3.3.60)
64. Treaty of Waitangi Act 1975, s 6(3)
65. Treaty of Waitangi Act 1975, s 5(2)

wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

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

Ko te Tuarua
Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru
Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) William Hobson,
Consul and Lieutenant-Governor.

Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

The English text reads:

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment

of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

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

Article the Second
Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third
In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W Hobson
Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to

understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[Here follow signatures, dates, etc.]

1.6.2 Relevant Treaty principles

Having introduced the Tribunal's jurisdiction, we set out in brief the Treaty principles on which we rely in the assessment of Te Ātiawa/Ngāti Awa claims. We have already outlined some of the relevant principles in the *Horowhenua* volume of the report.[66]

1.6.2.1 *Partnership*

The Treaty established a relationship between Māori and the Crown akin to a partnership.[67] In the report *Whaia Te Mana Motuhake*, the Tribunal summarised the jurisprudence in respect of partnership:

> In its previous reports the Tribunal has provided extensive guidance on how the principle of partnership applies in a range of circumstances. At a fundamental level, the Treaty signifies a partnership between the Crown and the Māori people, and the compact between them rests on the premise that each partner will act reasonably and in the utmost good faith towards the other, and that in turn requires consultation. As is so often noted in this jurisdiction, it was a basic object of the Treaty that two peoples would live in one country and that their relationship should be founded on reasonableness, mutual cooperation, and trust. It is in the nature of the partnership forged by the Treaty that the Crown and Māori should seek arrangements which acknowledge the wider responsibility of the Crown while at the same time protecting Māori tino rangatiratanga.[68]

As the Tribunal also found in the report *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, the Treaty partnership is 'subject to ongoing negotiation and dialogue' in circumstances where kāwanatanga and tino rangatiratanga intersect.[69] Both Treaty partners must also 'respect the other's position and both owe each other a duty of good faith and a commitment to cooperate and collaborate where the circumstances require it'.[70] As the Tribunal stated in *Hauora*, the Treaty

66. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2017), pp 16–19

67. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at 667

68. Waitangi Tribunal, *Whaia Te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), p 28

69. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version*, parts 1 and 2 (Wellington: Waitangi Tribunal, 2018), p 181

70. Waitangi Tribunal, *Whaia Te Mana Motuhake*, p 28

partnership often requires the Crown to go beyond consultation to work with Māori as co-designers of policies and solutions.[71]

1.6.2.2 *Māori autonomy and the Treaty guarantee of tino rangatiratanga*

The principle of Māori autonomy arises from the Treaty partnership and the guarantee of tino rangatiratanga in article 2 of the Treaty. The Taranaki Tribunal stated:

> Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. Its more particular recognition is article 2 of the Maori text. In our view, it is also the inherent right of peoples in their native territories. Further, it is the fundamental issue in the Taranaki claims and appears to be the issue most central to the affairs of colonised indigenes throughout the world.
>
> The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are 'tino rangtiratanga', as used in the Treaty, and 'mana motuhake', as used since the 1860s.[72]

In the recent report *Hauora*, the Tribunal commented that the article 2 'guarantee of tino rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values'.[73] Further, the Central North Island Tribunal said that the principle of autonomy arises from both the active protection of tino rangatiratanga by the Crown and the 'full expression of that tino rangatiratanga' by Māori: 'Whenever Maori have genuine autonomy, including self-government and control of their social and economic destinies, then the Treaty is being carried out'.[74] The principle of autonomy also has an article 3 dimension in that Māori had a 'Treaty right to self-government through representative institutions at a community, regional, and national level', just as the settlers did,[75] and we see the search for this through various institutions such as the Kotahitanga Māori parliament, discussed in chapter 4.

1.6.2.3 *Active protection*

The principle of active protection flows from the 'plain meaning of the Treaty' (including the preamble), the promises of protection made by the Governor

71. Waitangi Tribunal, *Hauora: Report of the Health Services Inquiry* (Lower Hutt: Legislation Direct, 2019), pp 141–142; 163–164

72. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996 (reprinted with corrections in 2001), p 5

73. Waitangi Tribunal, *Hauora*, p 28

74. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 384

75. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 403

to secure Māori agreement to the Treaty, and the principle of partnership.[76] By entering into the Treaty, the Crown assumed a duty to Māori that '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'.[77] The Crown's duty to actively protect Māori rights and interests has been described by the courts and the Tribunal as analogous to a 'fiduciary' responsibility.[78]

In the *Tarawera Forest Report*, the Tribunal observed: 'Exactly which steps and what degree of protection are required in particular circumstances are questions that regularly face the Waitangi Tribunal.'[79] The Tauranga Tribunal, for example, observed in the context of confiscation that the Crown's duty of active protection is not merely limited to 'specified Maori resources', but also requires the Crown to ensure that Māori retain a 'sufficient endowment of land and other resources, and receive effective Government aid to fully develop them in order that they can share in the economic benefits that have flowed from colonisation'.[80] In *Whaia te Mana Motuhake*, the Tribunal identified that the principle of active protection 'applies to all the interests guaranteed to Māori under article 2 of the Treaty, including the right to exercise tino rangatiratanga or self-government'. A failure to protect tino rangatiratanga, therefore, would be 'as much a breach of the Treaty as a positive act that removes those rights'.[81]

It follows that active protection requires 'full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected'.[82] In other words, the Crown must find out how Māori want their interests protected and, where appropriate in the circumstances, provide for Māori to decide themselves how their interests are to be protected. Thus, as the Central North Island Tribunal stated, the 'principles of autonomy and active protection are (and have always been) perfectly reconcilable', because the Crown must 'actively protect Maori interests by ensuring that Maori are fully empowered to represent, define, and protect their own interests in any bodies or systems established to manage their lands and affairs'.[83]

1.6.2.4 *Mutual benefit*

The Tribunal first elaborated on the principle of mutual benefit in the *Report on the Muriwhenua Fishing Claim*:

76. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on the Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4
77. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), at 664
78. Waitangi Tribunal, *Te Ika Whenua Rivers* (Wellington: GP Publications, 1998), p 134; Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 40; Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 73
79. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 22
80. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 23
81. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 30
82. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 4
83. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 442

> Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit.[84]

The principle of mutual benefit reflects the overall intent of the Treaty 'to enable both peoples to live together, to participate in creating a better life for themselves and their communities, and to share in the expected benefits from settlement'.[85] As the national economy developed, the Central North Island Tribunal noted, Māori were entitled to share in the country's growing prosperity.[86] This sharing applied to both economic benefits and to 'other aspects of Government policy, such as providing for the health and welfare of Maori'.[87] The Tribunal has also observed on several occasions that the retention of sufficient Māori land and resources is a 'critical factor' if mutual benefit stemming from colonisation is to be realised.[88]

1.6.2.5 *Equity*

The principle of equity derives from article 3 of the Treaty, which guarantees Māori the rights and privileges of British subjects.[89] As the Tribunal stated in the *Te Tau Ihu* report: 'the interests of settlers could not be prioritised to the disadvantage of Maori. Where Maori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance'.[90]

The Tribunal in *He Maunga Rongo* considered this principle 'crucial to twentieth-century land issues',[91] emphasising that equity does not imply identical laws for settlers and Māori, 'but rather that they be equal'.[92] In *Te Urewera*, the Tribunal further clarified the distinction between equality and equity:

> The *Oxford English Dictionary* defines 'equal' in terms of sameness; for example, people having the same rights and status, or something being uniform in application. By contrast, equity is defined in terms of fairness . . . we consider that equal provision means providing everyone with the same type and level of service, whereas equitable

84. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Publications, 1988), pp 194–195
85. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 895
86. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 892, 894–896
87. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 23
88. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5
89. Waitangi Tribunal, *Te Mana Whatu Ahuru*, Parts 1–2, p 185
90. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 5
91. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 427
92. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 384

> provision means providing everyone with the services which best meet their needs. Perhaps the most important aspect of equitable provision derives from unequal needs . . . regardless of the reasons behind this disparity, the Crown has a duty to devote additional resources to reducing it.[93]

The principle of equity thus requires the Crown to ensure non-Māori do not have an unfair advantage over Māori and to identify and redress imbalances in outcomes between the populations where they exist.[94]

Further, the Crown is required to ensure that there is a 'level playing field' between Māori and non-Māori, especially where the barriers to equal Māori participation have been created by the Crown, such as the impact of the native land laws and title system on the ability of Māori to obtain access to finance for the development of their lands. A number of Tribunal reports have stressed the importance of a level playing field,[95] a concept that we think all New Zealanders understand and support.

1.6.2.6 *The principle of redress*

It is well established that where the actions and omissions of the Crown have breached the Treaty and prejudiced Māori, redress should be provided.[96] The Crown is obligated to provide redress for Treaty grievances, allowing restoration of the 'honour and integrity of the Crown and the mana and status of Maori'.[97] Appropriate redress is also vital to healing the Treaty relationship and reconciling the Treaty partners. One aspect of the principle of redress, which was stressed by the Crown in the 1990s in respect of Paraparaumu Aerodrome (and other Crown-owned lands and resources) is that the Crown should avoid creating impediments to redressing grievances (see chapter 7).

More broadly, the Crown is required to provide appropriate remedies when Māori bring valid grievances to its attention; this obligation cuts both ways as the Crown can redress those grievances only if informed of them or otherwise aware of them. This theme runs throughout this report as Te Ātiawa/Ngāti Awa appealed to the Crown many times in the nineteenth and twentieth centuries through direct representations, letters, and petitions.

Reflecting its recommendatory jurisdiction, the Tribunal has not generally been prescriptive when it comes to the character of redress in Treaty settlements,

93. Waitangi Tribunal, *Te Urewera*, 8 vols, (Wellington; Legislation Direct, 2017), vol 8, p 3774
94. Waitangi Tribunal, *Hauora*, p 33
95. See, for example, *He Maunga Rongo*, vol 3, p 1000; Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 550–551.
96. *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 693; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 288; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 134–135
97. Waitangi Tribunal, *The Tarawera Forest Report*, p 29

acknowledging that it will be situation-specific.[98] As noted in *He Maunga Rongo*, redress could involve restoring iwi or hapū rangatiratanga over their property and taonga, returning land, the passing of legislation, and restoration work in the case of environmental damage. Such redress would often require 'the joint efforts of a number of agencies working with Maori if that is what the parties agree to' and possibly the development of new joint management regimes.[99] We make our recommendations in section 10.9.

1.7 The Structure of this Report

This report is structured as follows:

- Chapter 2 provides an overview, based on oral evidence and traditional sources wherever possible, of Te Ātiawa/Ngāti Awa identity and experiences from 1819 to 1839, including their whakapapa, settlement in the inquiry district, tribal rohe, relationships with the natural environment, and interactions with neighbouring iwi prior to the signing of the Treaty.
- Chapter 3 considers Te Ātiawa/Ngāti Awa claim issues in the Crown preemption era (1840–65), and includes discussion of Te Ātiawa/Ngāti Awa's response to the Treaty, their relationship with the Crown during this period, their support of the Kīngitanga, and the Crown's purchase of the Whareroa and Wainui blocks.
- Chapter 4 discusses Te Ātiawa/Ngāti Awa claim issues in the Native Land Court era (1865–1900), notably title investigations for the Ngarara, Muaupoko, and Kukutauaki blocks; the impact of title individualisation; and Te Ātiawa/Ngāti's search for remedies from the Crown, including through the Kotahitanga Māori parliament.
- Chapter 5 examines the administration and alienation of Te Ātiawa/Ngāti Awa land in the twentieth century, including the degree of legislative protection provided by the Crown in the early decades of the century, the system of private purchase, and specific rating issues. The latter includes the compulsory sale of Māori land for non-payment of rates.
- Chapter 6 considers Te Ātiawa/Ngāti Awa claims concerning the Parata Native township, established within the Ngarara West block in the late nineteenth century.
- Chapter 7 analyses claims and allegations specifically related to the Paraparamu Airport, including the initial public works taking of the land and its subsequent privatisation in the 1990s, followed by an assessment of the Crown's protection of Māori interests after the purchase of the airport by a privately owned airport company.
- Chapter 8 discusses claim issues around the ownership and control of the Waikanae River.

98. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 66
99. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1248

- Chapter 9 turns to a series of issues related to Waikanae township and its environs, including the establishment of the Waikanae town centre, the Hemi Matenga Memorial Park and the landlocked Māori land adjoining the park.
- Chapter 10 provides a summary of findings and our concluding comments, including our recommendations.

CHAPTER 2

TE ĀTIAWA / NGĀTI AWA TRIBAL LANDSCAPES

'Ka ngahae ngā pī, ko Waikanae.'
'Staring in amazement, hence Waikanae' – Haunui-a-Nanaia

2.1 Introduction

This chapter provides an outline of Te Ātiawa/Ngāti Awa identity and experiences from 1819 to 1839, primarily reflecting the oral histories and perspectives of today's claimants. As the *Horowhenua: The Muaūpoko Priority Report – Pre-publication Version* explained, each iwi has their 'own narrative of events, and their distinct interpretations of the relationships and customary rights established by the migrant iwi and the "original occupants of the soil"'.[1] This observation is equally apposite to groups sharing close genealogical connections within iwi and hapū. While we observed consensus amongst Te Ātiawa/Ngāti Awa claimants on a range of matters, several pervasive disagreements became apparent during hearings. Central among the internal points of contention that came to our attention were:

- varying understandings of the most appropriate nomenclature to describe the group whose claims were being heard; and
- varying claimant definitions of how whakapapa within this group should be understood.

This chapter begins by addressing these points of contention in order. It then provides readers with an introduction to Te Ātiawa/Ngāti Awa, touching upon:

- key historical experiences that contributed to a series of migrations to the inquiry district during the nineteenth century and the distribution of land tenure upon arrival; and
- the tribal geography and interactions of Te Ātiawa/Ngāti Awa with their natural environment and kinship links.

We note that, apart from the kōrero presented at the Ngā Kōrero Tuku Iho oral history hearings, we have not heard all evidence relevant to the Porirua ki Manawatū inquiry district, particularly that of Ngāti Raukawa and affiliated groups. We anticipate that Raukawa claimants will likely have varying interpretations of the material discussed in this iwi volume. To avoid prejudice, we reiterate that this chapter is reflective of how Te Ātiawa/Ngāti Awa understand their history.

1. Waitangi Tribunal, *Horowhenua: The Muaūapoko Priority Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2017), p 78

A range of evidence is considered in this chapter, including:

- transcripts and briefs from the Ngā Kōrero Tuku Iho oral history hearings;
- transcripts and briefs of evidence from the Te Ātiawa/Ngāti Awa hearings;
- reports of commissioned researchers for the Te Ātiawa/Ngāti Awa stage of the inquiry and wider district inquiry;
- primary sources such as manuscripts and court minutes that have been placed on the record of inquiry; and
- published secondary sources.

2.2 Who Are Te Ātiawa / Ngāti Awa?

2.2.1 Introduction

In this section of the chapter, we discuss who Te Ātiawa/Ngāti Awa ki Kāpiti said they are at our hearings, at nineteenth-century commission and court hearings, and in other sources. The term 'Kāpiti' is used here, as it often is in the sources, as a term for the Kāpiti coast and not just for the island that also bears that name. It is necessary to use this term because the histories shared with us in this inquiry show that 'Te Ātiawa' or 'Ngāti Awa' who settled on this coast emphasise some different ancestors and historical events, as well as some different hapū, than those of their kin who remained in their ancestral Taranaki rohe. In this section, therefore, we set out what we were told about who the iwi call themselves, the names and deeds of ancestors that they associated with their origins in this district, and the hapū that they identified as belonging to their iwi on the Kāpiti coast.

2.2.2 Te Ātiawa/Ngāti Awa

One issue that emerged during hearings for this phase of the inquiry was diverging understandings of the most appropriate terminology to collectively define the claimants. We note that disputes over classification are inextricably linked to claimant interpretations of whakapapa and iwi history. These issues are discussed in more detail in sections 2.2.3 and 2.3 respectively. Claimants used varying nomenclature including Ngātiawa, Ngāti Awa ki Kāpiti, Ngātiawa Nui Tonu ki Kāpiti te Takutai, Te Ātiawa nō runga i te Rangi, Te Āti Awa, Āti Awa, Te Āti Awa ki Kāpiti, Atiawa-nui-tonu, Te Āti Awa ki Whakarongotai, and Taranaki Whānui to describe the iwi they belonged to. Disputes regarding terminology contributed to difficulties organising the Ngā Kōrero Tuku Iho hearing, a platform tailored to receiving tangata whenua evidence on oral traditions. Deputy Chief Judge Fox invited claimants and witnesses to address the issue to assist the Tribunal in 'understand[ing] what it is that makes you the people you are'.[2] To promote discussion, Deputy Chief Judge Fox quoted the evidence of Maui Pomare, given during the Chatham Islands hearings and reproduced in the Te Tau Ihu hearings. Mr Pomare stated in 1995:

2. Transcript 4.1.10, p 7

> I think it's probably appropriate if I explain now, some have mentioned in the last day or so their understanding of the name Te Āti Awa, Āti Awa, Ngāti Awa and some other corroborations of which I can't understand. But with Te Whiti, the name Te Āti Awa became paramount for the northern tribes of Taranaki. Taranaki Āti Awa Tribe, Ngāti Mutunga, Ngāti Tama and Ngāti Maru, those five tribes became a confederation which was called by Te Whiti, 'Te Āti Awa' and that's how the name came about.[3]

The Baker Whānau Land Alienation claimants (Wai 1628) took an interchangeable approach to the issue of terminology, accepting that naming conventions evolve over time. In their view, the development of different descriptors was a practical method to distinguish Kāpiti coast hapū from their Taranaki kin. These claimants generally preferred the terms 'Te Āti Awa' or 'Te Āti Awa ki Whakarongotai' to collectively denote their iwi, which has resided in Waikanae since the 1820s.[4] Lois McNaught, a co-claimant, believed there is little point differentiating between 'Te Ātiawa' or 'Ngātiawa'.[5]

Several witnesses spoke to the Baker Whānau claimants' fluid understanding of nomenclature. Mahina-a-rangi Baker, daughter of named claimant André Baker, identified as 'Te Āti Awa ki Whakarongotai',[6] while Hemi Sundgren identified as 'Te Atiawa Iwi in Taranaki'.[7] John Barrett stated that his whakapapa included both 'Te Atiawa' and Ngāti Toa lineage.[8]

Ani Parata, a Kāpiti Island and Whitireia block claimant (Wai 88 and 89), identified her iwi using several variants including 'Ngātiawa', 'Āti Awa ki Waikanae', and 'Te Āti Awa'.[9] Patricia Grace, who gave evidence for this claim, identified solely as Te Āti Awa ki Waikanae,[10] while Manu Piripi Parata identified more generally as 'Taranaki whanui'.[11]

Ben Ngaia, the Takamore Trust claimant (Wai 2390), said his whakapapa was 'Te Āti Awa',[12] but accepted archival evidence that suggested 'Ngātiawa' was the more prominent identifier of his iwi during the nineteenth century. Mr Ngaia added that '[p]rior to the name Ngātiawa, we were known as Te Tini-o-Awa, and that name featured not only within Taranaki but it also featured wherever Te Awanuiārangi peoples moved.'[13] During cross-examination, Mr Ngaia stated that 'I am Ngātiawa, I am Te Ātiawa'.[14]

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3. Transcript 4.1.10, pp 6–7; 'Transcript of Evidence by Maui Pomare at Chatham Islands Hearing held 20–24 February 1995 (Wai 785 ROI, transcript 5.1), p [2]
4. Wai 1628 amended statement of claim, 21 May 2018 (paper 1.1.58(a)), p 11
5. Lou Chase, 'Ngātiawa / Te Āti Awa Oral & Traditional History Report', February 2018 (doc A195), p 83
6. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 1
7. Hemi Sundgren, brief of evidence, 29 January 2019 (doc F19), p 1
8. John Barrett, brief of evidence, 22 January 2019 (doc F12), p 6
9. Ani Parata, brief of evidence, 30 July 2018 (doc E8), pp 2–3
10. Patricia Grace, brief of evidence, 2 August 2018 (doc E11), p 2
11. Manu Parata, brief of evidence, 30 July 2018 (doc E6), p 2
12. Benjamin Ngaia, brief of evidence, 30 July 2018 (doc E3), p 2
13. Transcript 4.1.16, p [559]
14. Transcript 4.1.16, p [560]

The principal Paraparaumu Airport (No 6) claimant (Wai 1620), Moana Michelle Steedman, identified as 'Ngatiawa/Atiawa'. However, she noted that her claim was filed on behalf of the Puketapu hapū.[15] In addition, George Jenkins, a witness for this claim, outlined his lineage as 'Te Atiawa Ki Waikanae' while also stressing hapū rangatiratanga of Puketapu. He explained:

> We represent the Puketapu Hapu and all of its political, economic and land interests within its traditional boundaries . . . When I refer to rangatiratanga above I do not mean in name only. I am referring to the actual exercise of chiefly responsibility. This includes of course all responsibilities of a rangatira but particularly the role to protect and serve the interests of the Puketapu Hapu.[16]

The Paraparaumu Airport No 2 claimants (Wai 612) identified as 'Te Ati Awa',[17] while the George Hori Toms and Colonial Laws of Succession claimants (Wai 648) preferred 'Ngati Awa'.[18] The Ngarara West A14B1 block claimants (Wai 1945) recognised their iwi as 'Te Ati Awa' or 'Te Ati Awa Ki Waikanae'.[19] Chris Webber, the Kāpiti and Motungaro Islands (Webber) claimant (Wai 2361), cited his whakapapa as 'Te Ati Awa',[20] whilst also identifying with the more general ART Confederation (Te Ātiawa ki Whakarongotai, Ngāti Raukawa ki te tonga, and Ngāti Toa Rangatira).[21]

The Ngātiawa ki Kāpiti Lands claimants (Wai 1018) were resolute in their view concerning terminology. Apihaka Tamati-Mullen Mack maintained that 'Ngātiawa ki Kapiti' is the legitimate name of her iwi. She stated that the term 'Te Ati Awa ki Whakarongotai' is disrespectful and inauthentic, as, in her view, it was devised by the Crown's Runanga Iwi Act 1990.[22] Rawiri Doorbar, a witness who gave evidence for this claim, shared a similar view:

> We have gone from being the Ngatiawa with a rohe described by Witi Te Rangitaake in his letters to the governor, to Ngatiawa and Atiawa post 1860 war, to Te Atiawa Nui Tonu post Parihaka[,] covering the same rohe, to individual iwi post OTS mandate criteria process comprising Ngatitama, Ngatimutunga, Ngatimaru and Te Atiawa.
>
> Ngatiawa is now firmly replaced in history books as Atiawa or Te Atiawa, the very history of Ngatiawa distorted and misconstrued by crown interference.[23]

The Ngati Awa of Taranaki (Moore and Taylor) claimants (Wai 2228), Robert Taylor and Andrea Moore, identified as 'Ngatiawa'. In their view, 'Te Ātiawa'

15. Moana Michelle Steedman, brief of evidence, 8 May 2019 (doc F39), p 4
16. George Jenkins, brief of evidence, 8 May 2019 (doc F41), pp 2–3
17. Wai 612 statement of claim, 26 July 1996 (paper 1.1.51), p 1
18. Wai 648 amended statement of claim, 17 August 2009 (paper 1.1.51(a)), pp 1, 4
19. Wai 1945 statement of claim, 25 August 2008 (paper 1.1.60), p 1
20. Wai 2361 statement of claim, 1 September 2008 (paper 1.1.62), p 1
21. Chris Webber, closing submissions, 20 December 2019 (paper 3.3.71), p 2
22. Apihaka Tamati-Mullen Mack, brief of evidence, 8 May 2019 (doc F42), p 3
23. Rawiri Doorbar, brief of evidence, 10 May 2019 (doc F48), pp [6]–[7]

supported the Crown and settlers in Taranaki throughout the 1860s. This group, they said, was responsible for dispossessing 'Ngātiawa' of customary lands.[24] These claimants relied to a great degree on the historical evidence of Ray Watembach, who told us he had taken an interest in Taranaki history from a young age. Mr Watembach alleged that 'Te Atiawa' is a Crown construct that only came into existence in the 1860s during the war in Taranaki and is, therefore, illegitimate.[25] During the hearings, we made a search of the online Māori newspapers which revealed examples of Māori using the name Te Ati Awa to describe themselves before 1860 in both Taranaki and Waikanae.[26]

Historian Tony Walzl stated that the term 'Ngatiawa' described the tangata whenua of Waikanae in almost all of the documentary material consulted for his nineteenth-century historical report, although Mr Walzl noted that he had not reviewed the Māori newspapers.[27] While he appreciated nomenclature was a complex issue for claimants to traverse, the term 'Ngatiawa' was used consistently throughout his technical report because it seemed the most appropriate rendition of the sources examined.[28] Mr Walzl added:

> Commentators have suggested that it was from the late 19th century that the name Te Āti Awa increasingly emerged to refer to the tribes of northern Taranaki. Over time, this name has been adopted by some, often as a way to distinguish northern Taranaki people from Ngāti Awa of Whakatane. Others, however, have steadfastly continued to use the term Ngātiawa. As has been noted, all the old headstones in whānau urupā use the term Ngātiawa.[29]

Te Whanganui a Tara me ona Takiwa: Report on the Wellington District cited evidence that 'Ngati Awa' appeared most regularly in nineteenth-century literature to denote the iwi of north and mid-Taranaki, including Ngāti Mutunga and Ngāti Tama. The report notes that following 1860, 'Te Atiawa' was more commonly used to identify tribes on the northern and southern banks of the Waitara, by then excluding Ngāti Mutunga and Ngāti Tama.[30]

24. Andrea Moore and Robert Taylor, joint brief of evidence, 29 January 2019 (doc F20), pp [6]–[8]
25. Claimant counsel (J Hope), closing submissions, 21 October 2019 (paper 3.3.53), p 11
26. Transcript 4.1.18, pp 580–584; see also 'Kua Mate', *Karere o Poneke*, 29 March 1858, p 3 (death notice for Minarapa Takua who died at Waikanae on 19 February 1858); 'Mo te Karere o Poneke', *Karere o Poneke*, 1 November 1858, p 3 (letter dated 29 September 1858, from Pitama Iwikau); 'Mo te Karere o Poneke', *Karere o Poneke*, 1 November 1858, p 2 (letter from Wiremu Kingi Te Korohiti dated 23 September 1858); 'Te Pakanga kei Taranaki', *Te Haeata*, 1 July 1859, p 2 (letter dated 17 May 1859, from Kipa Ngamoke and others).
27. Transcript 4.1.16, p [231]
28. Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues c1819–1900', 11 December 2017 (doc A194), pp 14–15
29. Tony Walzl, 'Ngātiawa/Te Āti Awa Research Needs Scoping Report', 18 January 2016 (doc A186), p 14
30. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 20

While we were very aware of the passionately held views concerning how claimants wished to describe themselves, we note that we previously used the composite name 'Te Ātiawa/Ngāti Awa' or 'Te Ātiawa/Ngāti Awa ki Kāpiti' when issuing directions and have decided to do so in this report. This should not be interpreted as a finding. Rather, these are generic names adopted for the sake of inclusivity, consistency, and practicality. We reiterate that how the claimants wish to define themselves is an internal matter for them to decide.

2.2.3 Kāwai whakapapa

Te Ātiawa/Ngāti Awa form part of the 'Awa' people, sharing whakapapa with Te Ātiawa in Taranaki and Ngāti Awa in the Bay of Plenty.[31] Most recognise the common ancestor Te Awanuiarangi I, despite these groupings becoming differentiated through later marriages, and migrations throughout Aotearoa.[32] We note that Pouroto Ngaropo gave extensive whakapapa evidence.[33] The claimant for whom he was to give evidence did not want the evidence produced, but it had already been filed. Deputy Chief Judge Fox noted that the Waitangi Tribunal may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether it would normally be legally admissible evidence or not.[34] Thus, while we do not make any findings based upon his evidence, we do refer to it as context.

2.2.3.1 *Te Kāhui Maunga, Tokomaru, and Kurahaupō*

Mr Ngaia told us that all Taranaki iwi are descendants of Te Kāhui Maunga, an ancient group said to have occupied 'Taranaki in the Central Plateau region through to Te Upoko-o-te-Ika' since time immemorial.[35] Mr Sundgren added that following the arrival of Tokomaru and Kurahaupō kin from Hawaiki bearing the sacred kura, a series of marriages known as 'ngā uruwaka' produced mixed Kāhui and Polynesian descendants.[36] Mr Ngaia explained that Manaia, the ariki of Tokomaru, created the sand dunes of Paekākāriki to Te Horo when he initially landed at Waikanae.[37]

2.2.3.2 *Toitehuatahi*

Mr Ngaropo advised that the original ancestor who discovered Aotearoa was Maui-Tikitiki-a-Taranga or Maui. From Maui came Toitehuatahi, Toi Kairakau, or simply Toi. Toi's mother, Huiari, hailed from Tahiti. Toi's father, Ngaitehurumanu, was born in Whakatāne, but migrated to Pukehapopo, Tahiti, before his son's birth. Toi, a highborn 'Ariki Ihorei', was racing waka with his grandsons, Turahui and Whatonga, when a storm carried the grandsons across the Pacific Ocean to

31. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 6
32. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 26
33. Pouroto Ngaropo, brief of evidence, 8 May 2019 (doc F37)
34. Waitangi Tribunal, memorandum, 3 December 2010 (paper 2.5.18), p 5
35. Transcript 4.1.16, p [523]
36. Sundgren, brief of evidence (doc F19), p 3
37. Transcript 4.1.16, p [563]

Aotearoa. After the storm had settled, Toi immediately left Tahiti on his waka, known as 'Te Paepae Ariki ki Rarotonga' or 'Tutarakauika', in search of his grandsons. Toi landed at several points throughout Aotearoa, including Kāpiti Island, before establishing his main pā at Kaputerangi, Whakatāne.[38]

Toi's descendants moved throughout Aotearoa and established several different familial branches, including Te Tini o Toi, Te Tini o Awa, Te Marangaranga, Te Tini o Tuoi, Ngāi Tūranga, and Ngāti Ngainui. Toi's descendants eventually settled in Tangonge, in the Far North.[39]

2.2.3.3 *Te Awanuiarangi I*

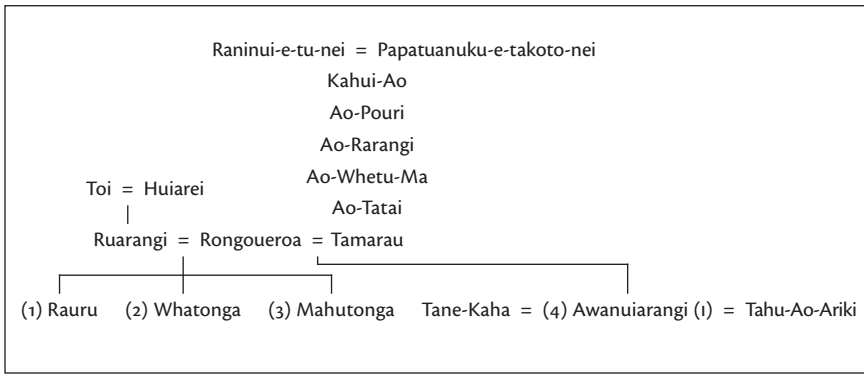
Toi had several sons. One of them, Ruarangi, had a daughter, Rongoueroa.[40] Mr Baker provided whakapapa evidence identifying Te Awanuiarangi I as Te Ātiawa/Ngāti Awa's eponymous heavenly ancestor. Mr Baker explained that Te Awanuiarangi I was conceived when Tamarau-Te-Heketanga-A-Rangi (Tamarau), a whatukura or a heavenly spirit, procreated with Rongoueroa who was bathing beside a stream.[41] According to Mr Ngaropo, that stream, Awanui, flows through modern day Kaitāia. He explained that:

> When Tamarau was leaving to go back to the heavens he said to Rongoueroa, 'When your child is born name him or her after the pathway that I came from in the heavens above'. If your child is a girl name her Hinenuiarangi, if your child is a boy name him Awanuiarangi. Not long after Tamarau returned to the heavens a baby boy was born to them and Rongoueroa named him Awanuiarangi.[42]

A ngeri provided by the claimants affirmed Te Ātiawa/Ngāti Awa's divine origins:

> Tamarau no Runga i Te Rangi
> Heke iho ki raro ki te whakamarimari te tatari ai
> Ki te hurahanga i te tapora o Rongo-ue-roa
> Taku kuia e! Taku kuia e!
> Te Ara o taku tupuna o tohia ai au
> Ko Te Āti Awa no Runga i Te Rangi
> Te toki te tangatanga e te ra
> Taringa mangō, ko to kete nge
> Ue ha! Ue ha!
>
> Tamarau from the heavens above
> Came down to make love and waited

38. Ngaropo, brief of evidence (doc F37), pp [7]–[9]
39. Ngaropo, brief of evidence (doc F37), p [10]
40. Ngaropo, brief of evidence (doc F37), p [10]
41. André Baker, summary of brief of evidence, 8 February 2019 (doc F6(a)), p 1; Ngaropo, brief of evidence (doc F37), p [10]
42. Ngaropo, brief of evidence (doc F37), p [10]



Whakapapa – Toitehuatahi and Te Huiarei

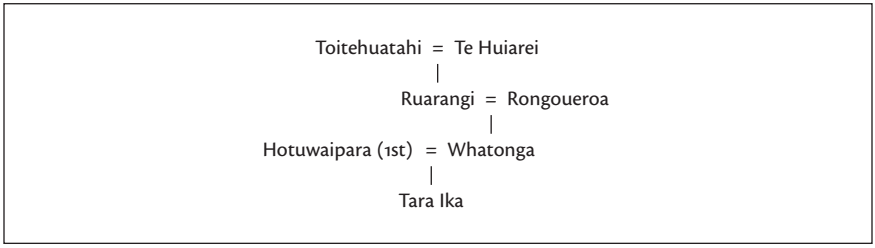
Sources: Alan Riwaka, 'Nga Hekenga o te Atiawa', 2nd ed (commissioned research report, Waikawa: Te Ataiawa Manawhenua ki te Tau Ihu Trust, 2003) (doc A209), p 1; Te Rangi Hiroa, *The Coming of the Maori* (Wellington: Whitcombe and Tombs Ltd, 1950), p 27

until he could have Rongo-ue-roa to wife
She is our kuia! She is our kuia!
This therefore is the consecrated pathway of my ancestors
Te Āti Awa from the heavens above
The adze (of Tamarau)
which can remove the very sun from its axis.[43]

Mr Ngaia related his understanding of these histories, which stipulated that northern Taranaki was the original home of Te Awanuiarangi I.[44] In other words, Rongoueroa was in Taranaki when she encountered Tamaru, as opposed to Kaitāia. Mr Ngaia acknowledged that there is debate concerning the specific location of Te Awanuiarangi I's conception. The encounter reportedly occurred beside the Waiongangana River near New Plymouth; other evidence suggests it happened closer to the Waiwhakaiho River.[45]

Mr Ngaropo also claimed that Te Awanuiarangi I travelled across Aotearoa with his great-grandfather, Toi. The two were said to have named various sites of significance, including Kapakapanui Maunga or 'Kapakapanui o Awanuiarangi', thereby marking an early Te Ātiawa/Ngāti Awa presence in the inquiry district.[46] According to this source, following Te Awanuiarangi I's arrival in the lower North Island, he married Te Ahiahiotahu and begat Titahi, Awaroa, Kauri, Kerepeti, Awatope, and Maruiwi.[47]

43. Baker, summary of brief of evidence (doc F6(a)), pp 1–2
44. Transcript 4.1.16, p [567]
45. Transcript 4.1.16, p [567]
46. Ngaropo, brief of evidence (doc F37), p [12]
47. Ngaropo, brief of evidence (doc F37), p [12]



Whakapapa – Toitehuatahi and Te Huiarei

Source: Morris Love, 'Te Āti Awa of Wellington – Identity', *Te Ara – The Encyclopedia of New Zealand*, http://www.teara.govt.nz/en/te-ati-awa-of-wellington/page-1, last modified 1 March 2017.

Ms Mack provided another narrative, telling the Tribunal that Ngāti Awa ki Kāpiti are 'Te Tini-a-Toi – the multitude of Toi' and that Whatonga –Toi's son – was a significant tupuna. She attributed the existence of Te Ātiawa/Ngāti Awa on Wellington's coastlines to Whatonga; 'and on the Kapiti Coast with Tohunga, Haunui-a-Nanaia'.[48] Haunui-a-Nanaia is discussed in section 2.2.3.5. However, others viewed Whatonga as a Muaūpoko tupuna. Mr Ngaia explained:

> It is also fair to say in acknowledging Muaūpoko that their ancestor Whatonga he had a number of wives, Hotuwaipara, Reretua. I wish to acknowledge Reretua, she is a descendant of Pananehu. Whatonga also married Tarawhai and Tarawhai is a descendant of Te Tini o Awanuiārangi. Whatonga also married Poautautahanga and Poautautahanga is a mokopuna to Pohokura of Te Tini o Pohokura. So they are various lines of descent from Whatonga and those marriages which are very much imbedded with Te Tini o Awanuiārangi blood lines.[49]

2.2.3.4 *Te Kahutara, Taikōria, and Okoki*

Mr Ngaia told us that another wave of occupation occurred when *Te Kahutara*, *Taikōria*, and *Okoki*, three ancient ancestral waka, arrived in Taranaki. The names of the iwi groupings affiliated to the *Okoki* canoe were Te Tini-a-Taitāwaro, Te Tini-a-Pananehu, Tāmaki, and Te Tini-o-Pohokura. Piopio, a chieftainess descended from these waka, married a progeny of Toi named Atakore to bring warfare between their tribes to an end. Toi bestowed upon Piopio his name in honour of that peace. Piopio Te Kairakau's people subsequently migrated to the Kāpiti region. Her name was bestowed upon two pou or pillars that rested on each side of the Waikanae River. One of these pou, named Piopio, was located on the Waikanae beachfront, within the traditional boundaries of the Takamore wāhi tapu. The other pou, named Te Kairākau, was situated at Ōtaihanga, marking traditional Māori symbols of occupancy. Mr Ngaia explained that 'Te Tini-o-Pohokura

48. Mack, brief of evidence (doc F42), pp 3, 4–5
49. Transcript 4.1.16, p [564]

descends directly to the people of Te Ātiawa, and hence it has genealogical relationships with the iwi of Te Ātiawa ki Whakarongotai.'[50]

2.2.3.5 *Haunui-a-Nanaia*

Mr Ngaia gave evidence that following the arrival of Piopio Te Kairākau in Te Upoko-o-te-Ika, another ancestor, Haunui-a-Nanaia, came to Takamore.[51] Prior to this, Haunui-a-Nanaia, descended from Kurahaupō and Aotea waka, resided in Whenuakura near Pātea. Mr Ngaropo stated that Haunui-a-Nanaia followed his wife, Wairaka, south to Takamore, near Waikanae. According to this source, Rongomai, the powerful deity who had taken the form of a meteor, guided his route. During Haunui-a-Nanaia's journey, whatever the meteor dust touched was deemed tapu.[52] Mr Sundgren said that this journey is recounted in a waiata, titled *E Hine Aku*, composed by Te Rangitakoru of the Whanganui district:

E hine aku, ki to kunenga mai i tawhiti,
I te whakaringaringa, ki te whahawaewae,
Te wakakanohi-tanga, ka manu, e hine, te waka i a Ruatea,
Ko Kurahaupo, ka iri mai taua, i runga i Aotea ko te waka i a Turi,
Ka u mai taua te ngutu Whenuakura,
Hanga iho te whare Rangitawhi;
Tiria mai te kumara,
Ka ruia mai te karaka ki te taiao nei,
Karia iho te pou Tamawahine i,
Ka waiho i Nga tuahine, i a Nonoko-uri,
I a Nonoko-tea, ko te Hererunga, ko te Korohunga.
Kapua mai e Hau ko te one ki te ringa,
Ko te tokotoko. Ka whiti i te awa,
Ka nui ia, ko Whanga-nui;
Tiehutia te wai, ko Wangae-hu;
Ka hinga te rakau, ko Turakina;
Tikeitia te waewae, ko Tikei;
Ka tatu, e hine, ko Manawatu;
Ka rorohio nga taringa, ko Hokio;
Waiho te awa iti hei ingoa mona ki Ohau;
Takina te tokotoko, ko Otaki;
Ka mehameha, e hine, ko Waimea.
Ka ngahae nga pi, ko Wai-kanae.
Ka tangi ko te mapu, e hine,
Ka kite koe i a Wairaka.
Matapoutia.
Poua ki runga, poua ki raro,

50. Transcript 4.1.16, pp [523]–[524]
51. Transcript 4.1.16, p [524]
52. Ngaropo, brief of evidence (doc F37), p [4]

Ka rarau, e hine. Ka rarapa nga kanohi,
Ko Wai-rarapa
Te rarapatanga o to tupuna,
E hine—ka moiki te ao,
Ko te pai a Waitiri;
Kumea kia warea Kaitangata
Ki waho ki te moana;
Hanga te paepae, poua iho, te pou
Whakamaro te rangi, ko Meremere:
Waiho te Whanau, ko te punga
O tona waka ko te Awhema.
Kati, ka whakamutu. e hine.[53]

O, my daughter, when you came from afar,
And your hands were formed, and your feet,
And your face, you floated, O daughter,
In the Kurahaupo, Ruatea's canoe,
When you embarked in the Aotea, the canoe of Turi,
You forded the Whenua kura at its mouth,
There was made the house of Rangitawi;
Let us plant the kumara,
And sow the karaka, in the land bordering the sea;
Sink deep the post Tamawahinei,
Leave it for Nga tua hine, from Nonoko-uri,
From Nonoko-tea, the Hererunga and Korohunga.
Hau took up some sand in the palm of his hand, and his staff.
When he crossed over the river,
Finding it was wide he called it Wanga-nui.
Splash the water, that will reach Wangae-hu;
The length of a fallen tree, is Turakina.
Having many times lifted up his feet, Tikei;
When his heart sank within him, Manawatu;
When the wind whistled past his ears, Hokio;
The small river called, Ohau;
When he carried his staff in a horizontal position, Otaki;
When he prayed, O daughter, it was Wai-mea;
When he looked out of the corner of his eye, Wai-kanae;
When he became weary, my daughter, he reached Wai-raka.
He repeated an incantation,
She became fixed above, and fixed below,
My daughter. When his eyes glistened with delight,
He called the place Wai-rarapa,
It was the rejoicing of your ancestor, my daughter.

53. Sundgren, brief of evidence (doc F19), p 4

> The sky became cloudless,
> On account of Waitiri's good will.
> She then enticed Kaitangata out to sea:
> She placed the plank across,
> And drove it in a post to hold on by, called Meremere.
> She left to her offspring, Punga, the anchor of his canoe,
> As his name, Awhema.
> Enough, it is finished, O my daughter.[54]

Ms Mack told us that Haunui-a-Nanaia named several sites of significance near Waikanae, including Waimeha, Kūititanga, Kenakena, Pekapeka, Te Paripari, and Wairaka. These names are synonymous with places in Tahiti, Whakatāne, and Taranaki.[55]

Two proverbs also detailed Haunui-a-Nanaia naming the Waikanae River. The first recalls his crossing the awa, staring into the waters and noticing myriads of kanae, or mullet. The eyes of the fish were gleaming due to the reflection of the stars and moon. Haunui-a-Nanaia uttered 'Ka ngahae ngā pi, ko Waikanae', or 'Staring in amazement, hence Waikanae'. Mr Ngaia said the essence of this story is also captured in the second proverb relating to the Waikanae River: 'Ko tōku waikanaetanga tēnei', or 'This is my peace and humility'.[56]

Mr Ngaropo added that the traditional name of the Paraparaumu waterfront is 'Te Wai o Rongomai'. Similarly, Haunui-a-Nanaia is said to have named an ancient spring Te Puna-o-Rongomai, located to the east of Takamore, after witnessing meteor dust landing on its waters.[57] Mr Ngaropo stated that '[f]or centuries following its name Te Puna o Rongomai was utilised by our ancestors Ngāti Awa ki Kapiti and the Muaupoko people as a healing spring, and used in association with birth rites.'[58]

Mr Ngaia emphasised that:

> Punawai are sites highly regarded by Māori. The establishment of a whare kohanga heightens the importance of this area in accordance with traditional Māori principles. This is due to restrictions being placed upon these areas in order to safeguard the mental and spiritual wellbeing of would-be mothers during the pregnancy, birth, and recovery of both the mothers and their new-born children. It was not until the mothers and their new-born children were fully recovered that they would present themselves to the iwi collective. Hence, this is one of the reasons that the whare kohanga was considered to be tapu (or restricted) to people other than those who were required to complete the birthing rites.[59]

54. Translation from 'Te Rangitakoru's nursery song for his daughter, for Wharaurangi', in 'Chant for the Newly Born', *Te Ao Hou*, August 1957, p 17.
55. Mack, brief of evidence (doc F42), pp 4–5
56. Transcript 4.1.16, pp [525]–[526]
57. Ngaropo, brief of evidence (doc F37), p [4]
58. Ngaropo, brief of evidence (doc F37), p [4]
59. Transcript 4.1.16, p [526]

Ms Mack said that the descendants of Haunui-a-Nanaia have since maintained ahi kā along the Kāpiti coast.[60]

2.2.4 Hapū of Te Ātiawa / Ngāti Awa who migrated

The Tribunal received several lists identifying the constituent hapū of Te Ātiawa / Ngāti Awa ki Kāpiti. The dynamism of these groups was illustrated, in part, by the Te Ātiawa (Taranaki) deed of settlement, signed in 2014. That document posited that prior to colonisation, there were some 96 'Te Ātiawa' hapū, each with their own defined whenua and rohe.[61]

In 1873, Wiremu (Wi) Te Kakakura Parata, a prominent nineteenth-century Te Ātiawa / Ngāti Awa and Ngāti Toa rangatira, identifed seven Te Ātiawa / Ngāti Awa hapū before the Native Land Court that included Kaitangata, Ngāti Kura, Hinetuhi, Puketapu, Ngāti Tuaho, Otaraua, and Mitiwai.[62]

Mr Ngaia provided a more contemporary hapū list, which generally adhered to Wi Parata's, with the addition of three groups and the omission of one. Mr Ngaia's hapū list included Ngāti Kaitangata, Ngāti Hinetuhi, Ngāti Kura, Puketapu, Ngāti Rahiri, Ngāti Maru, Ngāti Ruanui, Uenuku, Ngāti Tuaho, and Otaraua.[63]

Mr Walzl added that during the nineteenth century, Ngāti Mutunga and Ngāti Tama were often categorised as forming part of Te Ātiawa / Ngāti Awa. Further, throughout this period, the term 'Ngatiawa' or 'Ngati Awa', was used to collectively identify any group that originated between modern-day New Plymouth and the Mōkau River.[64] We discuss the migratory experiences of these groups in further detail in section 2.3.

We emphasise that this hapū list is not exhaustive or definitive. The Tribunal does not wish to prescribe who constitutes Te Ātiawa / Ngāti Awa. This is a matter for the iwi to decide. Rather, we have simply reflected the evidence presented to us to provide the reader with a greater depth of understanding. What is clear to us is that Te Ātiawa / Ngāti Awa, in both historic and modern times, represents a vibrant and multifaceted community.

2.3 Te Ātiawa / Ngāti Awa Histories, 1819–40

2.3.1 Introduction

This section outlines how Te Ātiawa / Ngāti Awa established and maintained land tenure in the inquiry district. We explain how this occupation affected relationships with both other iwi and the natural environment. We are aware that several

60. Mack, brief of evidence (doc F42), pp 4–5
61. Chase, 'Ngātiawa / Te Āti Awa' (doc A195), p 6
62. Acccording to Lou Chase, Wi Parata's original list included Kaitangata, Ngāti Kura, Hinetuhi, Puketapu, Ngāti Tuaho, Otaraua, Mitiwai: Chase, 'Ngātiawa / Te Āti Awa' (doc A195), pp 7–8.
63. Benjamin Rameka Ngaia, statement of evidence, 20 November 2001, Environment Court case RMA 1481/98 (Takamore Trustees v Kapiti Coast District Council) (Benjamin Ngaia, appendices to brief of evidence, 30 July 2018 (doc E3(a)), p [4]
64. Walzl, 'Ngatiawa' (doc A194), p 14; see also Alan Riwaka, 'Nga Hekenga o Te Atiawa', April 2003 (doc A209), p 14.

claimants identified a customary association with whenua in the inquiry district since time immemorial. We do not challenge these views and make no findings on their validity. All tangata whenua perspectives are treated as important. Similarly, we note that the documentary record is at times contradictory, with varying views informing several primary and secondary sources.

We note that gaining an appreciation for the nature of Te Ātiawa/Ngāti Awa interests was a complex and protracted task. We concur with Miria Pomare, who explained to us that Waikanae is a 'vortex' of interests.[65] We appreciate that despite the documentary record, traditions and histories are often verbally transferred by respected kaumātua and mentors. Several witnesses spoke of this customary practice for the transmission of knowledge.[66] Ms McNaught explained that 'Mātauranga Whakatipuranga' ensures the 'intergenerational transference of knowledge' from grandparents to carefully selected mokopuna.[67] To account for this, we have relied heavily on the claimants' oral evidence to inform this section to truly reflect Te Ātiawa/Ngāti Awa's perspective of their historical experience.

2.3.2 Rohe of Te Ātiawa/Ngāti Awa ki Taranaki, circa 1819

Claimant witnesses told us that the events of the early nineteenth century resulted in significant displacement and geographic realignment of Māori.[68] Taranaki was no exception; its large communities of skilled weavers and abundance of superior flax varieties made the district an attractive target for northern raiders. The earliest forays into Taranaki occurred in approximately 1810 and were led by Ngāti Whātua rangatira Murupaenga.[69]

By 1818, Te Ātiawa/Ngāti Awa, along with other neighbouring iwi and hapū, were gaining increasing access to firearms, which enabled them to participate in several ad-hoc raids, or taua, into central Taranaki. Mr Sundgren stated that these taua, had two purposes: to settle old scores, and to exploit resources.[70]

2.3.3 The 1819 taua

The first long-distance taua, involving 1,000 allied warriors that included some Te Ātiawa/Ngāti Awa, occurred in approximately 1819.[71] Wi Parata explained that Taranaki hapū joined the Ngāpuhi-led taua to 'go & seek for land where we will be near European[s]'.[72] Kahu Ropata told us that large unarmed iwi realised they could quickly become subservient to smaller groups equipped with muskets.[73]

65. Transcript 4.1.10, p 181
66. Baker, brief of evidence (doc F11), p 3; Barbara Goodman, brief of evidence, 6 May 2019 (doc F34), p [3]
67. Lois McNaught, brief of evidence, 22 January 2019 (doc F9), p 3
68. Sundgren, brief of evidence (doc F19), p 5; Kahu Ropata, brief of evidence, 23 January 2019 (doc F14), pp 2–5; Ray Watembach, brief of evidence, 5 August 2018 (doc E12), pp 4–6
69. Sundgren, brief of evidence (doc F19), p 6
70. Sundgren, brief of evidence (doc F19), p 6
71. Walzl, 'Ngatiawa' (doc A194), p 41
72. Otaki Native Land Court, minute book 10, pp 154–155 (Walzl, 'Ngatiawa' (doc A194), p 41)
73. Transcript 4.1.19, p 3; Video recording, Kāpiti Island site visit (doc E23), 00.09.20–00.09.40

Accordingly, the 1819 taua, led by Tuwhare of Ngāpuhi, symbolised this reality, the central objective being the discovery of prospective settlement locations close to Europeans and their technology but isolated from well-armed northern iwi. Several claimants told us this clearly defined purpose distinguished the 1819 taua from earlier war parties primarily concerned with raiding resources within Taranaki. In this regard, the 1819 taua was largely successful. Wi Parata would later tell the Native Land Court that when the taua was near Wellington, they saw a European vessel at sea. According to Wi Parata, Tuwhare remarked that it was 'a good place . . . for ships'.[74]

Mr Sundgren said that while the 1820 taua commenced under the mana of Tuwhare, Te Ātiawa/Ngāti Awa, Ngāti Mutunga, Ngāti Tama, and Ngāti Toa also participated.[75] Mr Sundgren drew on a manuscript that appears to have been scribed in 1857 by Te Pamariki Raumoa of Ngāti Mutunga and Ngāti Hinetuhi. The manuscript stated that the taua fought Ngāti Maru and Puke-rangiora at Te Kori-kerenga. They attacked and defeated Ngāti Kahungunu at Pukerua and went on to Rimu-rapa (Sinclair Head) where some of Tuwhare's canoes were wrecked. Ngāpuhi reassembled at Para-ngara-hu and journeyed to Wairarapa where they were initially beaten by Ngāti Kahungunu. They lost 50 men before defeating Ngāti Kahungunu. The combined ope returned to Taranaki where Te Ātiawa/Ngāti Awa stayed while Ngāpuhi and Ngāti Toa continued. Ngāti Toa stopped at Kāwhia. The narrator stated that unbeknown to Te Rauparaha, there was a Waikato and Ngāti Whātua party in the area that had come overland from Hawkes Bay. This, the narrator claims, was part of the group known as Te Amiowhenua (encircle the land) and had travelled through Ahuriri, Wairarapa, Te Whanganui-a-Tara, Ōtaki, Manawatū, Rangitīkei, and Whanganui.[76]

In 1890, Te Keepa Te Rangihiwinui of Ngāti Ruakā and Ngāti Tūpoho (of the Whanganui iwi) and Muaūpoko, gave evidence that Rangikatuta, Te Karu, and Tumokemoke were the Te Ātiawa/Ngāti Awa rangatira on the taua.[77] Rangikatuta was Ngāti Hinetuhi, while Te Karu and Tumokemoke shared Ngāti Rahiri lineage, with close links to Kaitangata.[78] In addition, Pikau Te Rangi of Ngāti Mutunga stated that 'a great number of N Awa' were present.[79]

The 1819 taua engaged in skirmishes with tangata whenua from Taranaki to Te Upoko-te-kaia.[80] The *Te Whanganui a Tara* report noted that the northerners engaged with some Kurahaupō-descended peoples near Wellington before

74. Otaki Native Land Court, minute book 10, pp 154–155 (Walzl, 'Ngatiawa' (doc A194), p 43)
75. Sundgren, brief of evidence (doc F19), p 6
76. The manuscript is part of the Heni Te Rau o Te Rangi papers (Ngāti Toa and Te Ātiawa/Ngāti Awa, died in her nineties in 1929) which were deposited at the Auckland War Memorial Museum by Heni's granddaughter Eleanor Spragg: Te reo resources document bank (doc A188), part 3, 261–296, p [37].
77. Walzl, 'Ngatiawa' (doc A194), p 40
78. Walzl, 'Ngatiawa' (doc A194), p 40
79. Napier Native Land Court, minute book 15, p 266 (Walzl, 'Ngatiawa' (doc A194), p 40)
80. Sundgren, brief of evidence (doc F19), pp 6–7

returning home.[81] That report used the term 'Whatonga-descent peoples' to collectively identify Ngāi Tara, Rangitāne, Muaūpoko, and Ngāti Apa. These iwi, descended from the Kurahaupō waka, populated the inquiry district before the arrival of Te Heke Tataramoa in 1822 (discussed below).[82]

Wi Parata told the Native Land Court that during the expedition, various rangatira began claiming land rights.[83] Despite this, the taua eventually returned without leaving anyone to occupy the land. Nonetheless, the 1819 taua did equip rangatira with an intimate knowledge of the lower North Island. This knowledge contributed to the efficiency with which these lands were subsequently settled.

2.3.4 Te Heke Tahutahuahi and northern Taranaki, circa 1821

The claimants widely accepted that soon after the Ngāti Toa section of the taua returned to Kāwhia, fighting against Waikato and Maniapoto became untenable.[84] Enoka Tatairau, a rangatira of Ngāti Manukorihi and brother of the prominent chief Wiremu Kingi, told the Native Land Court: 'I heard that the reason they [Ngatitoa] came down from Kawhia was that they had been attacked by the Waikato.'[85] Similarly, Wi Parata viewed the threat posed by well-armed adversaries as the catalyst for Ngāti Toa's movement back 'to the land we have seen'.[86] Te Heke Tahutahuahi left Kāwhia in approximately 1821, and consisted of 400 Ngāti Toa, including 170 warriors. The name of the migration, Tahutahuahi, is said to reference the large fires purposely lit by Ngāti Toa to confuse would-be attackers as to the size of the migrating group.[87]

The nature of Ngāti Toa's relationship with Te Ātiawa/Ngāti Awa following their arrival at Okoki Pā,[88] in northern Taranaki, is significant to this inquiry. Mr Baker commented on the extent that 'strategic' marriages defined Ngāti Toa's interconnectedness with northern Taranaki iwi.[89] Kahu Ropata added that Te Ātiawa/Ngāti Awa and Ngāti Mutunga were the southern-most allies of Ngāti Mangō of Ngāti Toa along the coastline between 'Marokopa-Waikawau-Poutama-Te Kaweka'.[90] Two of Te Rauparaha's generals and kinsmen, Te Pehi Kupe and Te Rangihiroa, also shared Ngāti Mutunga whakapapa. Reina Solomon, Te Raukura Solomon, and Hohepa Potini said this whakapapa also included 'Ngāti Awa'.[91] In

81. Waitangi Tribunal, *Te Whanganui a Tara*, pp 18–19
82. Waitangi Tribunal, *Te Whanganui a Tara*, p 18
83. Walzl, 'Ngatiawa' (doc A194), p 42
84. Ropata, brief of evidence (doc F14), pp 3–5
85. Enoka Tatairau, evidence to the Ngarara commission, 26 November 1888, pp 25–28 (Walzl, 'Ngatiawa' (doc A194), p 44)
86. Wi Parata, evidence, Ngarara rehearing, 6 February 1890, pp 154–155 (Walzl, 'Ngatiawa' (doc A194), p 43)
87. Walzl, 'Ngatiawa' (doc A194), p 44
88. Walzl, 'Ngatiawa' (doc A194), p 44
89. André Peter Baker, brief of evidence, 22 January 2019 (doc F6), p 8
90. Ropata, brief of evidence (doc F14), p 9
91. Reina Solomon, Te Raukura Solomon, and Hohepa Potini, joint brief of evidence, 8 May 2019 (doc F47), p 2

addition, one of Te Rangihiroa's wives, Pohe, was of Ngāti Rahiri, Kaitangata, and Otaraua ancestry.[92]

Tungia, another significant Ngāti Toa leader and half-brother of Te Rangihiroa and Te Pehi Kupe, also shared Ngāti Mutunga lineage.[93] Miria Pomare concluded that the marriage of Mutunga's daughter, Tuwhareiti, to Toa Rangatira's father, Korokino, 'makes it almost impossible to distinguish between Ngāti Toa and Ngāti Mutunga'.[94]

Decades of intermarriage meant that northern Taranaki was one of the safest havens for Ngāti Toa, enabling Te Heke Tahutahuahi to take temporary refuge in Okoki Pā.[95] According to Mr Walzl, Okoki was one of the strongest pā in the district and was occupied by Ngāti Hinetuhi.[96] Mr Sundgren also stated that Ngāti Toa were supported during this time by Kaitangata, Te Kekerewai, Ngāti Tupawhenua, and Ngāti Uenuku.[97]

Reina Solomon, Te Raukura Solomon, and Hohepa Potini explained in their evidence that the 'strength of these interlinks of whakapapa [was] so pronounced that Maniapoto and Waikato brought war to Taranaki'.[98] Hiria Te Aratangata, who was on the Te Heke Tahutahuahi as a child, noted in the Native Land Court that 'Waikato came to kill us'.[99] The method by which this war was waged was the Amiowhenua taua. We note there are several competing historical understandings regarding the Amiowhenua taua. In this context, we understand the Amiowhenua taua as a party consisting of approximately 600 Ngāti Whatua, Waikato, and Maniapoto warriors that was active in Taranaki between late 1821 and early 1822.[100]

According to Mr Walzl, Taranaki relations with the Amiowhenua taua were initially amicable. However, this soon changed when Tautara, an ariki of Te Ātiawa/Ngāti Awa, Huriwhenua of Ngāti Rāhiri, and Rangiwahia of Ngāti Mutunga orchestrated an attack on the Maniapoto and Waikato taua near Ngāpuketurua Pā.[101] Wi Parata had a different view, telling the Native Land Court that Te Ātiawa/Ngāti Awa did not wish to fight, but were forced to engage when they were attacked by 'Waikato'.[102] Enoka Tatairau, the brother of Wiremu Kingi, stated that all hapū of Te Ātiawa/Ngāti Awa fought against the Amiowhenua taua.[103]

92. Baker, brief of evidence (doc F6), p 8
93. Sundgren, brief of evidence (doc F19), p 7; see also Angela Ballara, *Taua: 'Musket Wars', 'Land Wars' or Tikanga?: Warfare in Māori Society in the Early Nineteenth Century* (Auckland: Penguin Books, 2003), p 336
94. Transcript 4.1.10, p 171
95. Sundgren, brief of evidence (doc F19), pp 7–8
96. Walzl, 'Ngatiawa' (doc A194), p 44
97. Sundgren, brief of evidence (doc F19), p 8
98. Solomon, Solomon, and Potini, joint brief of evidence (doc F47), p 2
99. Hiria Te Aratangata, evidence, Ngarara rehearing, 31 January 1890, Otaki Native Land Court, minute book 10, pp 87–88 (Walzl, 'Ngatiawa' (doc A194), p 46)
100. Walzl, 'Ngatiawa' (doc A194), pp 45–46
101. Walzl, 'Ngatiawa' (doc A194), pp 47–48
102. Otaki Native Land Court, minute book 10, p 155 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
103. Walzl, 'Ngatiawa' (doc A194), p 46

After several days of skirmishing, the taua was assisted by the sympathetic Pukerangiora hapū, who facilitated their escape three miles inland. The rangatira that supported this action included Tautara, Rauakitua, Ngātata, Te Rangitumatatoru, Te Wharepouri, Te Puke-ki-mahu-rangi, and Te Puni.[104] The group opposing the taua, including Te Ātiawa/Ngāti Awa, Ngā Motu, and Ngāti Toa, pursued the northerners to Pukerangiora Pā and laid siege to its 1,600 occupants for seven months. The blockade was finally broken when a messenger escaped to the Waikato and informed Te Wherowhero of the unfolding events. A rescue force was amassed near Mōkau that consisted of Waikato, Ngāti Mahuta, Ngāti Hauā, and Ngāti Maniapoto warriors. Mr Walzl estimated that the party consisted of 2,000–6,000 men.[105]

An opposing force gathered at Okoki Pā. Mr Walzl said that this number included Te Ātiawa/Ngāti Awa, Ngāti Toa, Ngāti Mutunga, Puketapu, Manukorihi, Ngāti Rahiri, Ngā Motu, and Ngāti Tama.[106] Te Reretawhangawhanga, of Ngāti Manukorihi hapū, commanded an advanced party of 80 Ngāti Hinetuhi, under Te Rangipuahoaho, to attack the Waikato camp at Waitoetoe. Te Rangipuahoaho and his men killed approximately 20 Waikato warriors before retreating. The scattered Waikato forces pursued Ngāti Hinetuhi before they were met by the main body of allied Te Ātiawa/Ngāti Awa forces at the battle of Motunui. The combined Taranaki and Kāwhia force defeated the Waikato taua, resulting in a full withdrawal north of Te Wherowhero and his warriors, along with the remaining members of the Amiowhenua taua.[107]

2.3.5 Te Heke Tataramoa, circa 1822

We heard several views regarding the motivations of Te Heke Tataramoa. The first framed it as a deliberate migration into the inquiry district. Mr Sundgren stated that, '[f]ollowing the battle of Motunui, Te Rauparaha explained his plans [of a heke into the inquiry district] which were agreed'.[108] Mr Baker also viewed Te Rauparaha as the mastermind of the migrations.[109] He added that whakapapa alliances and the instability caused by the battle of Motunui were beneficial to Ngāti Toa, still eager to migrate to the inquiry district.[110]

Reina Solomon, Te Raukura Solomon, and Hohepa Potini concurred, adding that Te Heke Tataramoa was the brainchild of Te Rauparaha, but qualified that 'it wasn't on the back of this one rangatira that the kaupapa was carried'.[111] These claimants suggested that significant agency and leadership on behalf of Ngāti Toa shaped a conscious decision to migrate.

104. Walzl, 'Ngatiawa' (doc A194), p 49
105. Walzl, 'Ngatiawa' (doc A194), p 49
106. Walzl, 'Ngatiawa' (doc A194), pp 49–50
107. Walzl, 'Ngatiawa' (doc A194), pp 50–52
108. Sundgren, brief of evidence (doc F19), p 8
109. Baker, brief of evidence (doc F6), p 9
110. Baker, brief of evidence (doc F6), p 8
111. Solomon, Solomon, and Potini, joint brief of evidence (doc F47), p 2

Dr Catherine Love held a different perspective. She argued that several prominent authors have adopted historical interpretations favourable to the interests of Ngāti Toa, resulting in a narrative that inaccurately portrays Te Rauparaha as controlling a vast group of people. This 'Myth of the Overlord', she said, has contributed to divisions and misunderstandings that diminish the agency of Te Ātiawa/Ngāti Awa rangatira who decided to migrate.[112]

Mr Walzl also remarked on the narrative surrounding Te Heke Tataramoa, stating that several commentators view the migration as Ngāti Toa-led. He suggested that there may be issues with this perspective, given the broad Te Ātiawa/Ngāti Awa representation on the heke and the participation of several high-ranking Taranaki rangatira. Mr Walzl concluded that the most prominent impetus encouraging Te Ātiawa/Ngāti Awa to participate on Te Heke Tataramoa was the likely revenge Waikato would seek following their defeat at Motunui.[113]

Alan Riwaka, a researcher for Te Atiawa Manawhenua Ki Te Tau Ihu Trust, whose report for the Te Tau Ihu inquiry was placed on our record, shared a similar view. He stated that Te Ātiawa/Ngāti Awa likely knew that supporting their Kāwhia kin would bring war, however, they may not have anticipated that this action would precipitate their own migration.[114] When appearing in the Native Land Court during the late nineteenth century, Te Ātiawa/Ngāti Awa witnesses commonly put forward the view that Te Heke Tataramoa was not orchestrated by a paramount leader but was a mutual arrangement beneficial to both Taranaki and Kāwhia because of likely Waikato retaliation.[115] Watene Taungatera shared a similar view when giving evidence before the Native Land Court, stating that the 'Ngatiawas defended Ngatitoas' during the fighting on the Kāpiti coast.[116]

Te Heke Tataramoa left Taranaki around 1822, marking the first large-scale deliberate Te Ātiawa/Ngāti Awa migration to the inquiry district. Estimates of participation vary significantly. Nonetheless, most sources identify Taranaki hapū as comprising the majority of this number. Watene Taungatera told the Native Land Court in 1890 that '400 Ngatiawa went on the heke'.[117] Tamihana Te Rauparaha, son of Te Rauparaha, provided the following estimates of participation numbers: 'Ngati Toa – 170; Manukorihi – 200; Ngati Tama under Te Puoho and Rangitakaro – 100; Ngatiawa – 600'.[118]

Lou Chase gave evidence presented in table 1, listing the Taranaki hapū that participated in Te Heke Tataramoa. This list was compiled from several primary and secondary sources. Mr Sundgren provided a similar list of rangatira present.

112. Catherine Love, brief of evidence, 8 May 2019 (doc F43), pp 4–5
113. Walzl, 'Ngatiawa' (doc A194), p 53
114. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 36
115. Walzl, 'Ngatiawa' (doc A194), p 54
116. Otaki Native Land Court, minute book 10, p 312 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
117. Walzl, 'Ngatiawa' (doc A194), p 55
118. Walzl, 'Ngatiawa' (doc A194), p 55

Hapū / Iwi	Rangatira
Ngāti Rāhiri	Tumokemoke, Te Pakaiahi, Kawe, Kohiwi, Ngātata, Te Karu, Tukatete, Hone Tuhata
Ngāti Mutunga	Ngātata, Tiwai, Pōmare, Te Waka Tiwai, Pakaiahi (Manukonga), Te Matoha, Patukawenga, Ketu, Wharepoaka
Manukorihi	Reretawhangawhanga, Wiremu Kingi, Tatairau, Pakaiahi, Manuparenga
Ngāti Hinetuhi	Te Reu, Takaratai, Rangikatata, Ngarewa, Pito, Te Hara, Ru, Henare Ngākoti
Kaitangata	Tumokemoke, Te Karu, Hone Tuhata, Te Pakaiahi, Tuhata Patuhiki, Te Ika a Kape, Ranginohokau
Ngāti Tama	Te Puoho
Puketapu	Te Whakapaheke
Ngāti Uenuku	
Ngāti Kura	Te Pakaiahi, Wiremu Kingi
Otaraua	Rautahi
Ngāti Tuaho	Tamaranga, Hamiora Hotu, Taikarekare, Wharerau, Piti, Poki (wahine), Pohe Waiehuehu

Table 1: Taranaki hapū / iwi and rangatira that participated in Te Heke Tataramoa according to Lou Chase's evidence.

Source: Chase, 'Ngātiawa / Te Āti Awa' (doc A195), pp 35–36

He added that Ko Horo of Ngāti Hinetuhi hapū, and Te Kara and Te Ika a Kupe of Kaitangata hapū also participated.[119]

Violence punctuated Te Heke Tataramoa's journey to the Porirua ki Manawatū rohe. Despite navigating northern Taranaki peacefully, the migrants encountered conflict with Ngā Rauru near Waitōtara.[120] As the heke passed Rangītikei and Manawatū, rangatira brokered a fragile arrangement with Ngāti Apa, which secured Te Heke Tataramoa's safe passage. Te Rangihaeata of Ngāti Toa, who had previously married Pikinga, a Ngāti Apa chieftainess during the 1819 taua, facilitated this arrangement.[121] Wi Parata later testifed that from Rangītikei, Ngāti Toa rangatira of the heke began allocating whenua between themselves.[122]

Violence again ensued following Te Heke Tataramoa's arrival in Horowhenua. According to historian Dr Terry Hearn, Waimai of Muaūpoko and Ngāti Apa was killed in retaliation for the alleged theft of a waka.[123] In the *Horowhenua* volume

119. Sundgren, brief of evidence (doc F19), p 9
120. Walzl, 'Ngatiawa' (doc A194), p 58
121. Walzl, 'Ngatiawa' (doc A194), p 58
122. Walzl, 'Ngatiawa' (doc A194), p 61
123. Terry Hearn, 'One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century', June 2015 (doc A152), pp 21–22

of our report, we noted evidence that Waimai, a chieftainess of rank, was killed by Nohorua, Te Rauparaha's elder brother, on the banks of the Manawatū River.[124]

Muaūpoko retaliated nonetheless, inviting a party under the pretence of friendship led by Te Rauparaha to Te Whi Pā, near Papaitonga. Dr Angela Ballara suggested that the northerners were attacked while they slept.[125] While Te Rauparaha managed to escape, his son, Rangihoungariri, and his daughters, Poaka and Te Uira were killed, along with several Ngāti Toa warriors. A third daughter, Hononga, was taken prisoner.[126] Hepa Potini said at the Ngā Kōrero Tuku Iho hearing at Te Whakarongotai:

> Te mutunga iho nui rawa te riri a Te Rauparaha mā, me ōna whanaunga, ā, ka pakanga haere, ka pakanga haere. Tērā pea tana whakaaro kia mate katoa rātou. Kia whiwhi tonu tēnei whenua hei whenua, hei kāinga mōna.
>
> In the end Te Rauparaha was left with an indelible anger, as were his relatives, and they fought several battles for vengeance. Perhaps he was intent on killing them all, and taking possession of the land as a home for himself.[127]

Te Rauparaha retaliated against Muaūpoko with his Te Heke Tataramoa allies. Enoka Tatairau, the brother of Wiremu Kingi, stated that Te Ātiawa/Ngāti Awa assisted Ngāti Toa in conquering Muaūpoko and securing whenua throughout the Kāpiti coast.[128] Similarly, Wi Parata said that three Te Ātiawa/Ngāti Awa rangatira, Pakaiahi, Ngatata, and Tumokemoke, had conquered the original inhabitants and claimed lands with the other Te Heke Tataramoa chiefs.[129] According to Mr Riwaka's evidence for the Te Tau Ihu inquiry:

> With only traditional weapons, they [Muaūpoko] could do little to defend themselves. Eventually the tribe was forced to abandon their settlements and retreat for safety to Wai-pata, and Wai-kie-kie, the island pa of Lake Papaitonga. These pa were not, however, as safe as they thought. Two subsequent attacks were made and more than two hundred Muaupoko slaughtered. Survivors made their way through the forest ranges to Paekakariki, and the hills behind Waikanae, where they appear to have stayed for some time.[130]

The name 'Tataramoa' is said to reference these challenges faced by the migrants, likened to forcing one's way through bramble bush.[131]

124. Waitangi Tribunal, *Horowhenua*, pp 83–84
125. Ballara, *Taua*, pp 328–329
126. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 42–43
127. Transcript 4.1.10, pp 36–37 [Waitangi Tribunal translation]
128. Walzl, 'Ngatiawa' (doc A194), p 59
129. Walzl, 'Ngatiawa' (doc A194), p 63
130. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 43–44
131. Walzl, 'Ngatiawa' (doc A194), p 57

Following the sacking of several Muaūpoko pā, the migrants initially camped at Ōhau before settling at Waikanae.[132] It is unclear whether armed conflict had been the original objective of Te Heke Tataramoa. Regardless, the Te Ātiawa/Ngāti Awa narrative is that the displacement of Muaūpoko provided Te Heke Tataramoa with a foothold to establish themselves in the inquiry district. In 1890, Wi Parata provided detailed evidence to the Native Land Court of the distribution of land amongst Te Heke Tataramoa rangatira:

> The land was then named and given to Ngatitoa.
>
> Rangitikei for Te Rangihaeata and Rauparaha.
>
> And on this [south] side of Rangitikei – Aratangata and Te Kaue and his younger brother Rawiri Kingi right on to Manawatu.
>
> And this [south] side [of] Manawatu was given to Rauparaha and Te Rangihaeata, Nohorua and a lot of [others] of Ngatitoa and Waitohu on other side of Otaki was the boundary.
>
> And coming across to this [south] side of Otaki they gave the land to Tungia right down to stream of Otaki.
>
> On this [south] side Otaki was given to Rangihaeata.
>
> The land Waitaheke next was given to Pokaitara and Ropata Hurumutu.
>
> The next land to Aratangata, Huhurua, Te Kanae right up to Kukutauaki and there it ended.
>
> The land then commenced for Te Pehi and Rangihiroa up to Tiakiteretere and there it ended.
>
> The Uruhi was given to Tungia and Te Rakau and Te Teke. Tungia was an elder relative of Te Pehi's. They had up to Mataihuka.
>
> Muaupoko [block] was given to Puaho afterwards.
>
> This was the distribution that enabled the other people to come afterwards and settle upon it.
>
> Muaupoko was given by Pehi and Rangihiroa to Puoho, they were closely related [cousins] . . .
>
> Waikanae and Kapiti were then given to Te Pehi.[133]

We note that Wi Parata's account in 1890 made no mention of land allocation with reference to Te Ātiawa/Ngāti Awa. This account also contradicted Wi Parata's earlier statements concerning the land rights gained by Pakaiahi, Ngatata, and Tumokemoke. Wi Parata subsequently explained that Te Ātiawa/Ngāti Awa claims were rejected by Ngāti Toa after the battle of Waiorua.[134]

Mr Walzl stated that Wi Parata's testimony provided one perspective within Te Ātiawa/Ngāti Awa, which generally viewed the customary rights of Te Ātiawa/Ngāti Awa as derived through Ngāti Toa.[135] In other words, Te Ātiawa/Ngāti Awa

132. Walzl, 'Ngatiawa' (doc A194), pp 59–60; transcript 4.1.10, p 172
133. Otaki Native Land Court, minute book 10, p 299 (Walzl, 'Ngatiawa' (doc A194), p 62)
134. Walzl, 'Ngatiawa' (doc A194), p 64
135. Walzl, 'Ngatiawa' (doc A194), p 123

gained rights through tuku whenua, or the gifting of land. Wi Parata did, however, identify 'Te Pehi' as the rangatira assigned whenua at Waikanae and Kāpiti Island. As outlined in section 2.3.4, Te Pēhi Kupe shared Taranaki whakapapa, namely Te Ātiawa/Ngāti Awa and Ngāti Mutunga. We note that not all Te Ātiawa/Ngāti Awa witnesses before the Native Land Court accepted this view. Some instead contended that their independently held rights in land derived from their participation in Te Heke Tataramoa. In their view, the Battle of Waiorua 'settled the question the conquest was by N Toa & N Awa jointly'.[136] As will be discussed further in later chapters, these divergent views within Te Ātiawa/Ngāti Awa, especially in the 1890s, arose from the bitterly divided contest over Waikanae lands at the 1890–91 rehearing. It is important to note that, whether by gift or otherwise, all Te Ātiawa/Ngāti Awa viewed their customary rights in their Waikanae rohe as firmly established.

2.3.6 Kāpiti Island

Kahu Ropata told us that when Te Heke Tataramoa arrived at Waikanae, they were vulnerable to attack given their inferior numbers. He added that Kāpiti Island provided relative safety for the embattled northerners.[137] Mr Barrett explained that in addition to mainland occupation, members of Te Heke Tataramoa captured Kāpiti Island by executing a 'feint manoeuvre'.[138] This consisted of a faked mainland expedition northward, drawing the attention of Ngāti Apa and Muaūpoko, while a smaller group of Ngāti Koata, led by Te Pehi Kupe, attacked and secured the motu.[139] Hepa Potini told us:

> Te tangata tuatahi, nāna i riro i a Kapiti ko tō mātou tūpuna, te tuākana tērā o Te Rangihīroa, ko Te Pēhi, me ana hungawai me Ngāti Koata. E ai ki ngā kōrero he momo, he mea huna, he ruse nē, a Ngāti Kimihia, e hīkoi ana ngā takutai ki tātahi rā. Ka kite atu ngā iwi ki a, ki Kapiti, ana, kua haere a Te Rauparaha mā ki Horowhenua. Tae mai te pō, whakaekengia e Te Pēhi tērā motu, ā, i riro tērā motu i a ia, i a Ngāti Kōata.
>
> The first person to take possession of Kapiti was our ancestor Te Pehi, the elder brother of Te Rangihiroa, along with his inlaws and Ngati Koata. It is said that this was done by deception, by the ruse of Ngati Kimihia walking away along the coastline. When the people on Kapiti saw this, they thought Te Rauparaha and his people had gone to Horowhenua. At night fall, Te Pehi arrived on the island and the island was taken by him and Ngati Koata.[140]

136. Evidence of Watene Taungatera, 30 January 1890, Ngarara rehearing (Walzl, 'Ngatiawa' (doc A194), p 74)
137. Transcript 4.1.19, p 3
138. Barrett, brief of evidence (doc F12), p 5
139. Transcript 4.1.10, pp 36, 172; transcript 4.1.19, pp 3–4
140. Transcript 4.1.10, pp 35–36 [Waitangi Tribunal translation]

Kahu Ropata told us Kāpiti secured a gateway to the South Island.[141] Several pā were quickly established on Kāpiti Island. Wharekohu was located at the southern end; Taepiro and Rangatira were situated near the inhospitable centre of the motu; and Waiorua was located on the island's northern periphery.[142] Te Ātiawa/Ngāti Awa settled at Waiorua under the leadership of Tumokemoke, Te Pakaiahi, and others.[143] These pā provided Te Heke Tataramoa with a secure base to launch punitive mainland attacks and raids. This included an assault on the Muaūpoko pā at Paekākāriki.[144] Te Rauparaha and Te Rangihaeata also attacked Rangitāne at Hotuiti.[145]

Because of the displacement of these Kurahaupō-descent peoples, most claimants viewed the settlement established by Te Heke Tataramoa as the origin of Te Ātiawa/Ngāti Awa land tenure in the inquiry district. Despite this interpretation, Muaūpoko and their allies were not defeated. Indeed, the remaining threat motivated Te Heke Tataramoa to relocate to Kāpiti Island to ensure security.[146] The precariousness of Te Heke Tataramoa's situation was again apparent when Te Hakeke, a rangatira of Ngāti Apa, and Hamua of northern Wairarapa, attacked a foraging party of Te Heke Tataramoa hapū at Kenakena, near the mouth of the Waikanae River. At least 60 were killed, including four of Te Pehi Kupe's daughters. Te Rangihiroa's wife, Pohe, of Te Ātiawa/Ngāti Awa descent, was also captured and subsequently killed near Ōtaki.[147] Wi Parata also told the Native Land Court that Muaūpoko were involved in the killings.[148] Hepa Potini described the events:

> Otirā i mua i taua pakanga rā tētahi mea anō i mate, i haere mai tētahi ope, ā, ka mate ētahi o Ngāti Awa ki tēnei, ki te ngutu-awa o Waikanae. Ko te wahine tonu a Te Rangihīroa tētahi, a Pohe. Me ōna kāwai ki ērā rangatira nui, kia pērā i a Te Wakatīwai mai, otirā ki ngā hapū o Kaitangata. Nō reira i mate tērā wahine, i mate hoki ngā tamariki a Te Pēhi. Tērā pea tokowhā ngā tamariki i patua ki reira ki tēnei ngutuawa o Waikanae, ki reira tonu ki tēnei rā, taku mōhio i tanumia ki reira.

> before that, there was another problem here, a battle, a war party came, a number of Ngāti Awa were killed here at the river mouth of Waikanae. One of them, Pohe was the wife of Te Rangihīroa. She died there. She had connections to all of the chiefs such as Te Wakatīwai, genealogical ties with the hapū known as Kaitangata. She died, and

141. Transcript 4.1.19, p 4
142. Walzl, 'Ngatiawa' (doc A194), p 67; 'Ko Kapiti te Motu', site visit booklet, 1 May 2019 (paper 3.2.302(a)), pp 4–8
143. Walzl, 'Ngatiawa' (doc A194), pp 72–73
144. Walzl, 'Ngatiawa' (doc A194), p 67
145. Hearn, 'One Past, Many Histories' (doc A152), p 22
146. Walzl, 'Ngatiawa' (doc A194), pp 67–68
147. Walzl, 'Ngatiawa' (doc A194), p 68
148. Otaki Native Land Court, minute book 10, p 156 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)

some of the children of Te Pēhi, perhaps around four of the children of Te Pēhi were killed at the Waikanae river mouth, and they lie there to this day, buried there.[149]

Mr Walzl noted that Pohe's daughter, Metapere Te Waipunahau, was captured and taken to the Wairarapa. She was eventually rescued when her father, Te Rangihiroa, made peace with Ngāti Kahungunu.[150] Metapere Te Waipunahau later married a Kāpiti whaler, George Stubbs, and had two children: Wi Parata and Hemi Matenga. According to Wi Parata, the killing of Te Pehi Kupe's children was also the reason that he (Te Pehi) left Aotearoa for England to seek weapons.[151]

In 1823, many Te Ātiawa/Ngāti Awa, including Wiremu Kingi Te Rangitake and Reretawhangawhanga, returned to Taranaki with the intention of bringing more hapū members to consolidate their occupation of the inquiry district.[152] The remaining Te Ātiawa/Ngāti Awa members were grouped with Ngāti Toa on Kāpiti Island.[153]

2.3.7 The Battle of Waiorua, circa 1824

For around a year, Te Heke Tataramoa hapū enjoyed the relative safety of Kāpiti Island. They also continued to expand their mainland settlement options by attacking the residents of the mainland.[154] Kahu Ropata told us that Te Pehi Kupe's acquisition of Kāpiti Island disrupted trade routes to the South Island that Kurahaupō-descent peoples had previously utilised.[155] In addition, South Island rangatira were increasingly concerned with Te Heke Tataramoa's growing influence.[156]

As such, a significant counter-attack against the island stronghold was inevitable. Miria Pomare told us of her tupuna wahine, Kahe Te Rauoterangi, who had received warning of an impending attack on Kāpiti Island:

> Kahe's kaitautoko had dreamt of an attack and forewarned her of the danger that she and her immediate whānau faced due to Te Matoha's involvement in the deaths of the two prominent Waikato chiefs back in Taranaki. She feared that Waikato and Ngāti Maniapoto might be involved with the opposing forces gathering to attack Kapiti and she needed to warn her father of the imminent threat. But he was over at Waikanae staying with relations . . . She decided the only option was to swim to the mainland in order to avoid detection by the armada of waka gathering from the North and South to attack the island fortress. . . . Kahe was able to warn her relations on the mainland and gathered reinforcements . . .[157]

149. Transcript 4.1.10, p 38
150. Walzl, 'Ngatiawa' (doc A194), p 68
151. Walzl, 'Ngatiawa' (doc A194), p 69
152. Wai 2228 amended statement of claim, 6 October 2015 (paper 1.1.61(a)), pp 4–5
153. Walzl, 'Ngatiawa' (doc A194), p 66
154. Walzl, 'Ngatiawa' (doc A194), p 71
155. Transcript 4.1.19, p 5
156. Walzl, 'Ngatiawa' (doc A194), pp 65–66; Waitangi Tribunal, *Te Whanganui a Tara*, pp 20–21
157. Transcript 4.1.10, pp 172–173

In around 1824, a confederation of Kurahaupō-groups, including Rangitāne, Muaūpoko, and Ngāti Apa[158] gathered between Ōtaki and Waikanae.[159] Dr Ballara suggested that several northern South Island peoples were also present including Rangitāne of Wairau, Ngāti Kuia, and Ngāti Tūmatakōkiri.[160] The allied Kurahaupō group ranged from 600 to 2,000 warriors.[161] Comparatively, according to Kahu Ropata's evidence, the warriors defending Kāpiti numbered between 300 and 500.[162]

Matene Te Whiwhi told the Native Land Court that the Kurahaupō war party landed near Waiorua, before dawn.[163] The choppy seas slapping against the sides of the waka armada resulted in the attackers being heard before making landfall.[164] According to Mr Riwaka, this gave Waiorua's defenders time to fire an initial volley, killing a significant number of the enemy.[165] Other published sources suggested that the attacking group was likely hampered by its large size and lack of coordinated leadership. Similarly, the beach itself was rugged and difficult to ascend, thereby favouring the defenders.[166]

The battle of Waiorua, also known as Whakapaetai and Umupakaroa,[167] resulted in a decisive victory for the allied iwi of Te Heke Tataramoa.[168] Te Ātiawa/Ngāti Awa and Ngāti Toa had secured customary rights on Kāpiti Island and on the mainland. The Tribunal's *Te Tau Ihu* report stated that Waiorua marked the sound defeat of Kurahaupō groups. Many of their rangatira had been killed, captured, or forced to flee into the inquiry district's interior.[169] In her Kōrero Tuku Iho evidence, Miria Pomare stated:

> The Battle of Waiorua . . . was the key event marking the definitive establishment of Ngāti Toa and their Taranaki relations in the Cook Strait area. This decisive victory removed any resistance and cleared the way for Ngāti Toa and their allies to settle along the Kapiti Coast and into Te Whanganui-a-Tara. It also cleared the way for other iwi to come south from Taranaki . . .[170]

Paora Temuera Ropata Jr held a similar view, telling us:

158. Walzl, 'Ngatiawa' (doc A194), p 71
159. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 48–49
160. Ballara, *Taua*, p 335
161. Walzl, 'Ngatiawa' (doc A194), p 71
162. Transcript 4.1.19, p 4
163. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 49
164. Hearn, 'One Past, Many Histories' (doc A152), p 23; see also Ballara, *Taua: Musket Wars*, p 335
165. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 49
166. Ballara, *Taua*, pp 336–337; see also Chris and Joan Maclean, *Waikanae*, 2nd ed (Waikanae: Whitcombe Press, 2010), pp 20–21
167. 'Ko Kapiti te Motu', site visit booklet (paper 3.2.302(a)), p 8
168. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 49–50
169. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p 60
170. Transcript 4.1.10, pp 178–179

> [Waiorua] seems to have been the major battle that cleared out the tribes from the main land. Not immediately. It took a couple, to three years for all this to happen, and there were still raids down into Horowhenua, Kāpiti while we had mana of Kāpiti Island so to say that the Kāpiti area was safe and you know from, trying to get it back from the previous owners, yes, that continued.[171]

The identity of the defenders of Waiorua Pā remains more contentious, despite significant evidence suggesting Te Ātiawa/Ngāti Awa bore the brunt of the fighting. The specific rights obtained through fighting at Waiorua are not documented in any detail. Hiria Te Aratangata of Ngāti Toa, the daughter of Te Aratangata, testified before the Native Land Court that Te Ātiawa/Ngāti Awa rangatira involved in the battle were Ngatata, Tiwai, Mari, Okawe, of Ngāti Kura, Te Puke and Reu of Ngāti Hinetuhi, as well as Pakaiahi.[172] She explained that the Ngāti Manukorihi hapū were at the battle but did not specifically name individuals.[173] Pikau Te Rangi added that Ngāti Kaitangata, Ngāti Kura, Ngāti Tuaho, Ngāti Hinetuhi, and Ngāti Mutunga were on the motu during the battle.[174] In 1890, Mere Pomare stated that '[t]he battle of Waiorua was fought and won by Ngatitoa and Ngatiawa'.[175] Te Watene Taungatera shared a similar perspective stating that Waiorua 'settled the question the conquest was by N Toa & N Awa jointly'.[176]

Reina Solomon, Te Raukura Solomon, and Hohepa Potini said that Te Ātiawa/Ngāti Awa played the decisive role in the fighting because Te Rauparaha was on the mainland during the battle. These claimants stated that Waiorua was 'the victory of Te Pehi, Te Rangihiroa, and their Ati Awa and Koata whānau'.[177] John Barrett viewed the battle as the seminal event that established Te Ātiawa/Ngāti Awa interests on Kāpiti Island.[178]

Other Māori sources, including Wi Parata, emphasised the role of Ngāti Toa in the victory.[179] Wi Parata later conceded that Pomare Ngatata, Pakaiahi, and Tumokemoke had, in fact, been present at Waiorua, but according to his account they established no customary rights:

> after this fight [Waiorua] there was a quarrel & some tussling among the victors. These three [ie Pomare Ngatata, Pakaiahi and Tumokemoke] comm[ence]d to dispute about

171. Transcript 4.1.10, pp 57–58
172. Walzl, 'Ngatiawa' (doc A194), pp 71 -72
173. Walzl, 'Ngatiawa' (doc A194), p 72
174. Walzl, 'Ngatiawa' (doc A194), p 81
175. Evidence of Mere Pomare, 25 February 1890, Ngarara reheating, Otaki Native Land Court, minute book 10, p 327 (Walzl, 'Ngatiawa' (doc A194), p 74)
176. Evidence of Watene Taungatera, 30 January 1890, Ngarara rehearing, Otaki Native Land Court, minute book 10, pp 83–84 (Walzl, 'Ngatiawa' (doc A194), p 74)
177. Solomon, Solomon, and Potini, joint brief of evidence (doc F47), p 3
178. Barrett, brief of evidence (doc F12), p 6
179. Walzl, 'Ngatiawa' (doc A194), p 72

the right to some land. Te Pokaitara [of Ngati Toa] then said to those three 'what right have you to speak about this. You simply joined yourself on to my canoe.'[180]

2.3.8 Te Heke Nihoputa, circa 1824

Te Ātiawa/Ngāti Awa and their allies' victory at Waiorua appeared to lay the groundwork for further migrations from Taranaki.[181] Wi Parata told the Native Land Court that the decisive defeat of the Kurahaupō-peoples meant that 'the coast was clear'.[182] Miria Pomare stated that the second wave of Taranaki migrants, led by Pomare Ngatata, was known as 'Te Heke Niho Puta'.[183] Some Ngāti Toa sources suggested that Te Heke Nihoputa left Taranaki after they had learned of the victory at Waiorua.[184] Other documentary evidence suggested that Te Heke Nihoputa only became aware of the victory upon arrival in the inquiry district. According to this source, the increasing threat from Waikato, intent on exacting revenge for the battle of Motunui, proved the catalyst. In other words, the outcome of the battle played no part in influencing the decision to migrate.[185] Pikau Te Rangi, who was on Nihoputa as a child, shared a similar view, stating '[w]e came to Kapiti through fear of Waikato.'[186] In addition, the outbreak of disease in Taranaki likely provided a further impetus.[187]

Information available about the heke's journey from Taranaki to the Kāpiti coast is limited. A nineteenth-century ethnographer, Percy Smith, said that the name Nihoputa, or 'boar's tusks', referenced an incident in southern Taranaki when several members of the heke were duped into visiting a Ngā Rauru kāinga. When the sentence 'Ku patua noatia taku niho-puta mo te rurenga' ('My pig-with-tusks has long since been killed for the guests') was uttered, it signalled the kāinga's occupants to attack and kill the manuhiri.[188]

The heke travelled to the inquiry district as three separate groups, with smaller groups arriving the following year.[189] It is largely viewed as a Ngāti Mutunga migration.[190] Miria Pomare stated that Ngāti Tama, Ngāti Hinetuhi, Kaitangata, Ngāti Te Kēkerewai, and Ngāti Hineuru also participated.[191] Pikau Te Rangi stated:

180. Evidence of Wi Parata, 7 February 1890, Ngarara rehearing, Napier Native Land Court, minute book 15, p 166 (Walzl, 'Ngatiawa' (doc A194), p 74)
181. Walzl, 'Ngatiawa' (doc A194), p 76
182. Evidence of Wi Parata, Otaki Native Land Court, minute book 10, p 158 (Walzl, 'Ngatiawa' (doc A194), p 77)
183. Transcript 4.1.10, p 173
184. Walzl, 'Ngatiawa' (doc A194), p 77
185. Walzl, 'Ngatiawa' (doc A194), p 77
186. Otaki Native Land Court, minute book 10, p 302 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
187. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 42
188. Stephenson Percy Smith, *History and Traditions of the Maoris of the West Coast, North Island of New Zealand prior to 1840* (New Plymouth: Polynesian Society, 1910), p 401 (Walzl, 'Ngatiawa' (doc A194), p 80)
189. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 43
190. Tony Walzl, presentation summary for 'Ngatiawa: Land and Political Engagement Issues', 23 July 2018 (doc A194(b)), p 3
191. Transcript 4.1.10, p 179

Hapū	Rangatira	Source
Ngāti Mutunga		
Kaitangata		Watene Taungatara
Ngāti Mutunga	Pomare Ngatata, Patukawenga	Enoka Tatairau
Ngāti Mutunga Ngāti Kauhurua Ngāti Rangi	Te Poki, Te Arau, Paitea (Apipia), Wharepoaka, Patukahinga, Raunoa	Pikau te Rangi

Table 2: Taranaki hapū and rangatira that participated in Te Heke Nihoputa according to Lou Chase's evidence.

Sources: Chase, 'Ngātiawa / Te Āti Awa' (doc A195), p 43, Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 59

> The chiefs were Te Poki, Arau, Apitea [Apipia], Wharepoaka, Patukahinga, Raunoa of Ngati Mutu[nga]. Of Ngatikura hapu the chiefs were also those of Ngati Mutu[nga]. Ngatikauhurua hapu the same chiefs as I named before. Ngatirangi the same chiefs. These are all the hapus.[192]

Paratawhera and Rihari Tahuaroa told the Native Land Court that the heke consisted of 800 men.[193] Secondary sources, however, have estimated a slightly smaller group of 400 to 500 warriors.[194] Claimants said that over 1,000 fighting men also remained in northern Taranaki to guard Te Ātiawa / Ngāti Awa's remaining customary whenua and resources.[195]

When the migrants arrived in the district, they found very few people living on the mainland.[196] Miria Pomare explained that the size of Te Heke Nihoputa meant they were able to safely settle at Waikanae.[197] Te Ātiawa / Ngāti Awa witnesses before the Native Land Court emphasised that Ngāti Mutunga took up this land because of the role they had played in conquering the district. Metapere Te Waipunahau, the mother of Wi Parata, held a different view, stating that the land allocated to Ngāti Mutunga actually was gifted by Ngāti Toa.[198] These two differing views are explored further in chapter 3.

Mere Pomare told the Native Land Court that Te Heke Nihoputa's mainland settlement near Waimeha prompted Kaitangata to join them from Kāpiti Island. She explained 'Kaitangata settled on the south side of Waikanae & also between

192. Evidence of Pikau Te Rangi, 21 February 1890, Ngarara rehearing, Otaki Native Land Court, minute book 10, p 302 (Walzl, 'Ngatiawa' (doc A194), p 79)

193. Chase, 'Ngātiawa / Te Āti Awa' (doc A195), pp 43–44

194. Robyn Anderson and Keith Pickens, 'Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu', Waitangi Tribunal Rangahaua Whanui Series, August 1996 (doc A165), p 12

195. Wai 2228 amended statement of claim (paper 1.1.61(a)), p 6

196. Chase, 'Ngātiawa / Te Āti Awa' (doc A195), p 44

197. Transcript 4.1.10, p 173; Chase, 'Ngātiawa / Te Āti Awa' (doc A195), p 44

198. Walzl, 'Ngatiawa' (doc A194), p 82

the [Waikanae and Waimeha] rivers.'[199] The Wai 2228 claimants added that the newcomers constructed the Kenakena Pā with the assistance of Ngāti Maunu of Ngāti Toa.[200] This meant that migrated iwi could permanently establish themselves on both sides of the Waikanae River.

2.3.9 Te Heke Mairaro, circa 1828

2.3.9.1 Introduction

In around 1828, a third migration left Taranaki.[201] Details vary, particularly between adult participants on the heke and others who were either children at the time or who heard the story from their parents. These variations were sometimes given in evidence supporting land claims before the Native Land Court. Essentially, it appears that this migration may have departed in at least two groups and, once settled in the Waikanae area, they were regularly going backwards and forwards from Waikanae to Taranaki. It was generally referred to as Te Heke Mairaro, meaning the migration from the north. A single account gives the name as Te Heke Whirinui which was said to derive from the large decorative twists and curls woven into the migrants' koka, or mats. As a result, the names are used interchangeably. However, Mr Walzl stated that Te Ātiawa/Ngāti Awa sources referred to the 1828 migration as Te Heke Mairaro.[202]

Further, he noted the hapū associated with Te Heke Mairaro: Pukerangiora, Manukorihi, Otaraua, Puketapu, Ngāti Kura, Ngāti Rāhiri, Ngāti Tuaho, Puketangata, Kaitangata, Ngāti Uenuku, and Ngāti Hinetuhi. The rangatira included Te Manutoheroa (Puketapu), Te Reretawhangawhanga (Ngāti Kura), and his son Wiremu Kingi Te Rangitake, Te Tupe o Tu (Otaraua), Huriwhenua (Ngati Rāhiri), Te Hawe, and Kawhena Taranui.[203] Essentially, more than 800 travelled south, in one heke or more. Pikau Te Rangi stated that Manutoheroa led Puketapu south.[204] While there are various versions, Te Manutoheroa, Te Reretawhangawhanga, and Wiremu Kingi were the key names associated with the leadership of the heke.[205] Several Te Ātiawa/Ngāti Awa commentators stated that Te Heke Mairaro planned to settle with their Ngāti Mutunga kin at Waikanae, near the Kenakena Pā.[206]

Growing instability in Taranaki likely contributed to the departure of Te Heke Mairaro. Mr Walzl reported that this instability was linked to Te Ātiawa/Ngāti Awa's increasing inability to defend their Taranaki rohe because of the resources committed to prior migrations. The nature of iwi and hapū relations in Taranaki

199. Mere Pomare, Ngarara rehearing, 25 February 1890, Napier minute book 15, p 294 (Walzl, 'Ngatiawa' (doc A194), p 81)
200. Wai 2228 amended statement of claim (paper 1.1.61(a)), p 5
201. Wai 2228 amended statement of claim (paper 1.1.61(a)), p 6
202. Walzl, 'Ngatiawa' (doc A194), pp 89–90
203. Walzl, 'Ngatiawa' (doc A194), p 90
204. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 43
205. Walzl, 'Ngatiawa' (doc A194), p 146
206. Walzl, 'Ngatiawa' (doc A194), p 148

was also becoming more complicated with Waikato ope taua becoming further involved in Taranaki iwi internal conflicts.[207]

The evidence pertaining to the nature of land allocation and occupation following the arrival of Te Heke Mairaro is complex, and shows the diverse ways in which the migrants perceived their rights. These include an earlier alleged gift to Te Haukaione of Ngāti Rāhiri.

2.3.9.2 *Te Haukaione's gift*

Following Te Heke Nihoputa, but preceding Te Heke Mairaro, another small heke (some accounts give two heke) is said to have arrived in Waikanae. Among the men believed to have been on this heke were the rangatira Te Pūoho (Ngāti Tama) and Te Haukaione, father (or uncle)[208] of Pohe, who was the wife of Te Rangihiroa. Pohe was murdered in the events leading up to the battle of Waiorua. Haukaione is said to have been gifted extensive lands at Waikanae by either Te Rangihīroa or Te Pehi Kupe (brothers who were high-ranked chiefs of Ngāti Toa) or both, as a condolence for the loss of his (Haukaione's) daughter.[209]

However, this narrative is controversial since witnesses disagreed about the extent of the gifted whenua, the timing of the gifting, and whether there was a gift at all. Hira Maike told the Native Land Court that the gift was relatively small and 'extended from Kenakena (the old mouth of the Waikanae River) up to the south side of the current mouth of the Waikanae River with Kukutauaki to the immediate north being later given to Huriwhenua'.[210] Another witness testified in the court that all land from Kenakena to Kukutauaki was included.[211] However, Wi Parata believed that the whenua on the south side of the Waikanae river was given to Haukaione, and 'the land on the north side of that stream was reserved by Te Pehi for his hapu, N'Hinetuhi a hapu of N'Awa'.[212] Regarding the timing of the gifting, many witnesses testified that Te Pēhi gifted the land before leaving for England in February 1824. However, the heke that brought Haukaione only happened after the battle of Waiorua in 1824.[213]

2.3.9.3 *Te Heke Mairaro arrives in Waikanae*

The arrival of Huriwhenua to Waikanae with Te Heke Mairaro added further complexity to the narrative surrounding the gifting of land to Haukaione. Paratawhera, who came on the heke as a baby, explained:

207. Walzl, 'Ngatiawa' (doc A194), pp 87–88
208. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 45
209. Walzl, 'Ngatiawa' (doc A194), pp 83–86
210. Walzl, 'Ngatiawa' (doc A194), p 85
211. Pare Tawhara claimed that she was told of these boundaries by Haukaione: Walzl, 'Ngatiawa' (doc A194), pp 85–86.
212. Evidence of Wi Parata, 13 May 1887, Ngarara partition, Otaki Native Land Court, minute book 7, pp 249–250 (Walzl, 'Ngatiawa' (doc A194), p 86)
213. Walzl, 'Ngatiawa' (doc A194), p 85

> The Ngatitoa were at Waikanae when they saw our heke [of] over 800 men had arrived[.] the Ngatitoa came over from Kapiti to greet us. They had received messages telling that we were coming. Pehi & Rangihiroa were the chiefs who came across from Kapiti to greet us. We all settled down on the land given to Haukaione there was no division. The Puketapu went to Uruhi, this had been apportioned to them. Tungia & Pehi gave the land.[214]

Although the witnesses at the Native Land Court who believed Haukaione to be Pohe's uncle did not explicitly state who Pohe's father was, Paora Temuera Ropata told us at the Ngā Kōrero Tuku Iho hearing at Whakarongotai Marae:

> The chief of Ngāti Rāhiri was . . . a tūpuna by the name of Huriwhenua. He had a daughter Pohe who was married to [Te] Rangihīroa[.] Te Rangihīroa and Pēhi gave over the end of Kukutauaki for the loss of his daughter who was murdered by Ngāti Apa [and] Ngāti Huruhuru and gave the land over to Ngāti Awa. And that's how Ngāti Awa managed to get, firstly a foothold into Kukutauaki and then once the land had been shared completely, well they took in all those other places that you see on these maps here, right down to Paekākāriki and up to Ōtaki.[215]

Some accounts given in the Native Land Court suggested that Te Pehi had reserved land to gift to Huriwhenua. Hira Maike (sometimes spelt Hira Maeke or Hira Maika) understood that Kukutauaki had been given to Huriwhenua after the original gift of land to Te Haukaione.[216] Te Wairingiringi argued that it had been Nohorua of Ngāti Toa who gave Waikanae to Huriwhenua, not Te Pēhi Kupe, calling into question whether the gifting of land to Huriwhenua was even related to the death of Pohe.[217]

Wi Parata held a similar perspective. He broadly asserted that Ngāti Toa provided the newcomers with whenua. Paratawhera, who, as previously stated, travelled on Te Heke Mairaro as an infant, supported Wi Parata's view.[218]

We note that some Te Ātiawa/Ngāti Awa witnesses before the Native Land Court vigorously challenged this version.[219] They generally held that Ngāti Mutunga gifted the newcomers with whenua. Mere Pomare testifed before the Native Land Court that because Ngāti Mutunga were related to Ngāti Kura they gifted them whenua at Te Ūpoko-te-kaia Pā. She added that Wiremu Kingi, who had returned in the heke with more members of his hapū and whānau, was given land and settled on the northern side of Waimeha.[220] Not long after the arrival of

214. Evidence of Paratawhera, 29 March 1890, Ngarara rehearing, Otaki Native Land Court, minute book 11, pp 199–200 (Walzl, 'Ngatiawa' (doc A194), p 94)
215. Transcript 4.1.10, p 66
216. Walzl, 'Ngatiawa' (doc A194), p 85
217. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 69
218. Walzl, 'Ngatiawa' (doc A194), p 94
219. Walzl, 'Ngatiawa' (doc A194), p 146
220. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 47

Te Heke Mairaro and a large number of their Ngāti Kura kin, many Ngāti Mutunga are said to have made the decision to move south to Te Whanganui-a-Tara.[221]

Hori Kokako stated that upon Te Heke Mairaro's arrival, Te Ātiawa/Ngāti Awa and Ngāti Mutunga were in possession of land south of the Waikanae River.[222] Pikau Te Rangi added:

> All his [Toheroa's] tribe Puketapu [arrived on Te Heke Mairaro]. After that came Reretawhangawhanga. He came to Waikanae. N Kura came with him. He brought his hapu with him, they stopped with Ngatimutunga. Some Ngatimutunga, Kaitangata & Ngatihinetuhi remained at Waikanae & some came on to Wellington.[223]

Pikau Te Rangi also said that some Kaitangata, including Hone Tuhata and Te Karu, had been living on Kāpiti. They too joined their relatives on the mainland.[224] Paretawhera testified that Te Heke Mairaro settled at Kenakena Pā.[225] Mere Pomare also provided detailed evidence regarding occupation at Waikanae:

> On the arrival of N Kura, as they were closely related, N Mutunga gave them the land on the northern side of Waimea. The pa they gave was Te Upoko te Kaia . . . So all the lands of N Mutunga north of Waimea by the Upoko te Kaia up to the land sold to Capt Rhodes & to the mountain was given to W Kingi and N Kura but they (N Mutunga) had also Kapakapanui. Those of N Mutunga who gave their land went to Wellington and those who remained & lived at Kapakapanui remained there & at Waikanae.[226]

Pikau Te Rangi further explained that after part of Ngāti Mutunga left for Te Whanganui-a-Tara, Kaitangata established themselves on both sides of the Waikanae River. Otaraua also cultivated along the banks of the Waikanae River.[227] In addition, Ngāti Mutunga, Ngāti Kura, and Ngāti Hinetuhi went and occupied Waimeha. However, Ngāti Kura and Ngāti Hinetuhi proceeded to Taiwapirau and Pikihou respectively.[228]

Mere Pomare's uri, Miria Pomare, held a similar view, explaining to us at the Ngā Kōrero Tuku Iho hearing that when Te Heke Mairaro arrived, those Ngāti Mutunga, Ngāti Tama, Ngāti Hinetuhi, Kaitangata, Ngāti Te Kēkerewai, and Ngāti Hineuru who had been on Te Heke Nihoputa and first settled in Waikanae, then moved further south to Te Whanganui-a-Tara, making space for the incoming Te

221. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 47
222. Walzl, 'Ngatiawa' (doc A194), pp 90–91
223. Evidence of Pikau Te Rangi, 21 February 1890, Ngarara rehearing, Otaki Native Land Court, minute book 10, pp 295–296 (Walzl, 'Ngatiawa' (doc A194), pp 90–91)
224. Walzl, 'Ngatiawa' (doc A194), p 93
225. Walzl, 'Ngatiawa' (doc A194), p 90
226. Evidence of Mere Pomare, 3 March 1890, Ngarara rehearing, Napier Native Land Court, minute book 15, p 337 (Walzl, 'Ngatiawa' (doc A194), p 92)
227. Walzl, 'Ngatiawa' (doc A194), pp 92–93
228. Walzl, 'Ngatiawa' (doc A194), p 93

Heke Mairaro. Pikau Te Rangi, who joined the Te Whanganui-a-Tara heke, noted that 'great mobility' existed between the Waikanae and Te Whanganui-a-Tara communities.[229]

The Otaraua hapū under the leadership of Te Tupe established customary rights over uninhabited land that subsequently became the Muaupoko block (part of the Waikanae lands and not to be confused with the iwi of that name).[230] Another narrative claims that the Puketapu section of the heke was also granted land by a Ngāti Toa chief, Tungia, that extended from Te Uruhi to the top of the ridge at Whareroa.[231]

These contested narratives were to become a complex part of Native Land Court proceedings, which will be discussed in chapter 4. But one of the earliest sources in time, predating the controversies in the court, was a letter from Metapere Te Waipunahau to Governor Grey in 1853, which is quoted in full in chapter 3. Here, we reproduce the part relating to customary rights at Waikanae, as well as the original translation and a new translation completed for our hearings by Kahu Ropata:

> Whakarongo mai, na Te Pehi, na Te Rangihiroa, na Te Pokaitara, na Te Teke, na Ngati Toa katoa i hoatu ki a Ngati Mutunga ki te heke o mua, muri iho ka mahue i a ratou ka waiho ki a Ngati Kura, ki a Ngati Hinetuhi, ki a Ngati Awa katoa. me au ano e noho ana i runga i taua whenua nei matou ko aku matua ko Te Pehi, ko Te Rangihiroa nana au e noho nei ano au i Waikanae i Waimea inaianei.
>
> He pani au kua mate aku matua, taku tungane a Te Hiko. Ko taku matua i ora ko taku whenua hei atawhai i a matou aku tamariki.[232]

The translation made by officials at the time read:

> Listen now, Waikanae was given to the 'Ngatimutunga' Tribe by the chief 'Te Pehi' 'Te Rangihiroa', 'Te Pokaitara', 'Te Teke' of the Ngatitoa Tribe together. They gave it to the 'Ngatimutunga' – to the first body who came down here from the Northward. When they went away it was left by them to the 'Ngatikura' & the 'Ngatihinetuhi' & generally to 'the Ngatiawa tribe'. I myself being at the time one of the residents on the land in question together with my parents 'Te Pehi & Rangihiroa' the latter chief is my father. I have since that time resided at Waikanae & Waimea. I am now an orphan. My parents are dead & so is my brother 'Te Hiko'.
>
> The only parent I have remaining alive is the land, to which I look for the support of my children and myself.[233]

Kahu Ropata translated this letter as:

229. Transcript 4.1.10, p 179; Walzl, 'Ngatiawa' (doc A194), p 92
230. Walzl, 'Ngatiawa' (doc A194), p 156
231. Walzl, 'Ngatiawa' (doc A194), p 95
232. Kahu Ropata, papers in support of brief of evidence, not dated (April 2019) (doc F14(b)), p [1]
233. Walzl, 'Ngatiawa' (doc A194), pp 250–251

> Listen here!! these lands were given by Te Peehi, by Te Rangihiiroa, by Pokaitara, by Te Teke, by all of Ngāti Toa to Ngāti Mutunga of the first migration, who departed, then it was left to Ngati Kura, Ngati Hinetuhi, and all of the Ngāti Awa and for myself to reside here along with my fathers Te Peehi and Te Rangihiiroa, they who put me on this land at Waikanae and Waimea right up until now. I am bereft as my uncles have all passed, my brother Te Hiko (actually her 1st cousin this is the use of tungane in the context of referring to cousins as brothers as in the case of Te Hiko). When my father was alive the intention was that the land be left as a resource for me, my children and his descendants.[234]

2.3.10 Te Heke Tamateuaua, circa 1832

Ms Moore and Mr Taylor told us that Te Heke Tamateuaua left Taranaki in 1832.[235] This large-scale migration depopulated Te Ātiawa/Ngāti Awa in Taranaki to the extent that remaining hapū were isolated to a few, heavily fortified pā.[236] Miria Pomare said the increasing assertiveness of Waikato and Maniapoto throughout Taranaki prompted the decision to migrate.[237]

Although the threat from Waikato had always loomed, that was not the only reason for migrations prior to 1830. The earlier heke were also premised on the prospect of acquiring new opportunities and resources in the district. However, by 1831 migration was fast becoming a necessity, as was evident that year when an estimated 4,000 warriors, led by Waikato, began attacking Te Ātiawa/Ngāti Awa settlements and wāhi tapu at Urenui and Onaero.[238] The unexpected incursion resulted in hapū quickly grouping at Pukerangiora, without sufficiently provisioning the pā. While the defenders successfully repelled the initial attack, the lack of water and food eventually drove the pā's occupants out of their fortifications. Hundreds were taken prisoner and several rangatira were killed, including Whatitiri, Pekapeka, Maruariki, Pahau, and Takiwaru, during the ensuing battle.[239] Mr Riwaka concluded that the Waikato and Maniapoto victory at Pukerangiora marked one of the darkest days in Te Ātiawa/Ngāti Awa history.[240]

The fall of Pukerangiora Pā catalysed the virtual abandonment of the entire coast from the Mōkau to Pātea, the exception being a small number of the Taranaki tribe who remained near Ōpunakē, and Te Ātiawa/Ngāti Awa at Ngā Motu.[241] The allied Waikato taua attempted to press their victory by taking another pā at Ngā Motu. While this Waikato endeavour was ultimately unsuccessful, the Te Ātiawa/Ngāti Awa occupants desired utu for their losses sustained and attacked

234. Kahu Ropata, papers in support of brief of evidence (doc F14(b)), p [2]
235. Wai 2228 amended statement of claim (paper 1.1.61(a)), p 6
236. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 106; Walzl, 'Ngatiawa' (doc A194), p 103
237. Transcript 4.1.10, p 179
238. Walzl, 'Ngatiawa' (doc A194), pp 99–100
239. Walzl, 'Ngatiawa' (doc A194), p 101
240. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), p 101
241. Walzl, 'Ngatiawa' (doc A194), p 10

Iwi / Hapū	Rangatira
Ngāti Mutunga	Rangiwahia, Te Ito, and Te Pononga
Ngāti Tawhitikura	Tautara, Rauakitua, Te Puni, Ngatata, Te Wharepouri, and others
Ngāti Tama	Te Tu o Te Rangi, Te Rangikatau, and Te Rangitamaru
Ngāti Maru Wharanui Ngāti Hineuru Ngāti Rāhiri Puketapu Ngāti Whakarewa Ngāti Kaitangata Ngāti Tupawhenua Ngāti Tu Ngāmotu Ngāti Te Whiti Ngāti Tawhirikura	Tautara, Rauakitua, Haukaione, Te Wharepouri, Te Puni, Rangiwahia, Te Ito, Wi Tako, Ngatata-i-te-Rangi, and Te Matangi
Puketapu	Tautara, Te Puni, Te Wharepouri, Rauakitua, Rangiwahia, Ngatata, Wi Tako, and Te Ito
Ngāti Mutunga	Rangiwahia, Hautohoro (Hau Te Horo), Onemihi, and Te Ito
Ngāti Tawhirikura	Tautara, Ruaukitua, Te Puni, Ngatata, Te Wharepouri, and Henare Te Keha
Ngāti Tama	Te Tu-o-te-rangi, Te Rangikatau, Kaeaea (Taringakuri), and Te Rangitamaru

Table 3: Hapū / iwi and rangatira that participated in Te Heke Tamateuaua according to Lou Chase's evidence.

Source: Chase, 'Ngātiawa / Te Āti Awa' (doc A195), p 50

Ngāti Maniapoto.[242] Following this, and ahead of any further reprisals, the fourth and largest migration departed Taranaki, known as Te Heke Tamateuaua.

Mr Riwaka estimated that the migration included approximately 2,000 hapū members – fighting men accounted for half that number.[243] Miria Pomare told us that those who took part in the migration included Ngāti Mutunga under the chiefs Rangiwahia, Te Ito, and Te Pononga, and Ngāti Tawhitikura led by Tautara, Rauakitua, Te Puni, Ngatata, and Te Wharepouri. The Ngāti Tama section of the heke was led by Te Tu o Te Rangi, Te Rangikatau, and Te Rangitamaru.[244] Rangipito stated the following hapū made the journey:

> Nga-Motu, Puketapu, Manu-kohiri, Puke-rangiora, Ngati-Rahiri, Kai-tangata, Ngati-Tu, Ngati-Hine-uru, Ngati Mutunga, Te Whakarewa and Ngati-Tama. The

242. Walzl, 'Ngatiawa' (doc A194), p 103
243. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 11, 105
244. Transcript 4.1.10, p 179

principal chiefs were: Tau-tara, Raua-ki-tua, Te Wharepouri, Te Puni, Rangi-wahia, Hau-te-horo, Te Ito, Te One-mihi, and others.[245]

The migrants travelled southward via the Te Whakaahurangi track, which traversed the inland forests of Taranaki Maunga. Te Heke Tamateuaua encountered a serious attack near Whanganui after crossing paths with Tūwharetoa peoples under the leadership of Te Heuheu and his brother, Te Popo. The heke could only extract themselves from this attack once kin from Waikanae came to their aid and provided reinforcements. Following the killing of Te Ātiawa/Ngāti Awa rangatira Te Ito, members of the heke ambushed the Ngāti Tūwharetoa party. The ensuing battle near Pukemanu claimed the lives of at least 40 Te Ātiawa/Ngāti Awa. Te Popo was also shot and killed by Te Ketu of Ngāti Tama.[246] Several Europeans accompanying the heke were said to have assisted in the battle. Following this engagement, Te Heke Tamateuaua escaped south.[247]

Rangipito, son of the slain rangatira Te Ito, explained that following the events of Pukemanu, the main section of the heke travelled southward by land, although some women, children, and elderly were ferried along the coast on waka looted from Whanganui. When the heke reached Te Mahia, between Ōtaki and Waikanae, the group of Ngāti Toa who had been guiding the migrants crossed to Kāpiti Island. The heke then travelled to Waikanae and were reunited with their kin.[248] Watene Taungatera stated that the following peoples were living on the mainland when they arrived:

> Huriwhenua, W King. [Te Rere] Tawhangawhanga & others. They belonged to N Rahiri their chief was Huriwhenua
>
> —N Kura, Wi King was their chief
>
> —N Mutunga. under Ngatata. Patukaurunga. Te Poke.
>
> Kaitangata. N Hinetuhi Otarawa. N Uenuku. N Tuaho. All these were hapus of N Awa.[249]

Generally, those on the heke lived among those already resident at Waikanae. There is no evidence that suggested new land arrangements were made. The Puketapu and Ngā Motu hapū settled at Te Uruhi while Kaitangata settled inland of Waikanae. The Ngāti Tama section of Te Heke Tamateuaua settled at Te Pou-o-te-moana, further to the north.[250] After settling at Waikanae for a year, a section of Ngā Motu migrated further south to Te-Whanganui-a-Tara by waka. Here, an

245. Smith, *History and Traditions*, p 488 (Walzl, 'Ngatiawa' (doc A194), p 104)
246. Walzl, 'Ngatiawa' (doc A194), pp 104–106
247. Walzl, 'Ngatiawa' (doc A194), pp 105–106
248. Walzl, 'Ngatiawa' (doc A194), pp 106–107
249. Napier Native Land Court, minute book 15, p 80 (Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209, p 106)
250. Walzl, 'Ngatiawa' (doc A194), p 107

area of land from Waiwhetu to Okiwi was gifted to them.[251] In addition some Ngāti Mutunga moved on to Pito-one (Petone).[252]

2.3.11 Te Heke Paukena, circa 1834

Claimants Miria Pōmare and Hepa Potini told us that a final Taranaki heke followed Te Heke Tamateuaua. They said that Te Pūoho of Ngāti Tama, who had previously returned to Taranaki with the intention of bringing his remaining hapū members to Waikanae, led this final heke, known as Te Heke Paukena.[253]

In 1834, the last significant Waikato and Maniapoto taua attacked Ngā Motu at Mikotahi Pā and Te Namu. While this conflict marked the final incursion into Taranaki, fear of further attacks remained pervasive and prompted Te Heke Paukena.[254]

Mr Walzl estimated that Te Heke Paukena involved approximately 1,000 people.[255] Rangipito provided an insight concerning the composition of the migrants:

> It was some time after our settlement at Wai-kanae that the next heke, called by some 'Te heke paukena,' arrived from Puke-tapu, Taranaki . . . and with it went Wiremu Te Rangi-take and all his people, some of the Taranaki tribes, and a large number of the Ngati-Rua-nui tribe. Te Ura was the principal chief; it was the last of the many migrations from the northern parts of the Taranaki coast.[256]

Dr Hearn also noted that Te Heke Paukena consisted of peoples from central and southern Taranaki.[257] Mr Chase cited evidence that Ngāti Kura, Puketapu, Ngāti Haumia, Ngāti Haupoto, and Ngāti Tupaea were also present.[258] Overall, it appears those on Te Heke Paukena made their way to the Waikanae district without incident.

Te Watene Taungatera, a teenager on Te Heke Paukena, was asked by the Native Land Court about the nature of land tenure at Waikanae upon his arrival:

> **Q:** Were the hapus each on its separate land?
> **A:** Yes. N Rahiri had the north, came down to Opoua. N Kura came next to the mouth of the Waimea and Waikanae. Kaitangata, N Uenuku, N Tuaho and Otarawa south of the Waikanae and running inland of N Kura. Puketapu came south of Waikanae to Whareroa.
> **Q:** Where were the N Mutunga lands?

251. Walzl, 'Ngatiawa' (doc A194), p 108
252. Walzl, 'Ngatiawa' (doc A194), p 108
253. Transcript 4.1.10, pp 37, 179; Walzl, 'Ngatiawa' (doc A194), p 110
254. Walzl, 'Ngatiawa' (doc A194), p 110
255. Walzl, 'Ngātiawa/Te Āti Awa Research Needs Scoping Report' (doc A186), p 27
256. Smith, *History and Traditions*, p 497 (Walzl, 'Ngatiawa' (doc A194), p 110)
257. Hearn, 'One Past, Many Histories' (doc A152), p 27
258. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 51

A: At Te Upoko a te Kaia. N Kura and N Hinetuhi also lived there. Te Arau was chief of N Mutunga. All these hapus Kaitangata, N Uenuku, Tuaho etc lived together at Waikanae.
Q: When you came to Kukutauaki where did N Rahiri live?
A: At Mutukaatoa – they all lived there, they had a great number of houses.
Q: Did not N Kura cultivate there?
A: They did by permission of N Rahiri and N Rahiri cultivated in the same way on N Kura lands.[259]

Watene Taungatera's evidence suggested the settled nature of occupation around Waikanae provided little scope for newcomers on Te Heke Paukena. The migrants found themselves restricted to a limited area by those already resident at Waikanae, in which they had restricted customary rights and little access to resources. Further, some members of Te Heke Paukena may have began occupying areas north of the Kukutauaki Stream.[260]

Mr Walzl broadly summarised the complex occupation patterns at Waikanae during this time:

> The Ngatiawa groups that came were closely related, usually having ancestral connections to several Ngatiawa hapu as well as other neighbouring Taranaki or Kawhia groups. Most witnesses [in the Native Land Court] who claimed under the various hapu cases clearly showed that their occupation was shared with another one or two hapu. This type of occupation had been present from the beginning. When Ngati Mutunga arrived in Te Heke Nihoputa and occupied Kenakena pa south of Waikanae River, those of Ngatiawa from Te Heke Tataramoa who had remained came across to Waikanae from Kapiti and joined them. These included members of Kaitangata, Ngati Rahiri and Ngati Hinetuhi. When Ngati Kura came, they initially settled with Ngati Mutunga south of the Waikanae River. Thereafter, however, it appears that Ngati Mutunga with Ngati Kura focused their occupation from the north of Waimea River through to the north of the Waikanae River. This left Kaitangata, Ngati Rahiri and Ngati Hinetuhi occupying the area from north of Te Uruhi (where Puketapu had gone) to the northern banks of the Waikanae River. In addition, when Nohoroa had [allegedly] gifted the land at Kukutauaki to Ngati Rahiri chief Huriwhenua, members of that hapu occupied it, but neighbouring Ngati Kura also accessed resources in that area as well.[261]

2.3.12 The Haowhenua war, circa 1834

Miria Pomare explained that successive waves of migration from Taranaki to the inquiry district instigated land disputes.[262] Te Heke Mairaro and Te Heke Paukena

259. Walzl, 'Ngatiawa' (doc A194), p 111
260. Otaki Native Land Court, minute book 10, p 81 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
261. Walzl, 'Ngatiawa' (doc A194), p 526
262. Transcript 4.1.10, p 173

coincided with a large Ngāti Raukawa migration that created new pressures and resulted in competition for land between the two iwi which ultimately resulted in warfare.[263] Paratawhera told the Native Land Court in 1890 that the series of engagements, often referred to collectively as Haowhenua, lasted over a year.[264]

2.3.12.1 *Tawake's killing*

Hepa Potini explained that a quarrel brought these tensions to a head.[265] In the Native Land Court, Rangipito detailed these events, which contributed to series of battles continuing for over a year:

> Not long after their arrival [Te Heke Paukena] a man named Tawake, of the Ngati-Tawhake hapu of Ati-Awa from Puketapu, but formerly of Kairoa inland of Lepperton, and others went inland to a place on the north side of the Otaki river – to the territory then occupied by Ngati-Rau-kawa – to ao-kai, or steal food. As the party returned, Tawake, remembered that he had left his pipe behind, and so went back to fetch it, when he was caught by Ngati-Rau-kawa, who killed him with their tomahawks. Finding he did not return, his companions went to look for him, and found and brought away his headless body to the coast where the migration was camped. Great excitement was caused by this death, and, as usual, revenge was determined upon.[266]

A Māori source later told the ethnographer Alexander Shand, son of the resident magistrate on the Chatham Islands in the 1850s, that 'after this [the killing of Tawake], day after day we found odd numbers of our people, twos and threes, killed at short intervals, so that we dared not go out anywhere but in numbers'.[267]

The reaction to Tawake's killing demonstrated the complexity of interests and alliances. The *Te Whanganui a Tara* report found the threat posed by Kurahaupō-descent peoples contributed to cohesion and camaraderie amongst migrating iwi. However, the victory at Waiorua marked a significant reduction in the ability of the original inhabitants to challenge this new wave of settlement. Consequently, old attachments and allegiances that existed in Taranaki, Kāwhia, and Waikato became more pronounced.[268]

Sections of Ngāti Toa, namely Ngāti Kimihia, led by Te Rauparaha and Te Rangihaeata supported their Ngāti Raukawa kin.[269] Some Waikato, Ngāti

263. Walzl, 'Ngatiawa' (doc A194), p 109
264. Otaki Native Land Court, minute book 11, p 200 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 11)
265. Transcript 4.1.10, p 40
266. Smith, *History and Traditions*, p 516 (Walzl, 'Ngatiawa' (doc A194), p 112)
267. Alexander Shand, 'The Occupation of the Chatham Islands by the Maoris in 1835: Part 1 – The Migration of Ngatiawa to Port Nicholson', *Journal of the Polynesian Society*, vol 1, no 2, 1892, p 89 (Walzl, 'Ngatiawa' (doc A194), p 113)
268. Waitangi Tribunal, *Te Whanganui a Tara*, p 25
269. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 53; Waitangi Tribunal, *Te Whanganui a Tara*, p 26

Maniapoto, Ngāti Tipa, and Ngāti Tūwharetoa also reinforced Te Rauparaha.[270] Similarly, a contingent of 200 Ngāti Apa warriors from Whanganui, and 100 Ngāti Kahungunu warriors were sent to support Ngāti Raukawa.[271] In the *Te Whanganui a Tara* report, the Tribunal also noted that several groups of Kurahaupō descent supported this party.[272]

Their opponents were led by Te Ātiawa/Ngāti Awa.[273] Sections of Te Ātiawa/Ngāti Awa that had previously settled the Marlborough Sounds returned to Waikanae to support their kin.[274] Similarly, a party of Ngāti Mutunga that had previously migrated to Te-Whanganui-ā-Tara, returned to bolster the ranks of Te Ātiawa/Ngāti Awa.[275] Ngāti Toa on Kāpiti Island generally supported Te Ātiawa/Ngāti Awa.[276] This section was led by Nohorua and Te Rangihīroa[277] and Ngāti Maunu.[278] Paora Temuera Ropata also spoke at our hearings about the intricacy of divisions:

> Now, that battle of Haowhenua. That's the one that really put the schism in there, the split. There has always been two Ngāti Toas. The Ngāti Raukawa Ngāti Toas and the Ngāti Awa Ngāti Toas. The schism happened at Haowhenua when the chief – chiefly families of Ngāti Toa stood for Ngāti Awa actually, and fought Ngāti Raukawa and Te Rauparaha.[279]

2.3.12.2 *The battle of Haowhenua*

Tamihana Te Rauparaha explained that in retaliation for the killing of Tawake, 600 allied Te Ātiawa/Ngāti Awa and Ngāti Ruanui assaulted a Ngāti Raukawa pā near Ōtaki.[280] According to the historical record, this pā was probably Rangiuru.[281] The initial loss of life is said to be significant because both sides were well armed.[282]

While the attackers were unsuccessful, the hostilities resulted in Te Rauparaha reinforcing Rangiuru Pā with a section of Ngāti Toa. A force of approximately 3,000 Te Ātiawa/Ngāti Awa, Taranaki, Ngāti Ruanui, and allied Ngāti Toa subsequently besieged the Ngāti Raukawa and Ngāti Toa occupants.[283] Rangipito believed that Te Rauparaha himself was one of the occupants.[284] Some Ngāti Toa sources state that Ngāti Raukawa and their allies were victorious in a series of

270. Sundgren, brief of evidence (doc F19), pp 12–13
271. Walzl, 'Ngatiawa' (doc A194), p 115
272. Waitangi Tribunal, *Te Whanganui a Tara*, pp 25–26
273. Waitangi Tribunal, *Te Whanganui a Tara*, p 26
274. Walzl, 'Ngatiawa' (doc A194), p 115
275. Walzl, 'Ngatiawa' (doc A194), p 115
276. Walzl, 'Ngatiawa' (doc A194), p 114
277. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 52
278. Waitangi Tribunal, *Te Whanganui a Tara*, p 26
279. Transcript 4.1.10, p 59
280. Walzl, 'Ngatiawa' (doc A194), p 113
281. Walzl, 'Ngatiawa' (doc A194), p 114
282. Walzl, 'Ngatiawa' (doc A194), p 121
283. Walzl, 'Ngatiawa' (doc A194), pp 113–114
284. Walzl, 'Ngatiawa' (doc A194), p 114

battles associated with this initial siege known as 'Maringi-a-wai', 'Haowhenua', 'Te Rereamanuka', and the 'Pa-a-Te Hanataua.'[285]

Following several months, supposedly at the request of Te Rauparaha, Te Heuheu of Ngāti Tūwharetoa sent a fighting force of 800 men from Taupō.[286] The Tūwharetoa taua drastically altered the balance of power in support of the Ngāti Raukawa and Ngāti Toa forces[287] and broke the siege. The Ngāti Tūwharetoa arrival also forced the Te Ātiawa/Ngāti Awa allies to withdraw to Pakakutu Pā. Following two days of severe fighting, Te Ātiawa/Ngāti Awa effected another retreat across the Ōtaki River to Haowhenua Pā.[288] Rangipito stated that the pā was held by the rangatira 'Tu-whata (Hone), Huri-whenua, Te Hau-te-horo, Raua-ki-tua, Rere-tauwhanga-whanga, Rangi-wahia, Tau-tara, Te Tupe-o-Tu, Te Manutoheroa, and others'. He also described the first engagement at Haowhenua:

> On the arrival of the enemy before the pa, three ngohi or companies, were sent out by the pa to meet them, each two hundred men topu (four hundred), under Hone Tu-whata, Te Ua-piki, Rere-tawhangawhanga, and Huri-whenua as leaders. So they went forth, and were given over to death by the guns (ka tukua ratou katoa hei ngaunga ma te pa). As they went forth, those divisions under Hone and Te Ua-piki led the advance – the other two remaining in the rear as a whakahoki, or support. Then the enemy fled, followed by Hone's party. After watching his advance for some time, the two other ngohi gave chase also as a support – for by that time they knew it was a real retreat and not a feint . . . The first attack on Hao-whenua was at an end, and the victory lay with Ati-Awa.[289]

On the following day, the opposing forces met again southward of the pā. Each side fired several volleys before engaging in close quarter combat. According to Rangipito, Ngāti Tūwharetoa, Ngāti Maniapoto, and Ngāti Raukawa suffered heavy casualties causing a full retreat. It was during this engagement that Papaka, the brother of Te Heuheu, was shot and killed.[290] Te Tupe-o-Tu and Hau Te Horo from the hapū of Otaraua were also killed.[291] Te Ātiawa/Ngāti Awa did not pursue the enemy, instead choosing to withdraw to the heavily fortified Kenakena Pā at Waikanae.[292]

2.3.12.3 *Kenakena Pā*

Rangipito stated that following their defeat at Haowhenua Pā, Ngāti Raukawa and their allies united and attacked Kenakena Pā, while another force simultaneously assaulted other settlements near Waikanae. The assault on Kenakena was

285. Walzl, 'Ngatiawa' (doc A194), p 115
286. Walzl, 'Ngatiawa' (doc A194), pp 115–116
287. Walzl, 'Ngatiawa' (doc A194), p 116
288. Walzl, 'Ngatiawa' (doc A194), p 116
289. Smith, *History and Traditions*, pp 517–518 (Walzl, 'Ngatiawa' (doc A194), pp 116–117)
290. Walzl, 'Ngatiawa' (doc A194), p 117
291. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), pp 53–54
292. Walzl, 'Ngatiawa' (doc A194), p 125

successfully countered by a collective force of Te Ātiawa/Ngāti Awa, Ngāti Toa, Puketapu, Manukorihi, and Ngā Motu warriors. The victors were said to have pursued the retreating enemy and killed several Ngāti Maniapoto, Waikato, and Ngāti Tūwharetoa. A section of Te Ātiawa/Ngāti Awa, under the leadership of Hone Tuhata and Te Uapiki, also repulsed the Ngāti Raukawa attack at Waikanae.[293] Rihara Kahuaroa testified before the Native Land Court that both Te Ātiawa/Ngāti Awa and Ngāti Toa participated in the defence of Kenakena Pā. The Native Land Court, however, held that Ngāti Toa did not play an active role in the defence of Kenakena, instead attributing the victorious defence to Te Ātiawa/Ngāti Awa.[294]

In the *Te Whanganui a Tara* report, the Tribunal said that the outcome of the Haowhenua war was inconclusive, with withdrawals on both sides. Several significant rangatira were killed.[295] Dr Ballara concluded that Ngāti Raukawa suffered the greatest losses.[296] Rangipito testified that this attrition motivated Nini, a high-ranking rangatira of Ngāti Tipa, to offer peace terms on behalf of his Ngāti Raukawa allies. This was ultimately accepted by Te Ātiawa/Ngāti Awa.[297]

Te Watene Taungatera of Ngāti Rahiri and Otaraua, who fought at Haowhenua, held a different view. He stated that the peace was secured by Rangihaeata and his sister, Topeora.[298] The most commonly held view by the claimants in this phase of the inquiry was that Waitohi, Te Rauparaha's sister, distributed land between the competing iwi, resulting in an armistice.[299] It is said that Te Heuheu of Ngāti Tūwharetoa endorsed this agreement by breaking his taiaha across his knee.[300] Hepa Potini defined this land tenure:

> Mai i te awa o Rangitīkei, Manawatū tae atu ki te awa o Kukutauaki ko Ngāti Raukawa. Mai i te awa o Kukutauaki ki te awa o Waikanae, Te Āti Awa.' Otirā ka tae ki te awa o Waikanae, piki whakarunga te maunga o Tararua, heke whakararo ki Māwaihākona ki Heretaunga, piki ake ngā maunga o Ōrongorongo, tae atu ki Tūrakirae hoki mai, ana ki Pito-one, hoki mai ana ki Horokiri, Horokiwi rānei, tae mai ki waho atu o Pukerua i a Pouāwhā, tētahi wāhi kei muri i ngā puke o Whareroa, o Wainui, tae atu ki Pāwhakataka, hoki mai ki konei ki ngā takutai o Waikanae. Koia tērā te whakatakoto o te whenua mō Te Āti Awa, mō Ngāti Awa rānei.
>
> From Rangitīkei river and Manawatū down to the Kukutauaki the stream is Ngāti Raukawa's. From Kukutauaki to the Waikanae river, to the top of the Tararua range, descending to Māwaihākona down to the Hutt valley (Upper Hutt, Māwaihākona

293. Walzl, 'Ngatiawa' (doc A194), p 118
294. Walzl, 'Ngatiawa' (doc A194), pp 118–119
295. Waitangi Tribunal, *Te Whanganui a Tara*, p 26; Sundgren, brief of evidence (doc F19), p 13
296. Angela Ballara, 'Te Whanganui-a-Tara: Phases of Maori Occupation of Wellington Harbour, c1800–1840', in *The Making of Wellington, 1800–1914*, eds D Hamer and R Nicholls (Wellington: Victoria University Press, 1990), p 24
297. Walzl, 'Ngatiawa' (doc A194), pp 119–120
298. Walzl, 'Ngatiawa' (doc A194), pp 120–121
299. Ropata, brief of evidence (doc F14), p 2; transcript 4.1.20, pp 148, 195
300. Walzl, 'Ngatiawa' (doc A194), p 121

River) climbing up the Ōrongorongo Range, to the Turakirae Head, back to Pito-One, back to Horokiri, or Horokiwi, and coming up to Pukerua Bay. Pouāwhā, a place behind the hills of Whareroa, near McKay's Crossing down to Pā Whakataka coming back here to the coast of Waikanae. That's the land for Te Āti Awa, also known as Ngāti Awa.[301]

Miria Pomare added:

Following this battle, there was a re-arrangement of tribal boundaries which required Waitohi's intervention to settle the disputes and stipulate boundaries. She had considerable influence due to her whakapapa links and personal connections to the chiefly lines of both Ngāti Toa and Ngāti Raukawa, and she was a formidable leader in her own right. It was at her request that the Taranaki iwi moved further south to Waikanae where they took possession of the land south of the Kukutauaki Stream. Ngāti Raukawa agreed to occupy the land from the northern bank of this stream as far as the Manawatū River. Ngāti Toa remained mainly on Kapiti and also later occupied Mana Island, Pukerua Bay and Porirua. It is my understanding, that all of the iwi agreed to the tuku and the terms of the transfer as stipulated by Waitohi. These tribal boundaries were still in place at the time of the signing of the Treaty of Waitangi, te Tiriti o Waitangi, in 1840.[302]

The Native Land Court commented that the so-called peace amounted to little more than an armed truce.[303]

Watene Taungatera, who was involved in the fighting, stated that after the Haowhenua war, those who remained south of the Waikanae River were Kaitangata, Otaraua, Ngāti Tuaho, and Ngāti Uenuku. He added that some Kaitangata had gone to Arapawa.[304]

Various sources, such as the evidence of Te Ātiawa/Ngāti Awa witnesses to the Ngarara commission in 1888, agreed that some, perhaps many, had migrated to the South Island after the Haowhenua war because they felt unsafe.[305] Others held that the peace was not settled by the agreement sponsored by Waitohi. This was evidenced by some people who moved away from the area. The extent of the diaspora is contested. Enoka Tatairau testified that Toheroa, Te Hani, and other rangatira crossed the Cook Strait to Arapawa. However, he specified that some Te Ātiawa/Ngāti Awa maintained ahi kā at Waikanae.[306] Hiria Te Aratangata claimed

301. Transcript 4.1.10, p 40; Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 55
302. Transcript 4.1.10, pp 179–180
303. Walzl, 'Ngatiawa' (doc A194), p 126
304. Walzl, 'Ngatiawa' (doc A194), p 124
305. See, for example, Enoka Tatairau, evidence to Ngārara commission, 26 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 354–355).
306. Walzl, 'Ngatiawa' (doc A194), p 122

in the Native Land Court that the reason for the migration was to 'catch fish and plant potatoes.'[307]

On 14 November 1835, the first group of 500 set sail on the *Rodney* for the Chatham Islands; this group included Ngāti Mutunga, a few Ngāti Tama, and a party of Ngāti Haumia.[308] Their departure coincided with the formal transferral of their land rights surrounding the Wellington harbour to Taranaki and Ngāti Ruanui hapū. Rangipito said that 'shortly after Haowhenua the bulk of us (Ati-Awa) moved over to Port Nicholson to join our relatives there.'[309] Some Ngā Motu also settled in Te Whanganui-a-Tara with their Taranaki whānau.[310]

Wi Parata generally accepted this narrative of events, specifying that the majority of Te Ātiawa/Ngāti Awa migrated to the Marlborough Sounds following the Haowhenua war. However, he firmly believed that some representatives of most hapū maintained occupation of Waikanae.[311] Hemara Waiho testified before the Ngarara commission that despite many Te Ātiawa/Ngāti Awa travelling to Arapawa, several members of each hapū remained at Waikanae:

> Were there any Ngatiawa left at Waikanae then?
>
> Yes there were some left. . . . All the tribe left but there were a certain portion of each hapu [who] remained.
>
> Will you tell us which of the hapus went altogether – did any hapus go altogether?
>
> No there were three or four or ten or twenty left from each hapu, they all went, a hapu would go itself, but still they would leave some behind.[312]

Church Missionary Society missionary Octavius Hadfield shared a similar understanding. He estimated that following the Haowhenua war, approximately 400 of the 1,000 Te Ātiawa/Ngāti Awa inhabiting Waikanae relocated to Arapawa. Hadfield added that access to more plentiful fishing grounds (rather than any insecurity following the war) was the key factor that caused this relocation.[313]

2.3.13 Kūititanga, circa 1839

2.3.13.1 Waitohi's tangihanga and escalation of hostilities, 1839

Mr Sundgren said that the truce brokered after Haowhenua was uneasy and short-lived.[314] He explained to us that the tangihanga of Waitohi in 1839 provided the spark that reignited armed conflict. Insults and disparaging comments were traded on Mana Island amongst the attendees. Most notably, Te Rangihaeata chanted:

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307. Otaki Native Land Court, minute book 10, p 88 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
308. Waitangi Tribunal, *Te Whanganui a Tara*, p 27; Ballara, 'Te Whanganui-a-Tara', p 26
309. Smith, *History and Traditions*, p 522 (Walzl, 'Ngatiawa' (doc A194), p 123)
310. Waitangi Tribunal, *Te Whanganui a Tara*, p 27
311. Walzl, 'Ngatiawa' (doc A194), pp 123–124
312. Evidence of Hemara Waiho, 4 December 1888, Ngarara commission (Walzl, 'Ngatiawa' (doc A194), p 125)
313. Walzl, 'Ngatiawa' (doc A194), p 124
314. Sundgren, brief of evidence (doc F19), p 14

Ka tinei te pawa ma taua,
Riri, kotia, i te hana,
kotia ana i te haka tamumu, tamumu
I aua ra, kia tu ake au, i runga nui, ki raro nei
Ki te ueuenuku, ki te irirangi,
Ki tēnei koko, whai ake te raho o Mahuika.[315]

The smoke from the fires will be extinguished
Rage will spread and the bright gleaming fires will be dimmed
The hum from conflict will be resounding
Our presence
From above and below
will shake the ground, and unsettle the area
like the raging fires of Mahuika.[316]

Te Rere-tawhanga-whanga is said to have replied:

Me aha, Me aha,
Me kawe, me paepae whenua . . .
A kia kite mai i te paraha i tana tūnga
Ka hira ki runga ha!
Ka kikiki te kumu o Te Whatanui e
Paiaroa haha.[317]

Be that as it may
Occupation on the lands shall be re-affirmed by us
In order for Te Paraha (Te Rauparaha) to know his place,
the outcome will be widespread
and Te Whatanui's mana will be affected
A haha.[318]

Te Ātiawa/Ngāti Awa began reinforcing their pā at Waikanae, Whareroa, and Paripari because of this exchange.[319]

Following Waitohi's tangihanga, several Ngāti Ruanui were executed by Ngāti Raukawa in Ōtaki, despite efforts by Te Ātiawa/Ngāti Awa representatives to secure their safe return. The executions amounted to a declaration of war. Several commentators have queried the reasons motivating this decision on behalf of Ngāti Raukawa.[320] Enoka Tatairau, brother of Wiremu Kingi Te Rangitake, testified that

315. Sundgren, brief of evidence (doc F19), pp 14–15
316. Hemi Sundgren, interpretations of te reo Māori in brief of evidence, 29 July 2019 (doc F19(d), p 5)
317. Sundgren, brief of evidence (doc F19), p 15
318. Hemi Sundgren, Translation by Sundgren in brief of evidence (doc F19(d), pp 5–6)
319. Walzl, 'Ngatiawa' (doc A194), p 128
320. Walzl, 'Ngatiawa' (doc A194), pp 128–129

'[t]his battle was caused by Rauparaha and was intended to crush the Ngatiawa.'[321] Hori Kokako believed Te Rauparaha's hatred was linked to Ngāti Tama's mistreatment of his sister, Waitohi, before her death.[322]

Historians have speculated that Te Ātiawa/Ngāti Awa's increasing influence was linked to the rapid development of the whaling trade, the immediate consequence of this being that Te Ātiawa/Ngāti Awa were gaining more access to firearms.[323] Dr Ballara theorised that Te Ātiawa/Ngāti Awa's dealings with the New Zealand Company for Port Nicholson also increased levels of inter-iwi animosity.[324]

2.3.13.2 *The battle of Kūititanga*

Ngāti Raukawa rangatira Ngakuku and Te Whatanui attacked Waimeha Pā, an outpost on the northern side of the Waikanae River mouth, under the cover of darkness in late 1839. According to some sources, Waimeha Pā was also known as Kūititanga.[325] Mr Sundgren explained that the occupants of the outpost were Ngāti Kura and Ngāti Mutunga. Of the 1,200 people who lived at the pā, approximately 500 were warriors. The attackers achieved the element of surprise marked by the bodies strewn throughout the surrounding Ngāhuruhuru cultivation ground.[326]

The surviving occupants retreated in disarray across the Waikanae River to Arapawaiti Pā, finding refuge with Ngāti Rahiri and Ngāti Rukao. At Arapawaiti, the survivors were reinforced by Te Ātiawa/Ngāti Awa warriors from Kenakena Pā. Mr Sundgren added that Puketapu and Ngāti Maru auxiliaries also arrived from pā at Te Uruhi, Whareroa, and Tipapa to bolster the defence.[327] The rangatira Te Korua, Te Pane, Mohi Te Hua, Pirikawau, Te Manutoheroa, and others orchestrated the defence.[328] Ngāti Rāhiri rangatira who fought were identified as Te Hapiki, Huriwhenua, Ngapuke, Te Auru, Tutana Hitaongonge, Hoketaiawa, Mari Tahakau, Maaka, Rongotangata, Tamatikawhia, Te Porou, and Ngapaki.[329] Other sources suggest that Ngāti Tuaho were present and were represented by Tamati Raru, Patukakariki, Te Teira, and Hake. The latter, Hake, was killed during the battle.[330] Those of Ōtaraua who took part included Hutana Awatea, Reupena, Hone Kuri, Wi Aperahama, Poarore, and Te Kati.[331] Another observer, Octavius Hadfield, estimated that approximately 400 Te Ātiawa/Ngāti Awa warriors had

321. Evidence of Enoka Tatairau, 3 December 1888, Ngarara commission (Walzl, 'Ngatiawa' (doc A194), p 127)
322. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209, p 131)
323. Walzl, 'Ngatiawa' (doc A194), p 127
324. Ballara, 'Te Whanganui-a-Tara', p 31; Walzl, 'Ngatiawa' (doc A194), p 127
325. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Te Kārewarewa Urupā', 9 November 2015, pp 5–8 (Baker, papers in support of brief of evidence (doc F11(a)), pp 580–583); Carkeek, *The Kapiti Coast* (doc A114), p 58; Sundgren, brief of evidence (doc F19), pp 14–17; Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 57
326. Sundgren, brief of evidence (doc F19), p 16; Walzl, 'Ngatiawa' (doc A194), p 130
327. Sundgren, brief of evidence (doc F19), p 16
328. Walzl, 'Ngatiawa' (doc A194), p 130
329. Walzl, 'Ngatiawa' (doc A194), p 130
330. Walzl, 'Ngatiawa' (doc A194), p 131
331. Walzl, 'Ngatiawa' (doc A194), p 131

crossed from Arapawa in support of their kin at Waikanae.[332] Ms Mack also acknowledged the presence of her tūpuna wāhine who bravely contributed to the defence of Kenakena Pā.[333]

A full description of the battle, known as Kūititanga, was detailed by Smith:

> The Ngati-Rau-kawa forces, under their chiefs Te Whata-nui, Ngakuku, and many others, advanced to the attack, timing their arrival there so as to take advantage of the first streak of the day, a very favourite time for such a purpose . . . 'As soon as daylight appeared', says Te Kahui, 'it was found that the army of Ngati-Rau-kawa was drawing near, and as it got quite light the assault commenced, the enemy firing as they advanced. It was now seen that the pa was surrounded. Ati-Awa commenced firing, and very shortly a heap of dead were seen lying in front of the pa. This repulse caused the enemy to retire to a distance, but they shortly after returned to the assault. Then did Ati-Awa and Taranaki distinguish themselves! Nga-kuku and his people were beaten off, and fled, followed by those of the pa who continued the chase, slaying as they went, until sundown. Minarapa, who was with the party, on reaching their boundary (At Kuku-tauaki stream?), stood forth in front of the victorious army and said, 'Cease! These people are beaten. Let it end here.' The younger chiefs were most anxious to continue the slaughter, but they were overruled . . . It was here that the brave chief of Ngati-Rau-kawa (Nga-kuku) was slain, together with some two hundred of his people, whilst thirty-six of Ati-Awa and Taranaki were also killed.[334]

Importantly, Enoka Tatairau testified before the Native Land Court that '[t]his fight was fought by the Ngatiawa alone . . . This was the last fight. The Ngatitoa took no part in this battle.'[335] Published sources estimate the total losses incurred by both sides at approximately 100 men.[336] Wi Parata told the Native Land Court that 'there were some slain on both sides but the greater number were N Raukawa.'[337] Unlike Haowhenua, Kūititanga was over in less than a day.

After the battle, peace-making efforts soon arose. Colonel William Wakefield and his men from the New Zealand Company ship, the *Tory*, had aided in treating the wounded in the aftermath of the battle. According to Wakefield's account, as cited by W Carkeek, it was Wakefield who held the first peace-making conference on 27 October 1839. Three Te Ātiawa/Ngāti Awa chiefs were invited aboard the *Tory* to make peace with Te Rauparaha. Wakefield recorded that the meeting had been a success and that many of the grievances on both sides had been resolved, after being aired face to face.[338]

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332. Napier Native Land Court, minute book 15, p 330 (Walzl, 'Ngatiawa' (doc A194), p 135)
333. Mack, brief of evidence (doc F42), pp 9–10
334. Smith, *History and Traditions*, p 556 (Walzl, 'Ngatiawa' (doc A194), p 131)
335. Evidence of Enoka Tatairau, 3 December 1888, Ngarara commission (Walzl, 'Ngatiawa' (doc A194), p 134)
336. Walzl, 'Ngatiawa' (doc A194), p 131
337. Otaki Native Land Court, minute book 10, p 165 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
338. Carkeek, *The Kapiti Coast* (doc A114), p 63

Witnesses before the Native Land Court identified that Octavius Hadfield had later been involved in peace-making. Enoka Tatairau described how Hadfield had brought Ngāti Raukawa to see their dead, and then travelled with them to Ōtaki before requesting a cessation of hostilities.[339] In the *Te Whanganui a Tara* report, the Tribunal concluded that 'Te Atiawa saw Te Kuititanga as a victory over Te Rauparaha and as a final severing of their obligations to him'.[340] In 1887, Mere Pomare emphasied the significance of both Haowhenua and Kūititanga from a Te Ātiawa/Ngāti Awa perspective, and noted that "N' Awa gained possession of the land' as a result of these 'fights'.[341]

The cultivations at Ngāhuruhuru where many of the Te Ātiawa/Ngātiawa were killed at the outset were declared wāhi tapu.[342] Ms Baker told us that much of the landscape as it is known today was named after the events of Kūititanga:

> Maumaupurapura, Taewapirau, Upoko te kaia and Kaitoenga. . . . I have been told . . . their use and interpretation came from the battle of Te Kuititanga. . . . they were a reference to how the landscape looked after that battle, which we're told actually extended right back from Arapawaiti all the way through the sand hills of Pekapeka in that there were bodies littering the landscape. And the analogy was rotting like potatoes or that they were – I actually was told that Maumaupurapura was a reference to stars being wasted, or seeds being wasted.[343]

At a Native Land Court hearing in 1890, Pikau Te Rangi was asked which hapū were situated south of Waikanae after Kūititanga. She replied, 'all Ngatiawas'.[344]

Kūititanga marked the last of the tribal battles on the Kāpiti coast. In the following years, Wi Parata commented on the ramifications on customary land tenure. He explained that 'the Kuititanga fight took place. We still remained on the land until now and were never disturbed'.[345] This led Te Watene Taungatera to conclude that the same hapū continued to occupy Waikanae following Kūititanga as they had before.[346]

Documentary evidence does suggest, however, that during the immediate aftermath of battle, some Te Ātiawa/Ngāti Awa from Arapawa (a term that was used generally for the Marlborough Sounds as well as Arapawa Island) remained in Waikanae. They did so to prevent further Ngāti Raukawa incursions. Te Watene Taungatera testifed '[t]hey [Te Ātiawa/Ngāti Awa] were cautious, the men from

339. Walzl, 'Ngatiawa' (doc A194), p 138
340. Waitangi Tribunal, *Te Whanganui a Tara*, p 29
341. Evidence of Mere Pōmare, 12 May 1887, Ngarara partition (Walzl, 'Ngatiawa' (doc A194), p 139)
342. (Chase, 'Ngātiawa/Te Āti Awa" (doc A195), p 60
343. Transcript 4.1.10, pp 151–152
344. Otaki Native Land Court, minute book 10, p 316 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki (doc A68), vol 10)
345. Evidence of Wi Parata, 19 May 1873, Ngarara title investigation (Walzl, 'Ngatiawa' (doc A194), p 139)
346. Walzl, 'Ngatiawa' (doc A194), p 141

Arapawa and Poneke – all came there and lived at Waikanae.'[347] Eventually, the group from Arapawa returned to Te Waipounamu.[348]

The perceived threat posed by Ngāti Raukawa remained so pronounced that Te Ātiawa/Ngāti Awa transacted lands with Captain Rhodes to secure ammunition to discourage another attack. Hira Te Maike testified in 1890:

> I know ab[ou]t an attempted purchase by Capt Rhodes on the other side of Waimea. All N Awa & the chiefs of N Awa consented to sell to Capt Rhodes. Te Heke, W King, Ngaraurekau and the chiefs of N Kura & other hapus. Tuainane was another. The fern land, on the north side of Waimea. After Te Kuititangata. The land was sold for powder and bullets. The land was given to him and they got the powder.[349]

Wi Parata later explained that Te Hiko, the son of Te Pehi Kupe, advised Ngāti Kura, Ngāti Hinetuhi, and Ngāti Kuri hapū that they should not include lands near Te Ātiawa/Ngāti Awa's northern border. It was believed that this could provoke another attack by Ngāti Raukawa. Instead, the land purportedly extended to 'Taiwaipirau' (possibly Taewapirau), well within Te Ātiawa/Ngāti Awa's rohe. Wi Parata also confirmed that the arrangement was made to acquire firearms and powder.[350]

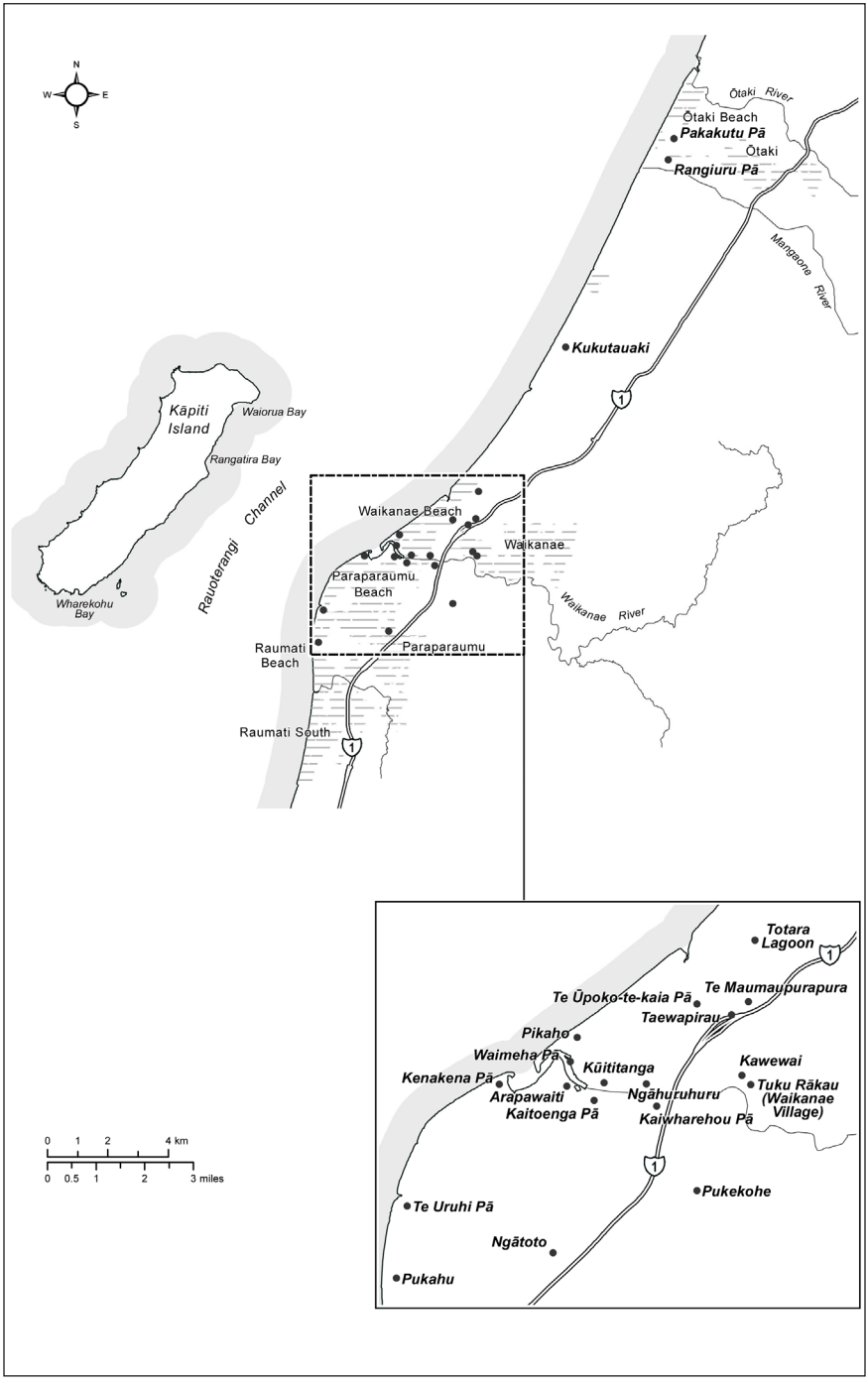
2.4 The Waikanae Region's Resources and their Usage at 1839

This section provides a brief overview and geographic context to sites discussed in the previous sections as at 1839. We also provide information regarding Te Ātiawa/Ngāti Awa's customary use of these areas (see map 2). Ratapu Solomon told us that Waikanae provided

> [a] safe place with enough resources to sustain us. To feed us. To clothe us. To shelter us. To protect the many, many people who began life's journey here. Who were born here. Who lived here. Who loved here. Who died here. Who are buried here and in many instances brought back home to be buried here alongside their loved ones.[351]

The claimants told us that occupation was often fluid and adaptable. Warfare often meant settlements were abandoned, particularly if the vicinity experienced significant bloodshed.[352] Similarly, the claimants explained that several

347. Evidence of Watene Taungatera, 24 February 1890, Ngarara rehearing (Walzl, 'Ngatiawa' (doc A194), p 140)
348. Walzl, 'Ngatiawa' (doc A194), p 140
349. Napier Native Land Court, minute book 15, p 144 (Walzl, 'Ngatiawa' (doc A194), p 141)
350. Walzl, 'Ngatiawa' (doc A194), pp 141–142. The partnership of Cooper, Holt, and Rhodes later claimed over a million acres in 12 transactions before the Old Land Claims Commission. Rhodes' Waikanae award, which was never surveyed, was abandoned and he received land at Napier instead: see Tony Walzl, answers to questions in writing, November 2018 (doc A194(d)), p 3.
351. Ratapu Solomon, brief of evidence, 30 July 2018 (doc E5), p 3
352. Baker, appendices to brief of evidence (doc F11(a)), p 580



Map 2: Te Ātiawa / Ngāti Awa sites referred to in chapter 2.

hapū frequently shared occupation and cultivation sites with others. Ms Baker explained the significance of these shared spaces:

> that Picture, I think, [is one] of interaction and sharing of resources, it supports what's recorded in terms of the different kāinga being occupied by what sounds like quite diverse and quite dynamic communities. Groups of many different hapū all living in one kāinga area, and that this area was active and trade was happening.[353]

We note that it is not our intention to provide an exhaustive list of all pā, kāinga, wāhi tapu, and urupā within the rohe. Instead, we discuss specific sites of significance, identified by the claimants and technical witnesses, that were brought to our attention during the hearings.

2.4.1 Pā

2.4.1.1 Waimeha Pā

Waimeha Pā (or Waimea depending on the dialect) was known as a 'small outpost of the main Āti Awa pa at Kenakena'. According to other sources, Waimeha and Kūititanga were the same pā.[354] Waimeha Pā was situated at the north-eastern confluence of the Waimeha Stream and the Waikanae River and was settled by Ngāti Kura and Ngāti Mutunga. Wi Parata stated that the pā belonged to his ancestors 'Rawiri Toko and Te Pono'.[355] Waimeha Pā was strategically positioned within a large cultivation ground called Ngāhuruhuru, which was renowned for its abundance of kai.[356] The pā was subsequently abandoned and made tapu due to the number who died there at the battle of Kūititanga.[357] This burial ground became known as Kārewarewa, named after a kāinga located close to this area. Wi Parata stated that his mother, Metapere Te Waipunahau, was buried there.[358] Kahe Te Rau-o-te-Rangi, who famously swam from Kāpiti Island to the mainland to warn her kin of an impending Kurahaupō attack, is also said to rest at the urupā.[359] Ms Baker added:

> From the mid 19th century the site has been used as an urupā. Several very significant tūpuna of Te Ātiawa are recorded as being buried there, as well as Pākehā that had some connection to Te Ātiawa. Te Kārewarewa is still regarded as an urupā and waahi tapu.[360]

353. Transcript 4.1.10, p 155
354. Lou Chase, 'Ngātiawa/Te Āti Awa Oral and Traditional History Report', February 2018 (doc A195), p 57
355. Carkeek, *The Kapiti Coast*, p 161 (Suzanne Woodley, 'Porirua ki Manawatū Inquiry District: Local Government Issues Report', June 2017 (doc A193), pp 622–623)
356. Baker, appendices to brief of evidence (doc F11(a)), p 583
357. Baker, appendices to brief of evidence (doc F11(a)), p 583; transcript 4.1.10, p 78
358. Rawhiti Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence, 22 April 2014 (doc A129), p [4]
359. Baker, appendices to brief of evidence (doc F11(a)), p 584
360. Baker, appendices to brief of evidence (doc F11(a)), p 588

2.4.1.2 *Arapawaiti Pā*

Arapawaiti Pā was an outpost and communal village of Ngāti Rāhiri and Ngāti Rukao. Kaitangata hapū are also said to have occupied the pā, situated on the south bank of the Waikanae River mouth, near the Waimeha and Waikanae Pā sites. According to some sources, the cultivation ground of the chief Hone Tuhata was located at Arapawaiti. During the battle of Kūititanga, the survivors withdrew to Arapawaiti, where they successfully counter-attacked against Ngāti Raukawa forces.[361]

2.4.1.3 *Kenakena Pā*

According to Mr Sundgren, Kenakena was a massive communal village partitioned into specific areas designed for hapū to coexist. The site covered a large part of the beachfront from the Waikanae River mouth towards Te Uruhi. It was the largest Te Ātiawa/Ngāti Awa settlement.[362] Mr Ngaia told us that Kenakena formed the central 'fortress' of an elaborate settlement system that was protected by several external pā including Te Uruhi, Arapawaiti, Kaitoenga, Kaiwharehou, Waimeha, Waikanae, Taewapirau, and Te Ūpoko-te-kaia.[363]

There are several narratives regarding the construction of Kenakena Pā. Mr Taylor and Ms Moore stated that members of Te Heke Nihoputa built the settlement in either 1824 or 1825.[364] Tamihana Te Rauparaha believed that the pā had been built for Te Ātiawa/Ngāti Awa by their Ngāti Toa relations in the wake of the Haowhenua conflict in 1834.[365] Wi Parata also testified that the settlement had been built for Te Ātiawa/Ngāti Awa by Te Hiko and Rangihiroa of Ngāti Toa as a sign of their support.[366] Conversely, Rawhiti Higgott believed the pā was established some 12 years earlier by Te Reretawhangawhanga, father of Wiremu Kingi, after his arrival on Te Heke Tataramoa.[367]

As noted in section 2.3.12, the defence of Kenakena during Haowhenua proved the decisive battle that brought hostilities to a close. In 1839, the visiting German naturalist Dr Johann Dieffenbach described the settlement following his arrival aboard the *Tory*:

> This . . . village was very large; it stood on a sand-hill, and was well-fenced in, and the houses were neatly constructed. Everything was kept clean and in good order, and in this respect it surpassed many villages in Europe. The population seemed to be numerous, and I estimated it, together with the first-mentioned village [Te Uruhi Pā and] a third, about a mile higher up, to amount, on the whole, to seven hundred souls.

361. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [4]; Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 59
362. Sundgren, brief of evidence (doc F19), p 16
363. Transcript 4.1.16, p [514]
364. Wai 2228 amended statement of claim (paper 1.1.61(a)), p 5
365. Walzl, 'Ngatiawa' (doc A194), p 118
366. Walzl, 'Ngatiawa' (doc A194), p 119
367. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]; transcript 4.1.10, p 79

> Several native missionaries, some of them liberated Ngati-Awa slaves, live here; and the natives had built a large house . . . At the time of our visit they were expecting the arrival of a missionary of the Church of England from the Bay of Islands, who purposed to live amongst them.[368]

2.4.1.4 *Te Uruhi Pā*

Te Uruhi Pā was a communal village and cultivation ground situated near the mouth of the Tikotu Stream, which was occupied by Puketapu and Ngāti Maru.[369] Mr Ngaia added that Ngāti Rāhiri also settled at Te Uruhi.[370] Similarly, witnesses before the Native Land Court testified that Ngā Motu temporarily occupied Te Uruhi before migrating to Te Whanganui-a-Tara.[371] Wi Parata believed that following the arrival of Te Heke Tataramoa, Te Uruhi was allocated to Tungia, Te Rakau, and Te Teke.[372] These Ngāti Toa rangatira reportedly gifted the pā to the Puketapu section of Te Heke Mairaro.[373] The rangatira Te Wharepouri, Wi Tako, and Te Puni were also said to have rested at Te Uruhi when passing on Te Heke Tamateuaua southward.[374]

2.4.1.5 *Kaiwharehou Pā*

Kaiwharehou Pā was a settlement and cultivation site on the southern bank of the Waikanae River. Otaraua, Kaitangata, and Ngāti Rāhiri resided here.[375] Ms Baker noted that these residents were 'a large group of people all co-operating with each other'.[376] Witnesses before the Native Land Court testified that the rangatira Paora Matuawaka also lived here. In addition, Mere Pomare explained to the court that the name 'Kaiwharehou' or 'Kaiwarehou' was an ancestral name that originated in Taranaki.[377]

2.4.1.6 *Te Ūpoko-te-kaia Pā*

Te Ūpoko-te-kaia Pā was situated on the northern bank of the Waimeha Stream, close to the Totara Lagoon. It was occupied at various times by Ngāti Mutunga, Ngāti Kura, and Ngāti Hinetuhi.[378] According to Mr Walzl, Te Ūpoko-te-kaia Pā was inherited by Ngāti Kura from Ngāti Mutunga, who planned to move southward

368. TL Buick, *An Old New Zealander Or, Te Rauparaha, the Napoleon of the South* (London: Whitcombe & Tombs, 1911), p 214 (Walzl, 'Ngatiawa' (doc A194), p 136)
369. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]
370. Transcript 4.1.16, p [561]
371. Walzl, 'Ngatiawa' (doc A194), p 108; Ballara, 'Te Whanganui-a-Tara', p 24
372. Walzl, 'Ngatiawa' (doc A194), p 62
373. Walzl, 'Ngatiawa' (doc A194), p 94
374. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]
375. Walzl, 'Ngatiawa' (doc A194), p 267
376. Transcript 4.1.10, p 155
377. Carkeek, *The Kapiti Coast* (doc A114), pp 114–115
378. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [2]

to Te-Whanganui-a-Tara.[379] Ms Baker said that the name Te Ūpoko-te-kaia referenced the bodies littering the landscape following the battle of Kūititanga.[380]

2.4.1.7 *Kukutauaki Pā*

Wi Parata told the Native Land Court that Kukutauaki was originally allocated to Te Aratangata and Te Pehi Kupe following the 1819 taua. The name Kukutauaki is derived from an incident that resulted in Te Pehi Kupe being speared in the hip by Te Ratu, a Muaūpoko rangatira. Because Te Pehi Kupe's blood was spilt on the whenua, Te Aratangata relinquished his claim.[381] In the 1820s, Te Pehi Kupe reportedly gifted Kukutauaki to Haukaione (see section 2.3.9.2). Piripi Taua testified that Kukutauaki Pā was associated with Ngāti Rāhiri by 1839.[382] Kukutauaki Stream also became Te Ātiawa/Ngāti Awa's northern boundary with Ngāti Raukawa following the Haowhenua war. Hepa Potini added that Waitohi, the sister of Te Rauparaha, was responsible for this land allocation.[383]

2.4.1.8 *Whareroa Pā*

Whareroa Pā was situated on the banks of the Whareroa Stream and was occupied by Ngāti Maru, Puketapu, and Ngāti Mutunga. Some witnesses before the Native Land Court held the view that Tungia, a rangatira of Ngāti Toa, gifted Whareroa to Manutoheroa of Puketapu, following his arrival on Te Heke Mairaro.[384] The pā supported an extensive cultivation ground of maize, kūmara, potatoes, and wheat.[385] Mr Watembach stated that Whareroa Pā also acted as a post for Māori to trade muka (prepared flax fibre used for rope) with local whalers.[386] According to Ms Mack, Whareroa traditionally marked Te Ātiawa/Ngāti Awa's southern border.[387]

2.4.1.9 *Waikanae Pā*

In 1823, four of Te Pehi Kupe's daughters were said to have been killed near Waikanae Pā.[388] Waikanae Pā was the main settlement in the area before the establishment of Kenakena. The relatively small pā and cultivation ground was situated at Waimeha Stream and was established by Ngāti Kura.[389] Ngāti Mutunga settled here after Te Heke Nihoputa, and were joined by Kaitangata, Ngāti Rāhiri, and Ngāti Hinetuhi.[390] The pā is believed to have been the original destination of Te Heke Mairaro in 1828.[391]

379. Walzl, 'Ngatiawa' (doc A194), p 148
380. Transcript 4.1.10, pp 95, 151–152
381. Walzl, 'Ngatiawa' (doc A194), pp 69–71
382. Walzl, 'Ngatiawa' (doc A194), p 132
383. Transcript 4.1.10, p 40
384. Walzl, 'Ngatiawa' (doc A194), p 95
385. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [6]
386. Watembach, brief of evidence (doc E12), p 11
387. Mack, brief of evidence (doc F42), p 4
388. Walzl, 'Ngatiawa' (doc A194), p 68
389. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [4]
390. Walzl, 'Ngatiawa' (doc A194), pp 148, 526
391. Walzl, 'Ngatiawa' (doc A194), p 148

2.4.1.10 *Waiorua Pā*

Mr Barrett told us that since the battle of Waiorua in 1824, Te Ātiawa/Ngāti Awa and Ngāti Toa have exercised kaitiakitanga over Waiorua.[392] Matene Te Whiwhi named Waiorua Pā on Kāpiti Island as the principal Te Ātiawa/Ngāti Awa and Ngāti Tama residence before commencing their mainland occupation following Te Heke Nihoputa's arrival.[393] Mere Pomare stated, however, that some Te Ātiawa/Ngāti Awa continued to occupy Waiorua.[394] Tiwhapaua was a cultivation ground that supported occupation there. From 1836, Waiorua was the location of the most important of the five whaling stations on Kāpiti.[395]

2.4.2 Kāinga and mahinga kai

2.4.2.1 Totara Lagoon

Totara Lagoon was a cultivation site for Ngāti Kura and Ngāti Rāhiri, and it was said that Wi Parata himself had a pā tuna (eel weir) here. Totara Lagoon was located near Te Ūpoko-te-kaia Pā.[396]

2.4.2.2 *Te Maumaupurapura*

Te Maumaupurapura was a cultivation ground of Ngāti Kura located north of Waimeha Stream, and west of Taewapirau.[397] Mr Higgott explained that Maumaupurapura translated to 'the lost seeds'.[398] Ms Baker held a similar view, clarifying that the name referenced the loss of life at the battle of Kūititanga.[399]

2.4.2.3 *Taewapirau*

Taewapirau was a settlement, cultivation site, and urupā belonging to Ngāti Kura, Ngāti Uenuku, and Ngāti Hinetuhi.[400] Like Maumaupurapura, the area is named to commemorate Kūititanga. Ms Baker clarified that Taewapirau, or rotting potatoes, is a metaphor for the decomposing corpses after the battle.[401]

2.4.2.4 *Kawewai*

Kawewai was a large inland Ngāti Kura cultivation ground between the Waikanae and Waimeha Streams.[402]

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392. Barrett, brief of evidence (doc F12), pp 4–7; transcript 4.1.18, p 255
393. Carkeek, *The Kapiti Coast* (doc A114), p 166
394. Walzl, 'Ngatiawa' (doc A194), p 81
395. Carkeek, *The Kapiti Coast* (doc A114), pp 165, 166
396. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [2]
397. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [2]; Walzl, 'Ngatiawa' (doc A194), p 142
398. Transcript 4.1.10, p 93
399. Transcript 4.1.10, pp 151–152
400. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [2]
401. Transcript 4.1.10, pp 151–152
402. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [3]; transcript 4.1.16, p [517]

2.4.2.5 *Pikaho*

Pikaho was a cultivation ground of Ngāti Kura. The area became tapu following the battle of Kūititanga in 1839.[403]

2.4.2.6 *Ngāhuruhuru*

Ngāhuruhuru lay on the north-western bank of the Waikanae River, a short distance from Kaiwharehou and Waimeha Pā. It was a Kaitangata cultivation site. Claimants said that Pohe, Te Rangihiroa's wife, was killed by Ngāti Kahungunu at Ngāhuruhuru.[404] Mr Sundgren told us that Ngāhuruhuru was also declared tapu after the battle of Kūititanga and abandoned as a kāinga.[405]

2.4.2.7 *Kaitoenga*

Kaitoenga was a Kaitangata cultivation site.[406] There is disagreement among some claimants and commentators regarding when Kaitoenga was established. Mr Chase identified a Te Ātiawa/Ngāti Awa source that suggested Kaitoenga was a kāinga occupied by Otaraua hapū during Kūititanga.[407] Mr Higgott disagreed, and stated Otaraua established a fortified pā here in 1848, following the departure of Wiremu Kingi Te Rangitake and his people to Taranaki (this departure is discussed in detail in chapter 3).[408]

2.4.2.8 *Pukekohe*

Pukekohe was the principal cultivation site of Ngāti Tuaho.[409] However, other groups were sometimes granted cultivation rights here.[410] In 1890, Enoka Taitea testified before the Native Land Court that this whenua was sandy and unsuitable for cultivation.[411]

2.4.2.9 *Ngātoto*

Ngātoto was a Kaitangata cultivation site. Ngātoto was also frequented by the Otaraua hapū, who harvested tuna from a nearby eel weir.[412] Ihakara Te Ngarara told the Native Land Court that the land marked the boundary of Puketapu.[413]

403. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [3]
404. Transcript 4.1.16, pp [484], [520]
405. Sundgren, summary of brief of evidence, 8 February 2019 (doc F19(c)), p 7
406. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [4]
407. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 60
408. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [4]
409. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]
410. Carkeek, *The Kapiti Coast* (doc A114), p 137
411. Walzl, 'Ngatiawa' (doc A194), pp 393–394, 592
412. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]; Carkeek, *The Kapiti Coast* (doc A114), p 128
413. Transcript 4.1.18, p 976

2.4.2.10 *Pukahu*

Pukahu marked the south-western boundary of the Puketapu hapū territory within the Ngarara block (later the boundary of Ngarara West B), but Puketapu interests were also located further south (see the discussion of Whareroa).[414]

2.4.2.11 *Harakeke*

Harakeke was situated north of Waikanae. George Leslie Adkin, a Horowhenua geologist and ethnographer, believed Harakeke was the original settlement of Te Rauparaha when he arrived on Te Heke Tataramoa.[415] Te Pehi Kupe was also said to have been speared by Te Ratu, the Muaūpoko rangatira, close to Harakeke. Several witnesses before the Native Land Court testified that this site was a 'place of residence'. Metapere Te Waipunahau, the mother of Wi Parata, had a large eel weir here, which subsequently passed to her son.[416]

2.4.2.12 *Te Rere (Te Rereatekupa)*

Te Rere was a Kaitangata cultivation ground on the south side of the Waikanae River where potatoes, oats, and beans were grown.[417]

2.4.3 Urupā

2.4.3.1 Kārewarewa Urupā

Mere Pomare provided evidence in 1890 that Kārewarewa Urupā was located on the north side of the Waikanae River.[418] Ms Baker explained that '[t]he name Te Kārewarewa is that which is used by the descendants of Te Ātiawa today to refer to the site at the eastern confluence of the Waikanae and Waimeha.'[419] The evidence we received suggested the first people buried at Kārewarewa were those who fell at Kūititanga. Accounts described a horrific scene of corpses spread across the landscape from Kūititanga north to Kukutauaki. As a result, Kārewarewa was deemed tapu and abandoned for occupation and food cultivation. Those who were initially interred at Kārewarewa were buried in unmarked graves, despite Christian burial customs being followed.[420]

The area was utilised throughout the mid to late nineteenth century as an urupā. Metapere Te Waipunahau, Te Rangihiroa's daughter and Wi Parata's mother, was

414. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [5]; Walzl, 'Ngatiawa' (doc A194), p 283

415. Vaughan Wood, Garth Cant, Eileen Barrett-Whitehead, Michael Roche, Terry Hearn, Mark Derby, Bridget Hodgkinson, and Greg Pryce, 'Environmental and Natural Resource Issues Report', September 2017 (doc A196), pp 50, 73 n

416. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [2]; Carkeek, *The Kapiti Coast* (doc A114), p 112

417. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [3]

418. Carkeek, *The Kapiti Coast* (doc A114), pp 115–116; Waitangi Tribunal, *The Kārewarewa Urupā Report*, p 4

419. Baker 'Cultural Impact Assessment', p 9 (Baker, papers in support of brief of evidence (doc F11(a)), p 584)

420. Baker 'Cultural Impact Assessment', p 13 (Baker, papers in support of brief of evidence (doc F11(a)), p 588); Sundgren, brief of evidence (doc F19), p 17

recorded as buried here in 1853. Kahe Te Rau-o-te-Rangi, namesake of the channel between Kāpiti Island and the mainland, was also said by her daughter, Mere Pomare, to have been buried at Te Kārewarewa.[421]

2.4.3.2 *Takamore Urupā*

Takamore Urupā originally formed part of Tuku Rākau, the original name of Waikanae village.[422] Tuku Rākau featured several pā, urupā, and mahinga kai.[423] The site also grew oats, wheat, and barley, and supported a three-storey flour mill on the banks of the Waimeha River. While the majority of whenua associated with Tuku Rākau was eventually alienated from Māori ownership, the urupā on the western edge of the settlement, known as Takamore, remained.[424]

Mr Ngaia, chairperson of the Takamore Trustees, identified as Ngāti Manukorihi and Otaraua hapū, and told us that many of his ancestors are buried at Takamore urupā. Oral traditions recorded that, as Takamore was the principal urupā of Tuku Rākau, many important ancestors were also buried here.[425] Among these notable tūpuna was Wi Tako's mother, Whetowheto.[426] Mr Ngaia explained:

> our Takamore wāhi tapu boundaries ran from the Urupā north to the pā site of Upokotekaia. From there, the boundary runs west, to the pa site of Taewapirau out to the Waikanae beach. Then down the coast to the Waikanae River mouth, along the River's northern banks to Kawewai, situated just east of Greenaway Road, then returning north to the Takamore Urupā. Our ancestors always simplified the korero by stating that the Takamore wāhi tapu went from the Takamore Urupā to the Waikanae Beach.[427]

2.4.3.3 *Waiorua Urupā*

Kahu Ropata told us that Te Rangihiroa was buried at the Waiorua urupā, on Kāpiti Island.[428] Mr Webber added that Te Rangihiroa, Wi Parata's maternal grandfather, expressed a wish to be laid to rest here, instead of the Wharekohu Caves, at the southern edge of the motu. This request was influenced by Te Rangihiroa's conversion to Christianity.[429] The neighbouring Okupe Lagoon was the burial place of those killed during the battle of Waiorua.[430]

421. Baker, appendices to brief of evidence (doc F11(a)), p 584
422. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [3]
423. Ngaia, brief of evidence (doc E3), pp 3, 6–7
424. Higgott, notes accompanying Ngā Kōrero Tuku Iho evidence (doc A129), p [3]
425. Ngaia, appendices to brief of evidence (doc E3(a)), p [17]
426. Ngaia, appendices to brief of evidence (doc E3(a)), pp [62]–[63]
427. Ngaia, brief of evidence (doc E3), p 5
428. Transcript 4.1.19, pp 14–15; Video recording, Kāpiti Island site visit, 26 April 2019 (doc E23), 00.00.30–00.00.40, 00.07.10–00.07.20, 00.11.07–00.11.40
429. Transcript 4.1.18, p 920
430. 'Ko Kapiti te Motu', site visit booklet (paper 3.2.302(a)), p 9

2.4.3.4 *Wharekohu*

Wharekohu Cave, situated at the southern edge of Kāpiti Island, is the principal wāhi tapu on the motu. Mr Barrett explained that Wharekohu was the place where many ancestors were deposited after death. It is said that the Ngāi Tahu rangatira, Te Ata o Tu, was spared by Te Rauaparaha at Kaiapohia and taken back to Kāpiti and tasked with protecting Wharekohu. Several Te Ātiawa/Ngāti Awa were laid to rest here.[431] Kahu Ropata also told us that Wharekohu is believed to be the resting place of Te Rauparaha.[432]

2.5 The Natural Environment of Te Ātiawa/Ngāti Awa

Topā ake rā te reo
ki ngā mātua tupuna
kia wahakaihiihi, kia whakawanawana
i te hiko o te rangi
i ngā tamariki-puku-mahi
e noho mai na i te whatinga mai
o te ngaru ki Whakarongotai
ko Te Āti Awa nō runga i te rangi
Piki ana tāua, e Tama
ki runga Kapanui, ko te pūpūtanga
o te Rikiōrangi me Wharekohu
e noho pīnaki kit te pae maunga Tararua
Kā titiro iho rā ki te Ruakōhatu
ki te nehutanga o Te Kākākura
whakataukitia ai
kākahutia koe e ngā kupu o ngā mātua tupuna
tukua ki te ao, ki te pō
ki te paki Matariki ē
E taki ana au i te ahikaaroa
nā Otarāua, nā Hinetuhi
nā Puketapu, nā Tu Āho
nā Kaitangata, nā Mitiwai
nā Rāhiri, nā Kura, nā Uenuku
me o rātou wheue
i tā pukenga e Te Marau
ki roto Takamore
ki roto Kenakena
kei te Ngutu awa
o Waikanae e ngunguru atu rā
i Te-Kahe-Rau-o-Te-Rangi

431. Barrett, brief of evidence (doc F12), pp 4–5
432. Video recording, Kāpiti Island site visit (doc E23), 00.05.10–00.05.50

ki te motu Kāpiti
e kimi, e kui te tāpui o te Rangi
ko Te Āti Awa ki Whakarongotai e
Hei ha!!

My voice is soaring
to our ancestors
to give us their ihi, wehi and wana
for the spark of the day
(name of the old whare) Puku mahi Tamariki
that live and work at the breaking
of the waves at Whakarongotai
in the name of Te Āti Awa from the sky on high
Climb with me moko
atop Kapakapanui to see the beginnings
of Rikiōrangi and Wharekohu (mist)
where they sit closely embraced in Tararua
Looking down at Ruakōhatu
the burial place of Te Kākākura
his whakatauki
adorn yourself with the knowledge of your ancestors
send it forth to the world of light and of darkness
to the constellation of Matariki
Now I step forth
to the long burning campfire of
Otarāua, Ngāti Hinetuhi
Ngāti Puketapu, Ngāti Tu Ahō
Kaitangata, Ngāti Mitiwai
Ngāti Rāhiri, Ngāti Kura, Ngāti Uenuku
and their bones
buried/covered by Te Marau (Eruini Te Moana)
in Takamore Urupā
in Kenakena Pā`
to where the river backs up
where Waikanae river mouth flows out
past Te-Kahe-Rau-o-Te-Rangi to Kāpiti Island to find the first sign of the day
Te Āti Awa at Whakarongotai Hei ha!![433]

The above waiata, which Mr Higgott provided, speaks of Te Ātiawa/Ngāti Awa's connection to their whenua, their constituent hapū, and Kāpiti Island. The Porirua ki Manawatū landscape was marked by a diverse range of terrains, encompassing estuarine swamplands, coastal dune lands, dense podocarp forest, and alluvial

433. Waiata provided by Rawhiti Higgott: Chase, 'Ngātiawa/Te Āti Awa' (doc A195), p 78.

flood plains. Ratapu Solomon told us that Waikanae in particular was the 'Jewel in the Crown'.[434]

This landscape, which supported varied flora and fauna, led Te Ātiawa/Ngāti Awa to develop cultural practices attuned to the natural environment. Harvesting these resources was 'governed by local kaitiaki according to tikanga, being subject to tapu, or alternatively temporary rāhui' if the resource was at risk of overharvesting or endangered in a spiritual sense.[435] All elements of the natural environment possessed mauri (life force), and the ways in which tangata whenua engaged with them allowed the concurrent exercising of mana whilst preserving and maintaining the mauri of the resource.[436] This would ensure Te Ātiawa/Ngāti Awa would live in harmony with Papatūānuku, who would feed, clothe, and sustain them.[437] Ms Baker explained:

> I believe that this ecology and geomorphology of the landscape is important in terms of our identity as . . . Ngāti Awa ki Kāpiti. I think we were shaped by the land and water as much, or perhaps actually more than we shaped it, and our identity is connected to the whenua and to the water. I think we are people of the wetlands. Our tūpuna were seduced, by them and our descendants were and are sustained by them.[438]

In this section, we discuss the nature of Te Ātiawa/Ngāti Awa's customary relationship with these natural landscapes as described in this pepeha given by Hepa Potini:

> Ko Kapakapanui te maunga,
> ko Kapiti te motu tapu,
> ko Waikanae te awa,
> ko Ngārara te whenua.[439]

2.5.1 Te Kapakapanui Maunga

Mr Ngaia stated in his evidence that the spine of the Tararua Ranges is known as Te Aratawhao, the name of one of the waka navigated by the ancestor Maui Potiki. Te Aratawhao now lies in state above Waikanae.[440] Similarly, Te Kapakapanui Maunga, a peak east of Waikanae is immensely important to Te Ātiawa/Ngāti Awa. Wi Tako Ngatata referred to the mountain as 'Tōku mounga tiketike, huinga

434. Solomon, brief of evidence (doc E5), p 2
435. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 48
436. Helen Potter, Aroha Spinks, Mike Joy, Mahina-a-rangi Baker, Moira Poutama, and Derrylea Hardy, 'Porirua ki Manawatū Inland Waterways Historical Report', August 2017 (doc A197), p 139
437. Solomon, brief of evidence (doc E5), p 4
438. Transcript 4.1.10, p 156
439. Transcript 4.1.10, p 53
440. Benjamin Rameka Ngaia, statement of evidence, 20 November 2001, Environment Court case RMA 1481/98 (Takamore Trustees v Kapiti Coast District Council) (Benjamin Ngaia, appendices to brief of evidence, 30 July 2018 (doc E3(a)), p [7])

mouri ora' or '[m]y lofty mountain is the gathering place of my lifeforce.'[441] Mr Higgott added that Kapakapanui is the signficant geological feature that orientates the rohe of Ātiawa/Ngāti Awa ki Kāpiti.[442] He spoke to this in his waiata: 'Climb with me moko atop Kapakapanui to see the beginnings of Rikiōrangi and Wharekohu (mist) where they sit closely embraced in Tararua.'[443]

Mr Baker told us that Kapakapanui is the source of the rohe's many waterways and tributaries that sustain the life of the iwi.[444] The eponymous ancestor Te Awanuiarangi was said to have consumed this water flowing off Kapakapanui while reciting karakia.[445] The claimants told us that Kapakapanui is depicted in the carving that sits in the wharekai at Whakarongotai.[446]

2.5.2 Forests

The majority of the Porirua ki Manawatū district was forested in 1840.[447] The lowland forests were principally comprised of podocarp-mixed hardwood. Tawa and kāmahi dominated the forests' understorey. The lowland forests also supported softwoods such as rimu, mataī, and miro. Kahikatea and pukeata dominated the swampier forests, while tōtara thrived near levees and in freer draining soils.[448] At points the forested Tararua Ranges are elevated to heights in excess of 1,500 metres.[449]

The forested landscape provided a rich supply of resources for Te Ātiawa/Ngāti Awa. Timber was fundamental to the development of the material elements of Māori communities including waka, pā fortifications, combat weaponry, and eel weirs. Each species of tree had specific applications: mānuka and kānuka were used for making palisades and kō (digging sticks), tawa for spears to snare birds, mahoe sticks for lighting fires, and cabbage tree leaves for cordage. The sweet fruit and fleshy bracts that surrounded the flower spike of kiekie were also a highly prized food source.[450] Plants of the forests were gathered for rongoā, carving, and weaving. Another bountiful source of kai, kūkū, kererū, tūī, and korimako were frequently snared amidst the lowland forests.[451] Carmen Timu-Parata told us that a wide range of shoots and leaves were traditionally eaten as part of a balanced diet. Pūhā (sow thistle) was particularly high in vitamin C.[452] Enoka Tatairau stated in 1888 that everyone at Waikanae had lived on 'thistles, fernroot and other green herbs that they gathered' but later there was also 'corn and wheat and other

441. Chase,'Ngātiawa/Te Āti Awa' (doc A195), p 75
442. Transcript 4.1.18, p 277; Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 1
443. Waiata provided by Rawhiti Higgott, 31 May 2017 (Chase,'Ngātiawa/Te Āti Awa' (doc A195), p 78)
444. Transcript 4.1.18, p 152
445. Ngaropo, brief of evidence (doc F37), p [12]
446. Transcript 4.1.16, p [331]
447. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 44
448. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 44
449. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 29
450. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 58–61
451. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 59–60, 127
452. Carmen Timu-Parata, brief of evidence, 30 July 2018 (doc E10), p 14

things.'[453] Introduced animals were also quickly incorporated in the customary uses of the bush. Hone Taramena, who gave evidence to the Ngarara commission in 1888, described the practice when he came to Waikanae in the 1860s, stating that 'each of the tribes [hapū] went up to the bush & shot birds, got wild pigs, & shot cattle.'[454] Wi Parata also noted the importance of the forests, stating to the Native Affairs Committee in 1888 that the people 'only cultivated little portions' of the land, and they 'went up to the mountains and procured food. Caught birds and so on.'[455]

The most highly valued tree was tōtara, which was used to make waka and beams for housing.[456] Access to timber was, therefore, an important expression of mana. Hepa Potini explained:

> Te pūtake i tēnei takiwā ki Ōtaki, ki Ōhau, te nui o ngā tōtara i tupu mai ki konei, i taea e mātou te tapahi kia haua te rākau ki raro kia tarai he waka. Nō reira i tērā wā he nui ō mātou waka o ō mātou tūpuna kia haere ki waho ki te hī ika.[457]

> A resource in this district [right up] to Ōtaki, to Ōhau were the huge tōtara which grew here, we were able to fell the trees to build canoes. Thus, we had many waka belonging to our ancestors which we could take out for fishing.[458]

2.5.3 Waikanae River

The Waikanae River, sometimes referred to as the 'lifeblood' of Te Ātiawa/Ngāti Awa,[459] begins in the Tararua Ranges, flowing through the foothills and reaching the coast directly east of and opposite to Kāpiti Island. The waters fed from the ranges that merge into the Waikanae River carry the mauri of Maui Potiki's waka, *Te Aratawhao*.[460] Rawhiti Higgott told us the Waikanae River was once healthy, fast flowing, and served settlements ensuring Māori survival.[461]

The river was central to the ecology of the area, and sustained a significant ecosystem of fish and other water species both in the river itself and by feeding the wetlands. Kahu Ropata related one story explaining the creation of the wetlands. He said that two ancient Polynesians had a huge naval battle off the coast of Waikanae. One of the participants did a karakia that made the river swell at one of

453. Enoka Taitarau, evidence to Ngarara commission, 27 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 356)
454. Hone Taramena, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 140)
455. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 835)
456. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 58–59
457. Transcript 4.1.10, p 213
458. This is the Waitangi Tribunal's translation.
459. Te Āti Awa ki Whakarongotai, draft of 'Whakarongotai o te moana, Whakarongotai o te wā: Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai', ca 2019 (Baker, paper in support of brief of evidence (doc F11(a)), p 35)
460. Ngaia, appendices to brief of evidence (doc E3(a)), p [7]
461. Transcript 4.1.10, p 81

The Naming of the Waikanae River

The following section is quoted directly from
the Ātiawa ki Whakarongotai Charitable Trust website.

The naming of the Waikanae River itself symbolises the serene nature of this area. The term, Waikanae, has two proverbial meanings. The first:

'Ka ngahae ngā pī, ko Waikanae'

'Staring in amazement, hence Waikanae'

This proverb recalls when Haunui-a-Nanaia was crossing the river. It was during a cloudless night in which the stars and moon were prevalent in the skies. When Haunui-a-Nanaia stared into the river waters, he noticed myriads of Kanae, or Mullet, swimming in shoals. What startled him was that the eyes of the kanae were gleaming from the reflection of the stars and moon. Haunui-a-Nanaia was 'staring in amazement'. The essence of this proverb is also personified by the following proverb:

'Ko tōku waikanaetanga tēnei'

'This is my peace and humility'

This simple proverb captured by the naming of the river symbolises our (Te Āti Awa) relationship to the Waikanae area.

its bends. This change in the flow of water formed sand dunes from Paraparaumu to Waitārere in the north.[462] These dunes trapped some of the water from the Waikanae River, and formed wetland areas along the coast.[463]

These wetlands eventually became a central mahinga kai of the area, and were reportedly incredibly bountiful. When the tohunga and rangatira Haunui-a-Nanaia travelled through the area, he named Waikanae in reflection of its plentiful kai.

462. Transcript 4.1.19, p 1
463. Ross Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways: Ownership and Control', September 2018 (doc A205), p 13

When Te Ātiawa/Ngāti Awa settled in the area, they established several pā and kāinga on the river's shores. Their main pā, Kenakena, was located to the south of the river mouth, with Waimeha Pā later established on the northern side.[464]

The river and the wetlands it fed became a key source of kai as well as a transport link, and the iwi altered the flow of the river to encourage these uses. Several streams that drained the wetland areas were blocked off, further sustaining the wetland areas for tuna fishing and allowing the iwi to travel through much of their rohe by waka.[465] The water from the river was also used to sustain cultivations on iwi land.[466]

2.5.4 Alluvial flood plains, wetlands, and estuaries

In Māori customary beliefs, inland waterways are regarded as the 'arterial network' of Papatūānuku, conduits and givers of life. Inland waterways are also the way by which the earth mother cleanses herself of impurities.[467] Some claimants held that the rivers and streams of the inquiry district are linked to Te Ātiawa/Ngāti Awa through whakapapa to Haunui-a-Nanaia. As stated earlier this tupuna is said to have named rivers following the occurrence of noteworthy events.[468]

Prior to 1840, wetlands made up 34 per cent of the Porirua ki Manawatū landscape.[469] Ms Baker remarked that the groups of the area are 'people of the wetlands'.[470] Lowland catchments, or wetlands, 'receive water, sediments, and nutrients from upslope and process them'. This abundance of nutrients and shallow water promotes a habitat that supports a wide range of fish, birds, and invertebrates.[471] According to Ms Baker, her tūpuna were 'seduced' by the rich array of mahinga kai and resources that the wetland habitats provided.[472] Practically, this meant that prior to the arrival of Pākehā, Māori strategically built pā sites and papakāinga near waterways.[473] Ms Baker described the significance of these sites:

> once our tūpuna decided to settle they were able to start – to settle, they were able to do that in a flooding ecosystem because actually those systems were quite safe. The structure of the main water bodies that flowed through those wetlands were such that they had a high flood carrying capacity, so I'm talking about Whareroa Stream, Titokū, Wharemaukū, Mangakōtukutuku or what's referred to as Muaupoko Stream and goes through the Muaupoko block, the Waimeha, the Kākāriki and/or Ngārara Stream and the Paetawa Stream. These streams, their character is that they're gravel-bottomed.

464. Chris and Joan Maclean, *Waikanae*, 2nd ed (Waikanae: Whitcombe Press, 2010), pp 23, 32
465. Maclean & Maclean, *Waikanae*, 2nd ed, p 218
466. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 13
467. Potter et al, 'Porirua ki Manawatū Inland Waterways' (doc A197), pp 32–33, 139
468. Potter et al, 'Porirua ki Manawatū Inland Waterways' (doc A197), pp 50–51
469. Potter et al, 'Porirua ki Manawatū Inland Waterways' (doc A197), pp 139, 458
470. Transcript 4.1.10, p 156
471. Potter et al, 'Porirua ki Manawatū Inland Waterways' (doc A197), p 466
472. Transcript 4.1.10, p 156
473. Potter et al, 'Porirua ki Manawatū Inland Waterways' (doc A197), p 52

> . . . they were very slow to rise and fall, so the advantage for our tūpuna was that they could live right next to the kai without suffering too much from flood risk.[474]

The network of waterways connecting various pā and papakāinga allowed neighbouring hapū and iwi to travel by waka to interact and trade with one another.[475] Ms Baker explained this in her evidence:

> Those networks of small streams . . . They provided for the connectivity between the different communities and you imagine all the different kāinga and pā that are dotted across the land, they were all connected and you could ride your waka in between them.[476]

Estuaries, river mouths, and waterways were known for species such as herring, mullet, kahawai, flounder, and freshwater cockles. Inland wetlands provided habitats and breeding grounds for īnanga, banded and giant kōkopu, common cranes, and upland bullies, as well as abundant bird life. Tangata whenua used kuta (bamboo spike sedge) for thatching, dried moss for bedding, and mānuka for poles and stake posts.[477] Further, various wetlands and dune lakes were also a haven for several edible bird species such as the pūkeko, pārera (grey duck), tētē (brown teal), and kawau (shag). The birds were usually harvested by snares.[478] Wetlands also provided Māori communities throughout the inquiry district with access to harakeke (phormium flax), used for textiles, construction material, and medicines.[479]

The waterways throughout the inquiry district were rich in other freshwater fisheries including kokopū and koarō (native trout), kākahi (fresh water mussel), kōura (freshwater crayfish), īnanga (whitebait), pātiki (flounder), and other species migrating seasonally between the salt and freshwater.[480] Another culturally significant practice was the harvesting of materials for rongoā (traditional medicinal practices) from waterways and water bodies.[481] Waterways and their banks were also important sites for spiritual practices, such as purification and tohi (baptism), wai ora (reviving health and soundness), wāhi whakawātea (places where tapu was removed), and wāhi whakahaumaru (places of protection). Some sites at waterways were considered wāhi tapu, including urupā and sites for preparing bodies for burial.[482] The practical management of water bodies and the spiritual and physical health of both awa and tangata whenua were intrinsically linked.

474. Transcript 4.1.10, p 153
475. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 238
476. Transcript 4.1.10, p 154
477. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), pp 71, 458
478. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 54–55
479. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 55
480. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 53
481. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), pp 230–231
482. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 71

The most valued of all the resources offered by awa, wetlands, and estuaries was tuna (long finned eel).[483] Tuna were both caught and cultivated through a range of techniques and tools.[484] As a constant and readily available source of protein that provided vitamins, fatty acids, and high caloric value, tuna was an essential element of the traditional diet. Tuna could also be dried and smoked, before being stored for up to six months in pātaka.[485] So significant was tuna to daily life that pā tuna would be allotted to specific whānau and individuals.[486] Therefore, the management and harvest of tuna was an important part of the yearly food gathering cycle.[487]

Tuna fishing took many forms. Fishing methods included koumu (eel trenches), hīnaki (eel pots), pā tuna (eel weirs), toi (eel bobbing without hooks), kōrapa (hand netting), rapu tuna (by hand), rama tuna (using torch light), patu tuna (eel striking), and mata rau (eel spearing).[488] Certain methods were more suitable for particular breeds: puhi and hau were easily caught in hīnaki, while papaka were usually caught with a hook.[489] Some of these practices endured to modern times. Manu Parata told us that as a boy he went on food-gathering forays, bobbing and spearing tuna in Waikanae's waterways.[490]

Because tuna was such a substantial food source, the catching and eating of eels became culturally significant. Ratapu Solomon told us that tikanga maintained the mauri of the waterways for future generations.[491] Strict kaitiakitanga practices governed the process of making traps and nets, as well as gathering tuna. These practices were managed by tohunga. At different times of the year, karakia were spoken to ensure that the harvest would be successful.[492]

Māori also transferred live eels to restock smaller lakes.[493] Provision of tuna to visiting manuhiri was a key source of mana which enabled the extension of manaakitanga.[494] Storage boxes were submerged and used to keep caught tuna in fresh, reliable supply. Preservation techniques were applied to other foodstuffs too: corn was submerged in running water to produce kānga pirau (fermented corn).[495] Similarly, Manu Parata told us the abundance of tuna and other kai made the community self-sustaining and gave them a 'type of autonomy'.[496] As a result, tuna was of the utmost importance to Te Ātiawa/Ngāti Awa. As well as being a source of nutritious kai, tuna became a significant part of everyday Māori life.

483. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), pp 458, 471
484. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 230
485. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 51
486. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 73
487. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 471
488. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 476
489. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 73
490. Manu Parata, brief of evidence (doc E6), p 3
491. Solomon, brief of evidence (doc E5), pp 5–6
492. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 472
493. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 51
494. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 235
495. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 230
496. Manu Parata, brief of evidence (doc E6), p 3

While western scientists name two species of tuna, Māori identify several different species. The common dark brown copper-bellied type have two varieties, puhi (a longer tuna) and hau (a shorter tuna). Papaka was a common silver-bellied tuna. Rehi rehi eels had particularly large heads, and yellow bellies were not to be eaten.[497] Freshwater and saltwater tuna are often said to have become differentiated when the waterways dried up and the original species was split in two. Some suggested that Maui himself split the tuna deity creating the two species. Tuna in physical manifestation can be found in various forms such as kaitiaki; a tuna tuoro may represent a bad omen or warning, attacking humans as a taniwha in the representation of giant eels protecting a body of water. Tuna are considered representations of atua and continue to be cared for and revered.[498]

2.5.5 The coast and moana

The 'sand country' along the Kāpiti coast, from Paekākāriki to Pātea, occupied about 70,000 hectares.[499] Spinifex and pīngao grew on the young foredune ridges, while flax, raupō, and toetoe grew in the margins of the dune lakes.[500] The waterlogged basins of older dunes were often habitat for tī kōuka, the dunes themselves clothed in a mixture of mānuka scrub, bracken fern, and native grasses. The diverse range of habitats of the coastal sand country – sandy beaches, swamps, lakes, and lagoons – provided many mahinga kai.[501]

Tutere Parata told us that '[c]ustomary fishing and collection of kaimoana and mahinga kai were common practice and go way back. This was what we survived on and this is why we settled here, this was our staple diet.'[502] Ratapu Solomon relayed stories to the Tribunal of catching snapper, mullet, kahawai, flounder, shark, and gurnard as a boy.[503] The Cook Strait and Pacific Ocean provided a great bounty of kaimoana for Te Ātiawa/Ngāti Awa. Tāmure and kahawai were the most commonly caught fish.[504] Since the arrival of Te Ātiawa/Ngāti Awa in the district, fisheries and kaimoana have been an important source of mahinga kai, as emphasised by Hepa Potini: 'since those days, we have fed our manuhiri, we have had fish, a big fishery. Both Ngāti Awa and indeed Ngāti Toa Rangatira have been fishing people.'[505] When Hone Taramena was asked in 1888 whether the 'Mitiwai boundary runs down to the sea', he responded: 'It ran right down to the fish in the sea.'[506]

Darrin Parata told us that effectively fishing the waters of the rohe required

497. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), p 73
498. Potter et al, Porirua ki Manawatū Inland Waterways' (doc A197), pp 471–472
499. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 413
500. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 413
501. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 47
502. Tutere Parata, brief of evidence, 17 January 2019 (doc F2), p 4
503. Solomon, brief of evidence (doc E5), p 3
504. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 56
505. Transcript 4.1.10, p 213
506. Hone Taramena, evidence to the Ngarara commission, 17 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 111)

> the logical transition and impartment of generational knowledge, which was and still is very much steeped in tradition. This to me is customary fishing; the collection of all knowledge pertaining to the pursuit. What to do, what not to do, how to do, how not to do, when to do, when not to do . . . a lot of 'do's . . . learnt over a period of time, not in the confines of a library, the books in a class room or any type of formal training, but passed from the experienced to the inexperienced when the time was right at a verbal, practical and repetitive level.[507]

The coastal environment was an important source of resources, both on land and at sea. In the rocky shores and outcrops pāua, kina, and mussels were common.[508] Archeaological analysis of middens throughout this inquiry district illustrated the centrality of kaimoana as part of a traditional diet. Middens discovered at Arapawaiti Pā contained '[t]ons on tons' of pipi and tuatua shells.[509] Ms Timu-Parata told us that this traditional diet provided a healthy source of B vitamins, potassium, selenium, zinc, and iodine, thereby ensuring the well-being of Te Ātiawa/Ngāti Awa.[510]

Pākehā ethnographer Elsdon Best identified upward of 30 species of shellfish that were harvested for kai throughout the region.[511] Typically, shellfish would be gathered over the summer season before being dried and preserved.[512] However, shellfish could also be harvested throughout the year when other food sources were scarce.[513]

2.5.6 Kāpiti Island

Mr Barrett told us that since the earliest histories of his people, Kāpiti Island has been of the utmost significance. Some tūpuna likened the island to 'our mother's milk'.[514] Whakapapa connections to Kāpiti Island are significant. Te Rangihiroa, Wi Parata's maternal grandfather, is buried at Waiorua Bay, and is viewed as the kaitiaki of significant wāhi tapu, urupā, mahinga kai, kāinga, pā, puna, maunga, awa, marae, whare karakia, tuku whenua, and taonga within the takiwā.[515] As was discussed in section 2.3.7, Kāpiti Island was also the location of the battle of Waiorua, which is viewed by the claimants as establishing Te Ātiawa/Ngāti Awa customary rights on the island.

'Te Waewae Kapiti o Tara raua ko Rangitane' is Kāpiti Island's full name. It is situated at the entrance to the Cook Strait, and was described by one claimant group as 'the jewel between the North and South Islands'.[516] The motu is 10 kilometres

507. Darrin Parata, brief of evidence, 21 September 2018 (doc E17), p 4
508. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 56–57
509. Carkeek, *The Kapiti Coast* (doc A114), p 102
510. Timu-Parata, brief of evidence (doc E10), p 13
511. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 56
512. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 57
513. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 58
514. Barrett, brief of evidence (doc F12), p 4
515. Transcript 4.1.10, p 146
516. Wai 2361 amended statement of claim, 1 August 2012 (paper 1.1.62(a)), p 2

long and two kilometres wide, with steep and broken terrain replete with gullies, ridges, and streams that support unique ecological diversity. From south to north, creeks and streams punctuate the island's interior, including Wharekohu Stream, Te Mingi Creek, Maraetakaroro Stream, Mangawharariki Stream, Kaiwharawhara Stream, Otahape Stream, Te Mimi o Rakopa Stream, Taepiro Stream, Otehou Stream, Kahikatea Stream, Te Rere Stream, Pariparoa Stream, Te Kahu o Te Rangi Stream, and Waiorua Stream.[517]

At the northern edge of the island lies Okupe Lagoon, a habitat for birdlife, such as waterfowl, and marsh vegetation.[518] The lagoon was once connected to the sea. However, an earthquake lifted the surrounding land and closed the shallow shoal. The water is now technically freshwater, but does not support life due to high acidity levels. Okupe was also the burial place of many of those who fell in the battle of Waiorua.[519] Kāpiti's forest cover was dominated by large rātā and podocarps such as mataī and miro.

Mr Barrett emphasised that Kāpiti had always been a place of abundant resources.[520] In particular, the island is rich in mahinga kai: seafoods and birds such as kiwi, tūī, and kererū, as well as berries and other edible plants. Suitable trees were also felled to make waka, for building, and for other material objects.[521] As the Te Ātiawa/Ngāti Awa and Ngāti Toa population of the Kāpiti mainland and island grew, the flattest and most fertile lands on the island were cleared and planted with vegetables.

The richest mahinga kai were the fisheries surrounding Kāpiti Island. The claimants spoke of the diverse marine life synonymous with the motu that are supported by the cold southern sea currents moving northwards, coalescing with the tepid, saltier waters of the D'Urville current.[522] Hepa Potini emphasised the significance of these fisheries:

> that was one of the main occupations, fisheries, feeding our people with fish. Even in the small islands, Tāhoramaurea, Motungārara, Browns Island, Aeroplane Island, Tokamapuna, those small islands off Kapiti Island, rich in fisheries and fish. There was no question, many many fish in the diet.[523]

Mr Barrett also said that te mangō, the great shark, is the mauri associated with Kāpiti Island.[524] During our Ngā Kōrero Tuku Iho hearings, Hepa Potini stated that Ngāti Mangō was the original name for Ngāti Toa.[525]

517. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), pp 363–364
518. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 364
519. 'Ko Kapiti te Motu', site visit booklet (paper 3.2.302(a)), p 9
520. Barrett, brief of evidence (doc F12), p 4
521. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 367
522. 'Ko Kapiti te Motu', site visit booklet (paper 3.2.302(a)), p 5
523. Transcript 4.1.10, p 214
524. Barrett, brief of evidence (doc F12), p 5
525. Transcript 4.1.10, p 33

The Webber whānau trace their traditional fishing rights at Kāpiti Island back to their tūpuna Waipunahau and Toitoi, the parents of Te Pehi Kupe and Rangihiroa, and to the arrival of Te Rauparaha. According to the Webber whānau, tarakihi and cod could be caught at Waiorua Bay, snapper and cod along the eastern side of the island, and snapper, tarakihi, and cod could be found around Motungārara Island.[526]

Each April and May, pods of whales passed close to Kāpiti Island as they travelled to breeding grounds off the Taranaki coast.[527] As early as 1794, Europeans began whaling in New Zealand waters.[528] Early Pākehā sailors became familiar with the island because it was the last safe anchorage for ships heading southward into Cook Strait. Captain James Cook referred to it as 'Entry Island'. By the 1830s, rangatira had invited whalers to establish stations on the motu. These chiefs believed that hosting these Pākehā would develop their iwi's access to trade.[529] The whaling industry centred around Kāpiti Island and the three small islands of its eastern coast, as related by Mr Higgott:

> the whaling era, which is the 1830s and 1840s. It lasted about 20 years. Whaling stations on Kapiti Island . . . these were shore whalers not bay whalers. The difference between them, shore whalers lived on the shore and bay whalers lived on the boats in the bay. So we have Wharekohu, Taepiro, Rangatira, Te Kahu-ote-Rangi and Wai-o-rua. Many of our people were crewmen on the whaler's boat. We also have three little islands here, Motungārara, Tokamāpuna and Tohora-maurea, these little islands here. They were also whaling stations.[530]

Whalers on Kāpiti employed local Māori, both on their boats and off-shore.[531] Māori also engaged in trade with Pākehā whalers, some of whom opened their own stores on or near the island and traded with the locals.[532] Mr Higgott explained that the whaling industry became a part of life for those living on Kāpiti, and while the Pākehā whalers came to be viewed in high esteem, their influence was both positive and negative:

> Rugged sea captains were the first whalers and traders to reach Kāpiti. The industry attracted lawless bands of runaway sailors and convicts. They had a profound effect on the Māori at the height of their turbulent tribal wars. The influence was both good and bad. The first Pākehā did much to set the scene for their subsequent colonising of our country. Pākehā were treated with great respect. The chiefs wanted at least one white man at each pā settlement to keep their people well supplied with things from the outside world. In return, Māori would protect them, would feed them, sometimes

526. Chase, 'Ngātiawa/Te Āti Awa' (doc A195), pp 117–118
527. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 369
528. Chris Maclean, *Kapiti* (Wellington: Whitcombe Press, 1999), p 118
529. Barrett, brief of evidence (doc F12), p 7
530. Transcript 4.1.10, pp 81–82
531. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 371
532. Wood et al, 'Environmental and Natural Resource Issues' (doc A196), p 371

> marriage took place between the Pākehā and the Māori women. She was often of high ranking, and any child born was assured the same ranking as the mother. . . . Descendants of whalers and early settlers are still residing in Waikanae and on our coast today, and some of us in here today can count a whaler in our whakapapa.[533]

Indeed, it was noted during Ngā Kōrero Tuku Iho hearings that some of the surnames of Te Ātiawa/Ngāti Awa and Ngāti Toa peoples could be traced to Pākehā whalers of the mid-nineteenth century.[534] Miria Pomare noted that her kuia, Kahe Te Rauoterangi, had married a Scottish whaler and trader by the name of John Nicol and that at the height of the whaling industry they had established a successful whaling station on Kāpiti Island.[535] Wi Parata was the son of Metapere Te Waipunahau who was given in marriage to George Stubbs, an English whaler and trader. George Stubbs drowned in 1838.[536] Michele Parata-Hamblin told us that by approximately 1840, most of the whalers had left the island to settle on the mainland.[537]

2.6 Conclusion

Te Ātiawa/Ngāti Awa migrated to the Kāpiti coast in the 1820s and 1830s in a series of heke. Some Te Ātiawa/Ngāti Awa rangatira were involved with Te Rauparaha in the 1819 taua but their settlement of the Waikanae district began with Te Heke Tataramoa in about 1822. It appears that Te Ātiawa/Ngāti Awa decided to migrate partly in support of their Ngāti Toa kin, partly to get access to muskets and the rich resources of Waikanae, and partly because of the threat posed to them by the Waikato people led by Te Wherowhero. After the battle of Waiorua on Kāpiti Island, which is held to have secured the possession of the region for the migrant iwi, further Te Ātiawa/Ngāti Awa heke followed: Te Heke Nihoputa (about 1824), Te Heke Mairaro (about 1828),[538] Te Heke Tamateuaua (about 1832), and Te Heke Paukena (about 1834). Although these were the main heke, many members of Te Ātiawa/Ngāti Awa travelled back and forth between the various settlements, including Wellington, the northern South Island, the Chatham Islands, and (later) Taranaki. Te Ātiawa/Ngāti Awa were a highly mobile people for much of the nineteenth century.

We have used the name 'Te Ātiawa/Ngāti Awa ki Kāpiti' in this report for the people who migrated to the Waikanae district. This name has been used for the purposes of inclusivity and practicality, but it should not be considered a finding or an authoritative determination of the name of this iwi. The claimants identified themselves by a number of names, including Te Āti Awa ki Whakarongotai, Ngātiawa, Ngāti Awa ki Kāpiti, Ngātiawa Nui Tonu ki Kāpiti te Takutai, Te Ātiawa

533. Transcript 4.1.10, pp 81–82
534. Transcript 4.1.10, p 89
535. Transcript 4.1.10, p 169
536. Higgott, brief of evidence, (doc F3), pp 2–3
537. Michele Parata-Hamblin, brief of evidence, 21 September 2018 (doc E18), p 3
538. Also known as Te Heke Whirinui.

nō runga i te Rangi, Te Āti Awa, Āti Awa, Te Āti Awa ki Kāpiti, Atiawa-nui-tonu, and Taranaki Whānui. The 'ki Kāpiti' part of the name we have used reflects the histories shared with us in this inquiry, which show that Te Ātiawa/Ngāti Awa on the Kāpiti coast emphasise some different ancestors and historical events, as well as some different hapū, than those of their kin who remained in their ancestral Taranaki rohe. The Te Ātiawa/Ngāti Awa hapū referred to as settling in this district included (but were not limited to) Kaitangata, Ngāti Kuri, Hinetuhi, Puketapu, Ngāti Tuaho, Otaraua, Mitiwai, Ngāti Rahiri, Manukorihi, Uenuku, and Ngāti Ruanui.

These hapū settled an area stretching from the Kukutauaki Stream in the north to the southern-most pā, Paripari, in what is now known as the Wainui block. For much of the period prior to the 1840s, most Te Ātiawa/Ngāti Awa hapū lived together at the massive, coastal Kenakena Pā, while ranging widely to use the river, wetland, and forest resources of the area. According to claimant Ben Ngaia, Kenakena was the central fortress of an elaborate settlement system that was protected by several external pā. The latter included Te Uruhi, Arapawaiti, Kaitoenga, Kaiwharehou, Waimeha, Waikanae, Taewapirau, and Te Ūpoko-te-kaia. These defences were necessary partly due to the arrival of Te Rauparaha's Ngāti Raukawa kin in large numbers in the 1830s. As described in section 2.3, Ngāti Raukawa attacked Te Ātiawa/Ngāti Awa in the 1834 Haowhenua war, which involved significant casualties and essentially pushed Te Ātiawa/Ngāti Awa south of the Kukutauaki Stream. Te Rauparaha's sister, Waitohi, is said to have settled the boundary between the two iwi at the Kukutauaki after Haowhenua, although not all Te Ātiawa/Ngāti Awa witnesses agreed with this, and there was later dispute about the boundary (see chapter 3). There was further conflict between Te Ātiawa/Ngāti Awa and Ngāti Raukawa in 1839. The battle of Kūititanga occurred after an exchange of insults at Waitohi's tangi, and Te Ātiawa/Ngāti Awa – reinforced by their kin from Wellington and the Marlborough Sounds ('Arapawa') – held their own; the battle was over in less than a day, with about 100 casualties on both sides. The newly arrived missionary, Octavius Hadfield, helped to negotiate peace between the two iwi.

Hadfield's arrival in 1839, and that of the New Zealand Company, altered the status quo with the whalers and hinted of the many changes that would come with colonisation. As at 1839, Te Ātiawa/Ngāti Awa still lived as they always had (albeit in a new rohe). They used the forests for materials to construct waka and pā, for rongoā, for gathering fruit and edible plants, and for snaring birds, including the kūkū, kererū, tūī, and korimako that inhabited the lowland forests. They swam in the rivers, fished the rivers and streams for kai (including tuna), took water fowl, and gathered freshwater shellfish. The Waikanae River was especially important to the hapū of Te Ātiawa/Ngāti Awa, and the rich wetlands of the area provided bountiful kai for cooking, drying, and storing for the winter. Te Ātiawa/Ngāti Awa had a number of coastal pā, and they fished the Rauoterangi Channel between the mainland and Kāpiti Island. Kaimoana was collected from the beaches and either eaten or dried and preserved, including pipi and mussels.

To a large extent, this way of life, and the customary rights that governed the use of resources by the various hapū, continued into the colonial era and some of it still continues today, insofar as land loss, access, and environmental changes permit. Nonetheless, Te Ātiawa/Ngāti Awa stood on the verge of revolutionary change in 1839 on the eve of the Treaty and the colonisation that would follow it. The Treaty of Waitangi promised that colonisation would occur with mutual benefit to settlers and Māori; the test of that promise is explored in the later chapters of this report.

CHAPTER 3

TE ĀTIAWA / NGĀTI AWA IN THE CROWN PRE-EMPTION ERA

3.1 Introduction

3.1.1 What this chapter is about

In this chapter, we address Te Ātiawa/Ngāti Awa claim issues in the Crown pre-emption era. In article 2 of the Treaty of Waitangi, the chiefs and people ceded to the Crown the right of pre-emption over their lands:

> Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. *Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.* [Emphasis added.]

> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; *but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.* [Emphasis added.]

In his 1839 instructions, the Secretary of State for the Colonies, Lord Normanby, instructed Governor Hobson that 'the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no Lands shall be ceded either gratuitously or otherwise, except to the Crown of Great Britain'.[1] This instruction led to the pre-emption requirements in article 2, which were intended as a protective measure for Māori in the alienation of their lands. Pre-emption was also designed to form the basis of a colony in which the Crown controlled settlement and funded it through buying land cheaply from Māori and selling it at a much higher price to settlers. The Crown was not supposed to buy any land that Māori needed or the loss of which would injure them. The underlying intention

1. Normanby to Hobson, 14 August 1839 (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1987), p195)

was that Māori would retain sufficient land to benefit equally with settlers from the rise in land values as a result of settlement and the colonial economy. From the concepts in Lord Normanby's instructions, the Governor and officials developed a series of principles and standards for the purchase of Māori land and the making of reserves, which are discussed in section 3.6.7.

The Crown pre-emption era lasted from 1840 to the mid-1860s. In theory it ended with the passage of the first Native Lands Act in 1862, which introduced direct private sale and leasing between Māori and settlers. The Act's operations, however, were suspended for a time in a large part of this inquiry district.[2] Another key feature of the pre-emption era was the direct control of Māori policy and administration by the Governor, including land purchasing, despite the establishment of a settler Parliament in 1854. At first, the Governor entrusted purchasing to protectors, who were appointed to watch over Māori interests (including in the alienation of land). After the abolition of the protectorate in 1846, Crown purchasing was conducted by a series of purchase agents under the control of the Governor and his native secretary, Donald McLean. The Governor eventually established a Land Purchase Department in 1854, staffed by land purchase commissioners with McLean as the Chief Land Purchase Commissioner.

It was through this system of Crown purchasing and reserve-making that Te Ātiawa/Ngāti Awa ki Kāpiti lost about 60 per cent of their tribal estate in the 1850s. The 34,000-acre Whareroa block was purchased by the Crown in 1858 and the 30,000-acre Wainui block was purchased in 1859. The Crown conducted both purchases primarily with Ngāti Toa Rangatira but reserves were made for Te Ātiawa/Ngāti Awa residents. The Crown's purchase of this land and the making of reserves is the primary claim issue for this chapter. It is dealt with in some detail in section 3.6.

Prior to that section, this chapter considers the reception of the Treaty of Waitangi at Waikanae and elsewhere by Te Ātiawa/Ngāti Awa ki Kāpiti, and the evolution of a relationship between that iwi and the Crown in the 1840s. Key issues include:

- the arrival of Christianity and the New Zealand Company in 1839;
- the challenges posed to the Te Ātiawa/Ngāti Awa–Crown relationship by the Wairau affray in 1843 and the Crown's war against Te Rangihaeata (the Hutt war) in 1846;
- the promise of the Queen's protection made by Governor George Grey to Te Ātiawa/Ngāti Awa ki Kāpiti in response to those challenges;
- the challenges posed to the Te Ātiawa/Ngāti Awa–Crown relationship by the New Zealand Company transaction in Taranaki and the Crown's divisive attempts to purchase Taranaki land in the 1840s;

2. Terry Hearn, 'One Past, Many Histories: Tribal Land and Politics in the Nineteenth Century', 2015 (doc A152), pp 225–227, 231

- Te Ruru Mā Heke,[3] in which leading chief Wiremu Kingi Te Rangitake led the majority of the Waikanae people back to Taranaki in 1848 as a result of Crown purchase activities there, despite threats of military action from Governor Grey; and
- the arrangements made about the land when the heke departed, including the question of whether those who left retained rights at Waikanae, and also the risks posed for the much smaller population by their powerful neighbours (Ngāti Raukawa) to the north.

The Crown purchasing system of the 1850s culminated in the infamous Waitara purchase of 1859, and also contributed to the establishment of a Māori King. Many iwi from around the North Island hoped that the King would unite the tribes, preserve Māori authority, and protect land from indiscriminate alienation to the Crown. Both of these developments had a major impact on Te Ātiawa/Ngāti Awa ki Kāpiti. In the final sections of this chapter, we address the nature and extent of that impact, including the wars of the 1860s and the Crown's pressure on Waikanae leaders to give up the Kīngitanga under the threat of confiscation.

We end the chapter by providing our conclusions and Treaty findings.

3.1.2 Jurisdiction issues

In this chapter, issues with regard to events in Taranaki are discussed in respect of their impact on Te Ātiawa/Ngāti Awa ki Kāpiti. We do not consider Te Ātiawa/Ngāti Awa ki Kāpiti grievances about Crown acts or omissions in Taranaki per se. One claim was filed by Robert Trent Taylor and Andrea Maria Moana Moore about Crown actions in Taranaki as well as Waikanae (Wai 2228). Claimant counsel submitted:

> The Tribunal has stated that the Porirua ki Manawatu District Inquiry is not about Taranaki. In one sense that is correct, however in another the events that occurred in Taranaki cannot be separated from those that occurred in the Ngati Awa/Te Atiawa division of the Porirua ki Manawatu Inquiry.[4]

For the avoidance of doubt, we reiterate that Taranaki matters are only considered in this chapter for their significance to the Crown's relationship with Te Ātiawa/Ngāti Awa ki Kāpiti at Waikanae, and for any Crown acts or omissions in the Waikanae district.

We therefore report on issues raised by the Wai 2228 claimants in respect of:

- the Crown's alleged threats towards Wiremu Kingi Te Rangitake to prevent that chief and the majority of Waikanae people from returning to Taranaki in 1848;

3. Claimant Benjamin (Ben) Ngaia, who explained that this name was used for the return migration to Waitara in 1848, did not know 'the rationale behind the name of that particular migration' (transcript 4.1.16, p 535).
4. Claimant counsel (J A Hope), closing submissions, 21 October 2019 (paper 3.3.53), pp 7–8

- the land arrangements made at Waikanae when Te Rangitake and his supporters returned to Taranaki; and
- the exclusion of those returnees from the certificate of title for the Ngarara block in 1873 and the Crown's response to their attempts to get back into the title in the late nineteenth century (addressed in chapter 4).

We turn next to summarise the parties' arguments about the issues addressed in this chapter.

3.2 The Parties' Arguments

3.2.1 The claimants' case

3.2.1.1 *Challenges of the 1840s*

Claimant counsel submitted that the relationship between the Crown and Te Ātiawa/Ngāti Awa in the 1840s was disrupted by the impacts of the Northern War (in the Bay of Islands) and the Crown's war with Te Rangihaeata in the Hutt Valley. Claimant counsel argued that Wiremu Kingi Te Rangitake insisted on remaining neutral in the Governor's war against Te Rangihaeata in 1846, despite pressure from the Crown.[5] In response to expressions of concern from the chiefs at that time, the Governor promised a 'partnership arrangement' in which they would be 'equal partners, and that the Queen would protect their lands and possessions from being taken'.[6] Citing Tony Walzl's research report, claimant counsel also pointed to important promises that the Queen would protect them from injury and ensure their happiness and equality with settlers.[7] Claimant counsel further submitted that the Treaty was to be understood in these terms, rather than as imposing British law on them.[8]

In respect of events in the late 1840s, counsel for Robert Taylor and Andrea Moore (Wai 2228), made submissions about the departure of Wiremu Kingi Te Rangitake and many others from Waikanae in 1848, due to 'growing pressure on Māori in the Waitara area to sell land'. Claimant counsel submitted that the Governor 'employed various tactics' to try to prevent their return, 'including a threat of military action against them'.[9] Nevertheless, these threats did not succeed in preventing the return to Taranaki. Claimant counsel also discussed the land arrangements made when these people departed. Counsel submitted that those who were leaving did not intend to relinquish their rights at Waikanae, and that Te Rangitake likely did not make a gift or absolute alienation of his land to Metapere Te Waipunahau at the time.[10] While this submission is more strictly relevant to chapter 4 (and the alleged exclusion of these people when the land passed through

5. Claimant counsel (J Mason), closing submissions, 2 December 2019, (paper 3.3.55), pp 11–12
6. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 12–13
7. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 12–13; Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues circa 1819–1900', December 2017 (doc A194), pp 349–350
8. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 11–13
9. Claimant counsel (Hope), closing submissions (paper 3.3.53), p 6
10. Claimant counsel (Hope), closing submissions (paper 3.3.53), pp 6–7

the Native Land Court), we note this submission because the question of land arrangements in 1848 is discussed in this chapter.

3.2.1.2 *Crown purchasing in the 1850s*

The claimants submitted that at the signing of the Treaty in 1840, they were 'mana whenua of their rohe', but that 'subsequent decades saw the Crown breach its Tiriti obligations at almost every opportunity', including failing to protect the claimants' land interests, culture, and well-being.[11]

In respect of the Crown purchasing that occurred in the 1850s, the claimants argued that the Crown breached the Treaty by 'failing to ensure that Te Ātiawa ki Whakarongotai retained sufficient land for the current and future needs'.[12] The Crown's 'dogged, continuous' efforts to purchase land 'despite ongoing opposition' was in breach of the Treaty, at a time when the iwi was in a 'particularly vulnerable state'. In the claimants' view, the Crown needed to take greater care rather than taking advantage of their position and location (following the departure of many to Taranaki in 1848). After a decade of pressure, including two personal approaches by the Governor, a deed was signed at Waikanae for some 75,000 acres '[c]ontrary to the wishes of a large number of Te Ātiawa'.[13] Claimant counsel submitted that the 'actions of the Crown in ignoring the wishes of Te Ātiawa undermined Te Ātiawa's rangatiratanga and was a clear breach of te Tiriti which recognises the rangatiratanga of Maori in respect of their lands and taonga'.[14]

Unable to actually complete this Waikanae purchase, the claimants argued that the Crown purchased the 34,000-acre Whareroa block just south of Waikanae instead, primarily from Ngāti Toa. The Crown also purchased the 30,000-acre Wainui block, again predominantly from Ngāti Toa. Claimant counsel submitted that a 'number of significant Te Ātiawa chiefs did not sign' these deeds, and that there is evidence of opposition to the Wainui purchase. The claimants argued that the Crown's provision of reserves as a means of dealing with this opposition (rather than obtaining consent) was a 'breach of the Crown's duty of active protection'. The claimants also pointed to how the Wainui survey was disrupted as further evidence of the 'continuing opposition to the alienation of the block'.[15] In the claimants' view, the Crown's completion of the Wainui purchase despite ongoing opposition was 'a breach of the Crown's clear duty to actively protect the property interests of Te Atiawa ki Whakarongotai to the fullest extent practicable'.[16]

The claimants also submitted that the Crown had a duty throughout the pre-emption era to ensure that its purchases were 'safe'; that is, 'the Crown had to ensure that the rightful owners were the ones who were selling and that '*any dispute regarding rights – as to their existence, location, and proportion – were resolved*

11. Claimant counsel (B Gilling, S Dawe, and R Brown), closing submissions, 21 October 2019 (paper 3.3.51), p 26
12. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 33
13. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 33, 35
14. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 35
15. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 36
16. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 36

beforehand' (emphasis in original).[17] In the claimants' view, this point applied to Taranaki and the Waitara purchase, which affected the Waikanae people who also had customary rights in that block.[18]

In sum, the claimants argued that the Crown's purchasing breached Treaty principles because it:

- Adopted unfair purchasing practices to acquire land from Te Ātiawa, including payments in advance;
- Exerted pressure on Te Ātiawa to sell their lands and targeted Te Ātiawa lands for purchase, even in the face of opposition;
- Targeted valuable and desirable land for the settler economy;
- Transacted with those 'willing' to sell regardless of whether they had customary rights to the land in question; and
- Failed to ensure Te Ātiawa retained adequate land to provide for themselves and future generations.[19]

3.2.1.3 *The Kingitanga and the impact of the wars of the 1860s*

The claimants argued that Wi Tako, as the leading chief of Waikanae at the time, developed a 'peaceful interpretation of Kingitanga' that proved them to be 'willing treaty partners, pursuing a course of peace and cooperation with the Crown whilst working to advance and protect their own rights'.[20] In terms of the Waitara purchase and the wars of the 1860s, some of the claimants submitted that 'Crown actions in Taranaki continued to have an impact on Te Ātiawa at Waikanae during the 1860s and 1870s'.[21] In their view, the Crown had failed in its duty of active protection by failing to 'clearly identify Te Ātiawa's relative interests or ensure there was an agreement between Te Ātiawa right holders prior to the purchases' in Taranaki, and that the results had an impact on them at Waikanae.[22] Other claimants submitted that Waitara was not their concern since they had not returned to Taranaki with Te Rangitake, and similarly that Parihaka was not their concern.[23]

3.2.2 The Crown's case

3.2.2.1 *Crown purchasing in the 1850s*

In general terms, the Crown submitted that nineteenth-century Crown acts or omissions should not be judged by today's standards. The Crown has 'a Treaty obligation to take reasonable steps to protect Māori interests' but only to the extent that is reasonably practicable 'in all the circumstances of the time'. In the

17. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 39. The italicised quotation comes from: Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 1, p 106.
18. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 38–39
19. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 40
20. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 4
21. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 38
22. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 39
23. Claimant counsel (Mason), closing submissions (paper 3.3.55), p 17

Crown's view, this means that the past should be judged by the standards of the time, and that the Tribunal should consider any alternative policies or actions that were both practicable and available to the Crown at the time.[24] 'While difficult to do', Crown counsel submitted, 'unless we put ourselves in the shoes of the participants of events at the time, we cannot hope (in the relative comfort of our present-day circumstances) to understand and articulate at this distance the motivations of historical actors with any confidence.'[25] In respect of Crown purchasing in the 1850s, the Crown argued that, 'in the circumstances at the time, the Crown was transacting with people who did wish to sell and who had "good title"'.[26]

Crown counsel submitted that, 'where Māori did not want to sell, the Crown did not compel people to sell their interests in land'.[27] The Crown quoted Governor Grey's statement in 1851 that 'he did not wish to buy except from a willing seller with a good title and that he should be ready to buy whenever such a person asked him'.[28] Relying on the evidence of Tony Walzl, the Crown argued that – although the Crown did persist 'even in the face of quite high complaint' – the Crown ultimately suspended negotiations when faced with resistance.[29]

In respect of the claim that Te Ātiawa/Ngāti Awa were largely excluded from the Whareroa and Wainui purchases by the Crown's dealing with Ngāti Toa, the Crown submitted that this Tribunal has not heard evidence from Ngāti Toa. The Crown also submitted that the Ngāti Toa Treaty settlement deed identifies these two blocks as significant sites for that iwi, and also that the deed identifies the purchases as being with Ngāti Toa.[30] Further, the Crown stated that Mr Walzl found 'no evidence of Crown officials acting in bad faith by seeking to deal with the wrong people'.[31]

Crown counsel therefore submitted that in the Whareroa and Wainui purchases, and in the circumstances of the time, 'the Crown was transacting with people who did wish to sell and who had "good title"'. In respect of Te Ātiawa/Ngāti Awa, the Crown submitted that their interests were provided for through reserves, and that the Crown 'complied with the duty of active protection it owed to Te Ātiawa/Ngāti Awa ki Kāpiti to ensure that adequate reserves were set aside'.[32] Further, the Crown submitted that there is no evidence of inappropriate advances having been used as a purchasing tool. Crown counsel also pointed to Mr Walzl's evidence that Te Ātiawa/Ngāti Awa retained 'the land that was closely held by the greater proportion of hapū members' following these purchases.[33]

24. Crown counsel, closing submissions, 18 December 2019 (doc 3.3.60), pp 14–17
25. Crown counsel, closing submissions (paper 3.3.60), p 15
26. Crown counsel, closing submissions (paper 3.3.60), p 44
27. Crown counsel, closing submissions (paper 3.3.60), p 42
28. *New Zealand Spectator and Cook Strait Guardian*, 26 March 1851 (Crown counsel, closing submissions (paper 3.3.60), p 42)
29. Crown counsel, closing submissions (paper 3.3.60), p 42; transcript 4.1.16, pp 215–216
30. Crown counsel, closing submissions (paper 3.3.60), pp 43, 44
31. Crown counsel, closing submissions (paper 3.3.60), pp 43–44; transcript 4.1.16, pp 214–215
32. Crown counsel, closing submissions (paper 3.3.60), p 44
33. Crown counsel, closing submissions (paper 3.3.60), p 45

In sum, the Crown's argument was that 'the Crown's purchasing of land within the Kāpiti Region prior to the establishment of the Native Land Court was undertaken only with willing sellers with good title and reserves were set aside for Te Ātiawa/Ngāti Awa ki Kāpiti in the Wainui and Whareroa blocks'.[34]

3.2.2.2 *Other issues*

The Crown did not make any submissions about the challenges of the 1840s, the Kīngitanga, or the impact of the 1860s' wars.

3.2.3 The claimants' replies

In their reply submissions, the claimants agreed with the Crown that 'resourcing, attitudes at the relevant time, and other options available to the Crown [at the time]' are matters that should be considered by the Tribunal where possible. The claimants also submitted, however, that the Crown drafted the Treaty in 1840 and convinced rangatira to sign it. The te reo Māori version of the Treaty provided for:

> the protection of tino rangatiratanga of tangata whenua over their land, people, taonga and resources. The English text also gave many such protections. It is submitted that any decision of the Crown which affected or continues to affect the land, people, taonga and resources of tangata whenua then [the] Crown must consider and implement the principles of Te Tiriti o Waitangi, which we submit include its terms.[35]

As a consequence, therefore, the claimants submitted:

> Regardless of when the Crown's action or decision occurred, the Crown must be held to the standard which Te Tiriti o Waitangi sets – that is, that the Crown was and continues to be obliged to actively protect the tino rangatiratanga of tangata whenua over their land, people, resources, and taonga.[36]

In respect of Crown purchasing in the 1850s, the claimants denied that the Crown could be sure that it had purchased land from those with 'good title', since the Crown did not hold an inquiry or even provide a vehicle for such until the Native Land Court in 1862.[37]

3.3 Issues for Discussion

Having considered the evidence and submissions, the key issues for discussion in this chapter are:

- How did Te Ātiawa/Ngāti Awa ki Kāpiti respond to the Treaty of Waitangi in 1840?

34. Crown counsel, closing submissions (paper 3.3.60), p 45
35. Claimant counsel (Gilling), submissions by way of reply, 14 February 2020 (paper 3.3.69), p 4
36. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 4
37. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 8

- How did the situation in Taranaki and Heretaunga (the Hutt Valley) in the 1840s affect the Crown's relationship with Te Ātiawa/Ngāti Awa ki Kāpiti?
- Why did the Crown fail in its attempt to purchase all of the lands of Te Ātiawa/Ngāti Awa ki Kāpiti in the 1850s?
- How did the Crown conduct the purchase of the Whareroa and Wainui blocks in the 1850s?
- Why did Te Ātiawa/Ngāti Awa ki Kāpiti support the Kīngitanga in the early 1860s, and how did the Kīngitanga, the Taranaki war, and the Waikato war impact upon them and their relationship with the Crown?

We address these issues in the following sections of this chapter.

3.4 Arrival of Christianity, the Company, and the Treaty

3.4.1 Introduction

In this section, we examine the 1830s' context for the arrival of the Treaty of Waitangi at Waikanae in May 1840. This includes a brief examination of whaling and early economic development, the arrival of missionaries, the reception of Christianity, and the activities of the New Zealand Company in the region in 1839. Some of this material has already been covered in chapter 2, especially an account of the Haowhenua and Kūititanga battles, which is not repeated in any detail here.

3.4.2 The arrival of Christianity

In the 1830s, Te Ātiawa/Ngāti Awa found that their new district was the centre of a thriving whaling trade. There were almost no European settlers. This was mostly because Waikanae was relatively inaccessible by land. Instead, the European presence was confined to whalers and traders, some of whom married the daughters of chiefs and lived at whaling stations on Kāpiti Island and along the coast.[38] One of the most important of those marriages was arranged between Metapere Waipunahau, the daughter of Te Rangihiroa and Pohe, and the whaler George Stubbs.[39] There were two stations at Te Uruhi (around Paraparaumu Beach) but most were located on Kāpiti and its offshore islands. Te Rauparaha's control of Kāpiti Island gave him a pre-eminent role in controlling access to whalers and European goods, but the battles of Haowhenua (1834) and Kuititanga (1839) showed that the Waikanae tribes were well armed and capable of defending themselves.[40] In addition to the preparation of flax for sale, the Waikanae peoples grew crops and kept pigs for sale, a trade which intensified in the early 1840s once the New Zealand company's settlers arrived at Wellington.[41]

The whalers were a source of European knowledge and goods in the 1830s, especially muskets and ammunition, but their influence was short lived. The whaling

38. Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues circa 1819–1900', December 2017 (doc A194), p 97
39. Michele Parata-Hamblin, brief of evidence, 4 October 2018 (doc E18(b)), p 2
40. Walzl, 'Ngatiawa' (doc A194), pp 97–98, 108–142
41. Walzl, 'Ngatiawa' (doc A194), pp 171–172

industry had entered a sharp decline by the early 1840s. Historian Tony Walzl noted that some ex-whalers 'remained on the coast and settled, sometimes within Maori communities', but there was 'little permanent European settlement'.[42] In October 1839, immediately after the battle of Kuititanga (see chapter 2), the rangatira entered into a land transaction with Captain William Rhodes. Their aim was to get more bullets and gunpowder in case of further attacks from Ngāti Raukawa.[43] Otherwise, there do not seem to have been any pre-Treaty land transactions at Waikanae.

In the mid-1830s, Christianity was brought to the Waikanae region by a Māori missionary, whose name was Ripahau (also called Matahau). There were various accounts of his arrival. According to most sources, Ripahau had been captured by Ngāpuhi and taken as a slave back to the Bay of Islands, where he learnt about Christianity and to read and write from missionaries of the Church Missionary Society (CMS). He was either freed or escaped from Ngāpuhi and returned to his people on the Kāpiti Coast.[44] Claimant witnesses from the Te Ātiawa/Ngāti Awa phase of this inquiry stated that Ripahau was a member of Te Ātiawa/Ngāti Awa,[45] although other sources state that he was of Ngāti Raukawa.

In any case, Ripahau began his teachings at Ōtaki, where 'the old men threatened to roast him and his books too'.[46] He found a much more receptive audience in the Waikanae district. His mission was significant for Te Ātiawa/Ngāti Awa, especially the Christian doctrine of peace.[47] Ben Ngaia explained:

> After Haowhenua, there was five years of tension between the neighbouring tribes. However, during this time an ancestor named Ripahau had returned from the Northland region to his Te Āti Awa people who were now firmly based in the Kapiti region. Ripahau had acquired the skills of literacy, and was well versed in the teachings of Christian beliefs. It was through Ripahau that members of the Te Āti Awa tribe, in particular Reretawhangawhanga, Wiremu Kingi Te Rangitaake, Eruini Te Marau, Pirikawau, and Riwai Te Ahu acquired the skills of literacy. More importantly, Ripahau introduced Te Āti Awa to the philosophies of the Bible. Te Āti Awa welcomed his teachings, which led to a gradual change in the traditional lifestyle of the tribe. Te Āti Awa were now looking at the Christian philosophies as a means to forging peaceful relationships within the Kāpiti region. Ripahau also influenced Tamihana Te

42. Walzl, 'Ngatiawa' (doc A194), p 97
43. Walzl, 'Ngatiawa' (doc A194), p 141
44. Hariata Higgott had a different version of Ripahau's coming to Waikanae from her husband Len: see Hariata May Higgott, brief of evidence, 22 January 2019 (doc F10), p 22.
45. See, for example, Benjamin Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP', July 2011 (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), p [88]); Hemi Sundgren, brief of evidence, 29 January 2019 (doc F19), p 14; Apihaka Tamati-Mullen Mack, brief of evidence, May 2019 (doc F42(b)), p 14.
46. Wakahuia Carkeek, *The Kapiti Coast: Maori History and Place Names* (Wellington: AH & AW Reed, 1965) (doc A114), p 51
47. Hemi Sundgren, brief of evidence (doc F19), p 14

Rauparaha and Matene Te Whiwhi of Ngāti Toa and Ngāti Raukawa into adopting Christian philosophies into their lifestyle, and taught them how to read and write.[48]

Ripahau was particularly influential with some of the younger people, who learnt to read and write using 'paper and ink obtained from Englishmen in the whaling stations'.[49] Riwai Te Ahu was prominent among his converts. As a result of Ripahau's mission, Tamihana Te Rauparaha and Matene Te Whiwhi travelled to the Bay of Islands in 1839 to obtain a European missionary for the Kāpiti coast. Their primary goal was to stop warfare between the allied tribes of the heke, although no missionary was able to come prior to Kuititanga. Henry Williams, head of the CMS mission in New Zealand, brought Octavius Hadfield to Waikanae in November 1839, soon after the battle.[50]

Octavius Hadfield settled first at Kenakena Pā where Riwai Te Ahu taught him to speak Māori. Hemi Sundgren described Kenakena: 'Kenakena pā was a massive communal village, partitioned into areas designed for individual hapū to commune independently of each other.' He said that the pā 'covered a large part' of the beachfront from 'the Waikanae river mouth towards Te Uruhi'.[51] The community had erected a large church there by 1843. Hadfield 'carried on from the work done by Ripahau, and worked closely with Riwai Te Ahu of Te Āti Awa in consolidating Christian philosophies into the community'.[52] Andre Baker noted an entry in Hadfield's diary in 1840, that '"Te Ātiawa had laid down their arms and in future would only fight in self-defence"'.[53]

Williams and Hadfield helped negotiate peace between Te Ātiawa/Ngāti Awa and Ngāti Raukawa in late 1839. Nonetheless, it was evident that the Waikanae people were concerned about the possibility of further attack, despite their victory at Kūititanga. They were aware that Te Rauparaha had supported Ngāti Raukawa against them. Hundreds of their kin had come from the South Island and Te Whanganui-a-Tara to reinforce them as a result of Kuititanga, and those people remained for the time being in case the war resumed.[54] Tony Walzl commented:

> There is some evidence that the attack by Ngati Raukawa brought an element of shock to Ngatiawa, to such an extent that the korero heard by Hadfield in the aftermath of the battle was that it might be time to return to Taranaki. This did not occur, however. Another development in customary rights also occurred in the immediate

48. Benjamin Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP' (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), p [88])
49. Octavius Hadfield, 'Maoris of Bygone Days', 1902 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 1414)
50. Carkeek, *Kapiti Coast* (doc A114), p 51; Hemi Sundgren, brief of evidence (doc F19), pp 14–17; Walzl, 'Ngatiawa' (doc A194), pp 138, 167–168
51. Hemi Sundgren, brief of evidence (doc F19), p 16
52. Benjamin Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP' (Ngaia, papers in support of brief of evidence (doc E3(a)), p [90])
53. Andre Baker, brief of evidence, 22 January 2019 (doc F6), p 15
54. Walzl, 'Ngatiawa' (doc A194), pp 138, 140; Carkeek, *Kapiti Coast* (doc A114), p 60

aftermath of the battle when Ngatiawa 'sold' some land to Captain Rhodes, who happened to be anchored offshore, in order to secure ammunition to ward off another attack should it come.[55]

This was an important part of the context in which Henry Williams, who had brought Hadfield a few months earlier, brought the Treaty to Waikanae in February 1840 with promises of peace and the Queen's protection.

3.4.3 The arrival of the New Zealand Company

The arrival of the New Zealand Company ship *Tory* in 1839 was another important part of the context to the signing of the Treaty at Waikanae. The New Zealand Company had a checkered history. Its earliest incarnation was in the 1820s but the most recent version of the company had only been formed quite recently in May 1839. Private investors established the company for the purpose of colonising New Zealand in a systematic fashion, and the directors had a lot of influence in the British House of Commons. The company's scheme included some protection of Māori interests, with stipulations that Māori must be included in the benefits of settlement and that one-tenth of all land purchased should be reserved for them.[56]

The company's agents were under pressure to buy as much land as possible, as quickly as possible, before Captain Hobson's mission to establish British sovereignty could be carried out. The result was the hurried negotiation of unrealistic, massive 'purchases' at Kāpiti and Queen Charlotte Sound in late 1839, each covering the same 20 million acres of land.[57] Colonel Wakefield, the company's principal agent, visited Waikanae in the aftermath of Kuititanga but did not obtain any signatures for his deeds. His nephew, E J Wakefield, recorded that the chiefs had 'offered to sell their land; but for no consideration except the munitions of war, as they wished to protect themselves against the Ngatiraukawa'.[58] Although Wakefield's negotiations at Waikanae were in fact unsuccessful, the whole Waikanae district was included in the Kāpiti and Queen Charlotte Sound deeds. The latter deed was negotiated with Te Ātiawa/Ngāti Awa leaders in the South Island, including some chiefs associated with Waikanae, but it was clear that the company's transactions were deeply flawed.[59]

The details are not important for this inquiry because Waikanae was not included in any of the lands awarded to the company by Commissioner William Spain and the Governor in the 1840s. Taranaki, on the other hand, was the subject of an award in 1844, consisting of '60,500 acres (being the area then surveyed and

55. Walzl, 'Ngatiawa' (doc A194), p 159
56. Waitangi Tribunal, *Te Whanganui a Tara me Ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), pp 45–47
57. Walzl, 'Ngatiawa' (doc A194), pp 164–165; Waitangi Tribunal, *Te Whanganui a Tara*, pp 58–59, 191; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 172–175
58. E J Wakefield, *Adventure in New Zealand*, 1845 (Walzl, 'Ngatiawa' (doc A194), p 165)
59. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 172–179, 199–203

most of the Te Atiawa land)'.[60] The company's importance for this phase of our inquiry lies in its introduction of British colonisation and its Taranaki claim, both of which had a significant impact on the Waikanae chiefs.

3.4.4 The arrival of the Treaty of Waitangi

The 1830s was a decade of significant change for Te Ātiawa/Ngāti Awa, including the heke to the Kāpiti coast, the settlement of the Waikanae district, trade with whalers, exposure to European ideas (especially the partial adoption of Christianity), and the arrival of the New Zealand Company and the first British settlers. The Treaty of Waitangi in May 1840 brought further change with the reception of a Governor and a new relationship with the British sovereign.

Other than the names of the signatories, we have virtually no information about the signing of the Treaty at Waikanae on 16 May 1840.[61] The 'Cook Strait' Treaty sheet, as it is known, was a copy of the Māori-language version of the Treaty which Henry Williams carried to both sides of Cook Strait on behalf of Governor Hobson. The Governor had fallen ill and – apparently believing that the signing at Waitangi on 6 February 1840 constituted sufficient consent – considered any further signatures to be 'window dressing' except for that of Te Rauparaha.[62] Hobson believed that Te Rauparaha 'exercise[d] absolute authority over all the Southern parts of this island', and that his 'adherence' to the Treaty would 'secure to Her Majesty the undisputed right of sovereignty over all the Southern districts'.[63]

Williams first took the Treaty to the new Company settlement, Wellington, where 39 rangatira signed on 29 April 1840 after 10 days of discussion.[64] After that, he carried on across Cook Strait to Queen Charlotte Sound, where the people were closely connected to their Te Ātiawa/Ngāti Awa kin at Waikanae. Williams collected signatures from 27 Queen Charlotte Sound chiefs on 4–5 May. He then returned to the North Island, where he was joined by Octavius Hadfield, who acted as witness for the signing of the Treaty at Waikanae on 16 May 1840. Neither Hadfield nor Williams recorded any details about what was said at this momentous event, and Hadfield did not take part in any discussions that occurred.[65] There were 20 signatories at Waikanae (see table 4). Notably, three Te Ātiawa/Ngāti Awa women signed the Treaty.

60. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington, GP Publishing, 1996), p 27

61. Walzl, 'Ngatiawa' (doc A194), p 173

62. Robyn Anderson, Terrence Green, and Lou Chase, 'Crown Action and Māori Response, Land and Politics 1840–1900', 2018 (doc A201) p 22. Although this report was presented in the Ngāti Raukawa and affiliated groups phase, Tony Walzl relied on a draft of it for his discussion of the Treaty signing and so we have also used it here.

63. Hobson to Bunbury, 25 April 1840 (Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 23)

64. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 23

65. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 23; Walzl, 'Ngatiawa' (doc A194), p 173; Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books Ltd, 2004), p 310

There was some discussion of the signing of the Treaty in 1888 during the sittings of the Ngarara commission. This included discussion of the occasion at which the Kaitangata and Mitiwai chief Hone Tuhata signed in Wellington in April 1840. There was a dispute as to Tuhata's status at the commission, and one of the witnesses, Pirihira Te Tia, was questioned about the occasion and the gifting of blankets to Tuhata (and the other rangatira). The blankets were important and were sometimes given by the rangatira to others who had not been present, but Pirihira Te Tia also explained the solemn significance of the occasion (Pirihira's answers are in italics):

> [Mr Richmond:] You say you were in Wellington when Hone Tuhata signed the Treaty of Waitangi. What did he write on it?
> *The European wrote & he held the pen*,
> Did you see the European write Hone Tuhata?
> *I saw him write his name, Hone Tuhata Patuhiki.*
> . . . . .
> Did he get any blankets?
> *Yes he got some blankets.*
> How many?
> *Two.*
> What did he do with the blankets?
> *The one he kept for himself, he put on, the one for Koihua he sent to Taitapu.*[66]
> Where is Taitapu?
> *At Nelson . . .*
> [Further discussion of the blankets.]
> Now, you say that Tuhata came to Wellington to give value to the Treaty of Waitangi. What do you mean by that?
> *All the Chiefs came to sign, to give value or mana to the Treaty, to do honour to it.*
> Who were the friends of Tuhata?
> *Te Puni and Wharepouri.*[67]
> Did not they send for him because they wanted him to be friendly to the Pakeha?
> *So that they should all assent to the Treaty together. Mr Williams had brought the Treaty of Waitangi.*[68]

3.5 Te Ātiawa / Ngāti Awa and the Crown in the 1840s

3.5.1 Introduction

In the 1840s, there were a number of challenges to the Crown's evolving relationship with Te Ātiawa/Ngāti Awa ki Kāpiti. These included the collision between Ngāti Toa and company settlers at Wairau in 1843, the Crown's war against Te

66. Wiremu Kingi Te Koihua, a Te Ātiawa rangatira at Pakawau in the northern South Island.
67. Two Wellington rangatira of Te Ātiawa.
68. Pirihira Te Tia, evidence to Ngarara commission, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 83–85)

Waikanae rangatira	Description
Wellington, 29 April 1840	
Hone Tuhata	A Kaitangata and Mitiwai chief. There was later much controversy about whether Hone Tuhata and his people left Waikanae permanently to settle in the South Island (see chapter 4).
Pakewa	A Puketapu leader, also known as Ihipera Nukiahu, one of the few Māori women who signed (see chapter 4).
Kahe Te Rau-o-te-rangi	Kahe's mother was of Ngāti Mutunga and Te Ātiawa / Ngāti Awa. Her father, Te Matoha of Ngāti Toa, lived frequently at Waikanae. Kahe married a whaler, John Nicol, and they had land in the Waikanae district. Kahe had two daughters: Heni Te Rau (Jane Brown) and Mere Pomare, whose first husband was Inia Tuhata (see below and also chapter 4).[1]
Queen Charlotte Sound, 4–5 May 1840	
Te Manutoheroa	Leading Puketapu chief at Waikanae before he moved to the South Island.[2]
Eruini Te Tupe o Tu	Leading Otaraua chief, associated with the Muaupoko block.[3]
Huriwhenua	Leading Ngāti Rahiri chief at Waikanae before he moved to the South Island.[4]
Waikanae, 16 May 1840	
Reretawhangawhanga	The senior Waikanae chief and chief of Manukorihi, Otaraua, Ngāti Tuiti, and Ngāti Kura.[5]
Wiremu Kingi Te Rangitake	Son of Reretawhangawhanga and Kehu, and leading chief of Waikanae after his father's death. Signed as 'Witi'.[6]
Te Patukekeno	Son of Te Manutoheroa.[7]
Ngaraurekau	A Waikanae chief who returned to Waitara around 1842 to forestall a Ngāti Maniapoto claim.[8]
Te Heke	A Waikanae chief, uncle of Pukerangiora, there is disagreement about his hapū affiliations.[9]
Tuainane	A leading Waikanae chief who returned to Taranaki and was killed in 1858 during an attack on the Pukerito pā near Waitara.[10]
Ngapuke	A Ngāti Rahiri chief, also, possibly identified as 'Ngapaki'.[11]
Te Patukakariki	A Ngāti Tuoho chief who returned to Taranaki with Wiremu Kingi Te Rangitake in 1848. He was a strong opponent of the Crown's 1859 Waitara purchase.[12]
Ngakaue	

1. John Barrett, brief of evidence, 22 January 2019 (doc F12), p 7
2. Tony Walzl, answers to written questions, November 2018 (doc A194(d)), p 4
3. Walzl, answers to written questions (doc A194(d)), p 4
4. Walzl, answers to written questions (doc A194(d)), p 4
5. Benjamin Rameka Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A, prepared for purposes associated with legal proceedings taken by Mrs Patricia Grace', 8 November 2013 (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [59]–[61])
6. Walzl, answers to written questions (doc A194(d)), pp 3, 37; Benjamin Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP', July 2011 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [90])
7. Carkeek, *Kapiti Coast* (doc A114), p 41
8. Carkeek, *Kapiti Coast* (doc A114), p 83; Walzl, answers to written questions (doc A194(d)), p 37
9. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), pp 14–15; Carkeek, *Kapiti Coast* (doc A114), p 87
10. Walzl, answers to written questions (doc A194(d)), p 37; Carkeek, *Kapiti Coast* (doc A114), pp 30, 65, 69
11. Walzl, answers to written questions (doc A194(d)), p 3; Walzl, 'Ngatiawa' (doc A194), p 130
12. Walzl, 'Ngatiawa' (doc A194), pp 647–648; Ray Watembach, brief of evidence, 5 August 2018 (doc E12), p 20; Walzl, answers to written questions (doc A194(d)), p 37

Waikanae rangatira	Description
Pukerangiora	In the Native Land Court, Pukerangiora's daughter, Te Kahutatara, stated that he was of Ngāti Kura, Ngāti Hinetuhi, and Ngāti Uenuku, and that he was killed at Kuititanga, raising the question of how his name was put on the Treaty.[13]
Paora Kukutai	A Waikanae chief who returned to Taranaki. He died at the battle of Waireka in March 1860 during the first Taranaki war.[14]
Koinaki	
Raranga	
Hohepa Matahau	Also known as Ripahau, a missionary (see above). There are divergent views as to whether he belonged to Ngāti Raukawa or the Ngāti Rahiri hapū of Te Ātiawa/Ngāti Awa.[15]
Kiha	Native Land Court evidence identified a Kaitangata chief named Kiha, also known as Kohika, who had mana at Otaihanga. Kiha returned to Taranaki with Wiremu Kingi Te Rangitake in 1848. He was the father of Tamihana Te Karu, who played an important role in the 1870s to 1890s at Waikanae (see chapter 4).[16]
Hiangarere	Kawana Hiangarere of Ngāti Mutunga and Ngāti Kura, father of Wi Tamihana Te Neke. Te Neke was a senior Waikanae chief at the time of the Ngarara hearing (see below and chapter 4).[17]
Hurerua	
Te Wehi	Possibly the Kaitangata chief, also known as Hikakupe, who was also a chief of Ngāti Rahiri and Te Mitiwai. Henry Williams recorded that Te Wehi was one of the main rangatira to sign the Treaty.[18]
Pehi	
Ketetakere	Pikau Te Rangi told the Native Land Court in 1890 that Ketetakere was a Ngāti Hinetuhi chief who came on Te Heke Tataramoa. This Ketetakere is likely the chief who signed the Treaty at Waikanae, identified as 'may have been from Te Āti Awa'.[19]
Ōtaki, 19 May 1840	
Te Kehu	One of the few Māori women to sign the Treaty. Wife of Reretawhangawhanga and mother of Wiremu Kingi Te Rangitake, described as a 'matriarch' of her hapū.[20]

13. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), p 13; Apihaka Tamati-Mullen Mack, typescript of the Ngarara rehearing minutes, 1891 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p [2925]); Ōtaki Native Land Court, minute book 12, p 43 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, p [909])

14. Walzl, answers to written questions (doc A194(d)), p 37

15. Walzl, answers to written questions (doc A194(d)), p 3; Walzl, 'Ngatiawa' (doc A194), p 167; Carkeek, *Kapiti Coast* (doc A114), pp 51, 55; Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway' (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [88], [90]); Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), p 14

16. Walzl, 'Ngatiawa' (doc A194), p 124; Apihaka Tamati-Mullen Mack, typescript of the Ngarara partition hearing minutes, 1887 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), pp [4310]-[4311])

17. Mahina-a-rangi Baker, 'Cultural Impact Assessment: Kārewarewa Urupā', 9 November 2015 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 586); 'Mata Pekamu Tamatuhiata', Nga Tupuna biographies, https://wcl.govt.nz/maori/wellington/tupunabeckham.html

18. Lou Chase, 'Ngāti Awa/Te Āti Awa Oral and Traditional History Report', February 2018 (doc A195), pp 7, 40; Walzl, answers to written questions (doc A194(d)), p 37

19. Walzl, 'Ngatiawa' (doc A194), pp 80–81; Walzl, answers to written questions (doc A194(d)), p 37

20. Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A' (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [59]–[61])

Table 4: Te Ātiawa/Ngāti Awa ki Kāpiti Treaty signatories. The information in this table has been drawn from the evidence in this inquiry and is incomplete.

Rangihaeata in 1846, and Crown purchasing in Taranaki to fulfil the company's commitments there and make large-scale acquisitions for colonisation.

The claimants stressed the promises of partnership and protection which Governor Grey made to Te Ātiawa/Ngāti Awa in the 1840s.[69] These laid an important foundation for the Crown–Māori relationship at Waikanae. In later years, Octavius Hadfield and others emphasised the debt that the Crown owed to Wiremu Kingi Te Rangitake for his role at this time in preventing any attack on the company's settlers at Wellington.[70] On the other hand, the claimants argued that the Crown put pressure on the Waikanae people to take up arms and fight against Te Rangihaeata in the Hutt war, quoting Tony Walzl's report on this point.[71] The claimants also argued that the Crown made inappropriate threats to try to stop Te Rangitake and others returning to their ancestral lands in Taranaki in the later 1840s.[72] In the claimants' view, these Crown acts paved the way for a less positive Māori–Crown relationship at Waikanae in the 1850s and 1860s.

In 1848, Wiremu Kingi Te Rangitake and the majority of the Waikanae population returned to Taranaki to defend their land rights there against the Crown's purchase campaign. This return – named Te Heke Mā Ruru by the claimants – caused a dramatic reduction in the number of people in the Waikanae district and altered the balance of power among the Kāpiti coast iwi. It also raised issues about whether those who left Waikanae at this time had abandoned their rights there in favour of retaining the Waitara and other treasured Taranaki lands.

We explore these issues in this section of our chapter.

3.5.2 Challenges to the relationship with the Crown: Wairau and Heretaunga

Te Ātiawa/Ngāti Awa ki Kāpiti had a mostly positive relationship with the Crown in the early to mid 1840s. This was partly because Octavius Hadfield lived with them at Waikanae and provided constant reassurance and advice about the Crown's intentions towards them and their lands.[73] In late 1844, however, Hadfield became seriously ill and had to move to Wellington, where 'illness confined him for almost five years to the home of Wellington magistrate Henry St Hill'.[74] In January 1846, the chiefs of Ngāti Toa and Te Ātiawa/Ngāti Awa wrote a joint letter to Governor George Grey, asking for a 'friendly adviser' who could 'understand both our customs and those of the white people'. They wanted to replace Hadfield, who had previously explained the Government's actions when whalers and others warned them that 'your lands will be forced from you, you will be destroyed'.

69. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 12–13

70. O Hadfield, *One of England's Little Wars: A Letter to the Right Hon the Duke of Newcastle, Secretary of State for the Colonies* (London: Williams and Norgate, 1860), pp 22–23, www.enzb.auckland.ac.nz

71. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 11–12; Walzl, 'Ngatiawa' (doc A194), p 349

72. Claimant counsel (Hope), closing submissions (paper 3.3.53), p 6

73. Walzl, 'Ngatiawa' (doc A194), p 183

74. June Stark, 'Octavius Hadfield', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/1h2/hadfield-octavius

Having already learnt 'the laws of God' from the missionaries, they wanted someone to 'constantly explain [to them] the laws of the Queen', so that those laws could be 'firmly and permanently established amongst us'.[75]

The Governor replied that he hoped the iwi would 'readily assist [him] in conferring benefits upon their country, and will be glad that they themselves can take a share in raising New Zealand to a higher state of civilisation, and in preventing the recurrence of those atrocities which formerly too much disgraced these Islands'. He also urged them to write to him or meet with him any time they were in doubt as to his intentions.[76] As highlighted by claimant counsel,[77] Grey added that the Queen had instructed him to protect them:

> The Queen has directed me to do all in my power to ensure your safety and happiness. Maoris and Europeans shall be equally protected and live under equal laws, both of them are alike subjects of the Queen and entitled to her favor and care. The Maoris shall be protected in all their properties and possessions and no one shall be allowed to take anything from them or to injure them. Nor will I allow Maoris to injure one another – an end must be put to deeds of violence and blood. You will always find me ready to aid you as far as lies in my power . . .[78]

According to Tony Walzl, Grey's statements 'flagged a partnership arrangement' in which the Governor would listen to their concerns and Te Ātiawa/Ngāti Awa would in turn 'be needed for him to implement future plans and policies'. Mr Walzl also noted Grey's emphasis on the Crown's protection, the Queen's instruction to secure their safety and happiness, and equal treatment with the settlers.[79] Partly in response, he argued, Wiremu Kingi Te Rangitake 'adopted a more closely allied association with the Crown'.[80] For Te Rangitake, his people had regard for the Governor (and the Governor for them) because they had been 'united by the Christian belief'.[81]

The growth of a positive relationship with the Crown, however, was challenged by two major sources of conflict: the New Zealand Company's transactions at Kāpiti and Taranaki. The Crown tried to fix the deficiencies in both transactions by negotiating extra deeds and making additional payments. In the Cook Strait region, conflict with Ngāti Toa arose at Wairau and Heretaunga (the Hutt Valley):

- The Wairau conflict: In June 1843, the Nelson police magistrate and a posse of armed settlers tried to arrest Te Rauparaha for disrupting the survey

75. '[A]ll the chiefs and people of Ngatitoa and Ngatiawa' to Grey, 19 January 1846 (Walzl, 'Ngatiawa' (doc A194), p 183)
76. Grey to the 'chiefs of Ngatitoa, Ngatiawa & Ngatimutunga', no date (c January 1846) (Tony Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 739)
77. Claimant counsel (Mason), closing submissions (paper 3.3.55), pp 12–13
78. Grey to the 'chiefs of Ngatitoa, Ngatiawa & Ngatimutunga', no date (c January 1846) (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 739)
79. Walzl, 'Ngatiawa' (doc A194), p 350
80. Walzl, 'Ngatiawa' (doc A194), p 350
81. Wiremu Kingi Te Rangitake to Grey, 15 July 1846 (Walzl, 'Ngatiawa' (doc A194), p 186)

of the Wairau district, which resulted in the deaths of several Māori and 22 Europeans. The full details are traversed in the Tribunal's *Te Tau Ihu* report.[82] The Waikanae chiefs supported Te Rauparaha in the aftermath, advising the Crown that they would fight and 'die with the father and leader of their tribes' if the Crown retaliated.[83] On the other hand, they refused to support Ngāti Toa in any kind of pre-emptive attack on Wellington.[84] The situation was resolved peacefully by Governor FitzRoy at a hui in Waikanae in 1844, where he accepted that the settlers had been in the wrong. Professor Richard Boast pointed out that FitzRoy was hampered by a lack of resources to take military action anyway, and that the likelihood of war on the Māori side has been exaggerated.[85]

- The Hutt war: Te Rangihaeata, a leading Ngāti Toa chief, refused to accept the compensation imposed by Commissioner Spain for Heretaunga unless the resident Ngāti Rangatahi and Ngāti Tama were compensated. Ngāti Tama agreed to leave. Ngāti Rangatahi, however, were forced out by Grey's troops in February 1846. The full details of the negotiations and the war that followed Ngāti Rangatahi's eviction are covered in the Tribunal's report *Te Whanganui a Tara*. In brief, the Governor declared martial law, abducted and held Te Rauparaha without trial, and attacked Te Rangihaeata's pā at Pauatahanui.[86] The Waikanae chiefs supported the Crown but, despite repeated requests, they refused to assist in attacking Te Rangihaeata. They only fortified their pā in case of attack from any Whanganui people who travelled south to support him. When Te Rangihaeata retreated up the coast to Manawatū, Wiremu Kingi also refused to assist the Crown in its pursuit.[87] According to Tony Walzl, Wiremu Kingi was 'trying to walk a middle line of showing he was allied with the Crown but not taking overt actions against Te Rangihaeata that would impact on local relationships'.[88]

But it was Taranaki, not affairs to the south, that was the main source of concern for Te Ātiawa/Ngāti Awa in the 1840s.

3.5.3 Challenges to the relationship with the Crown: Taranaki

The New Zealand Company transactions caused a great deal of trouble in Taranaki as well as in the Cook Strait region. The company negotiated two Taranaki deeds on 15 February 1840, the Ngāmotu and central Taranaki deeds, even though Governor Hobson had prohibited any private purchases after 30 January 1840. The

82. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 194–199
83. Chief Protector to Colonial Secretary, 16 August 1843 (Walzl, papers in support of 'Ngatiawa' (doc A194), pp 175–176)
84. Walzl, 'Ngatiawa' (doc A194, pp 175–176, 186–187
85. Richard Boast, 'Ngāti Toa Lands and Research Project Report One: 1800 to 1870', 2007 (doc A210), pp 93–97
86. Waitangi Tribunal, *Te Whanganui a Tara*, ch 9
87. Walzl, 'Ngatiawa' (doc A194), pp 182, 184–187; Walzl, answers to written questions (doc A194(d)), pp 4–5
88. Walzl, answers to written questions (doc A194(d)), p 4

company's surveys in 1841 were protested peacefully by Māori but there was soon a large settler population in New Plymouth demanding that the Crown put them in possession of land purchased from the company. The company's surveys were interrupted in 1842–43 but Commissioner Spain was not able to hear the Taranaki claim until 1844.[89] In the meantime, the leading Waikanae chief of the time, Reretawhangawhanga, had declared in 1840 that Waitara would never be sold, and 'he continued to express the same determination until his death in 1844'. Riwai Te Ahu stated that when Reretawhangawhanga died, he 'left a strict injunction to William King [his son, Wiremu Kingi Te Rangitake] to carry out his wishes after his death'.[90]

Ben Ngaia explained:

> due to the pressure of maintaining mana whenua rights in Taranaki as a result of colonial desires to acquire lands throughout Taranaki, it was at Kenakena Pa while Reretawhangawhanga was close to death that he imparted his parting wish to his son Te Rangitaake. The statement was:
>
> 'Ko te tangata ki mua. Kei muri iho ko te oneone.'
>
> 'The people first. The land afterwards.'
>
> . . . In accordance with his father's wishes, Te Rangitake led a migration of his people to Taranaki in 1848 in protection of their lands throughout Taranaki.[91]

In June 1844, Spain awarded the land claimed under the Ngāmotu deed to the company, finding that those who had migrated to Waikanae and elsewhere were 'absentees' who had given up all rights to their ancestral lands.[92] Wiremu Kingi, who was now the principal Waikanae chief after the death of his father, sent a strongly worded protest to Governor FitzRoy. He stated that they had not relinquished their rights and that Waitara would not be sold, reminding the Governor that they now lived in a Christian-inspired peace. 'We desire not to strive with the Europeans', he wrote, 'but at the same time we do not wish to have our land settled by them; rather let them be returned to the places which have been paid for by them, lest a root of quarrel remain between us and the Europeans'.[93]

Many Waikanae people began to prepare for a return to Taranaki in 1844–45, accompanied by several attempts to get the Crown to purchase their Waikanae lands before they left.[94] There seems to have been four reasons for this:

- a sale might serve as an 'inducement' for the Crown to look favourably on their return;

89. Waitangi Tribunal, *Taranaki Report*, pp 22–27
90. Walzl, 'Ngatiawa' (doc A194), p 176; Riwai Te Ahu to Superintendent of Wellington, 23 June 1860 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 3153)
91. Benjamin Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A', p 7 (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), p [61]
92. Waitangi Tribunal, *Taranaki Report*, p 27
93. Wiremu Kingi Te Rangitake to FitzRoy, 8 June 1844 (Walzl, 'Ngatiawa' (doc A194), pp 180–181)
94. Walzl, 'Ngatiawa' (doc A194), pp 181–182

- they wanted to prevent a Ngāti Toa or Ngāti Raukawa sale of their lands after they departed;
- they needed money and resources for the return; and
- Wiremu Kingi Te Rangitake wanted to encourage as many people as possible to come with him.[95]

The Government refused to purchase land at Waikanae. At that time, the protectors of aborigines (a post established to protect Māori interests) were also the Crown's land purchase agents. Protector Kemp advised against any purchase in 1845, arguing that not everyone had agreed to sell and leave, and that Te Rauparaha denied the Te Ātiawa/Ngāti Awa right to sell Waikanae. The Crown also wanted to keep a large Te Ātiawa/Ngāti Awa population at Waikanae because it still feared a Ngāti Toa attack on Wellington.[96] According to Tony Walzl, the Waikanae chiefs postponed their return in 1845–46 because of the developing situation at Heretaunga (discussed above).[97] Also, FitzRoy had declined to implement Spain's recommendations in 1845 or to accept his position on 'absentees', which took some of the urgency out of the proposed return.[98]

The situation had changed again in 1847. The Hutt war was over. Te Rauparaha was in the Governor's custody, Te Rangihaeata was at Poroutāwhao in the Manawatū, and leadership of Ngāti Toa had passed to a younger generation of Christian chiefs.[99] Also, the new Governor, Sir George Grey, was determined to put the company's settlers in possession of Spain's full award of land at Taranaki.[100] In February 1847, Grey held a hui in Taranaki, which was attended by 'Te Atiawa leaders of both Wellington and Taranaki'.[101] The Governor's purchase proposals were adamantly rejected, and Wiremu Kingi Te Rangitake announced his intention to return to Taranaki. This leading Waikanae rangatira, who had been a firm supporter of the Crown, was now seen as 'very insolent'.[102] His dismissal of the Governor's offers led Grey to threaten him with military action. A Wesleyan missionary, Henry Hanson Turton, recorded in his journal:

> Governor Grey was much annoyed at this impudent speech of King's, and replied immediately, 'Tell him, that I say he is to remain at Waikanae, and that I will place him under guard; and that if he dares to remove to Waitara, without my permission I will send the steamer after him, and destroy all his canoes.'[103]

95. Walzl, 'Ngatiawa' (doc A194), pp 193, 197, 356; see also Carkeek, *Kapiti Coast* (doc A114), p 84.
96. Walzl, 'Ngatiawa' (doc A194), pp 181–182
97. Walzl, 'Ngatiawa' (doc A194), p 193; Carkeek, *Kapiti Coast* (doc A114), p 83
98. Waitangi Tribunal, *Taranaki Report*, p 27
99. Boast, 'Ngati Toa Lands Research Project Report One' (doc A210), pp 205, 210
100. Waitangi Tribunal, *Taranaki Report*, p 27
101. Waitangi Tribunal, *Taranaki Report*, p 27; Carkeek, *Kapiti Coast* (doc A114), p 83
102. Carkeek, *Kapiti Coast* (doc A114), p 84
103. Henry Hanson Turton, journal, 2 March 1847, in Turton to the editor, *Taranaki Herald*, 5 September 1855, p 3 (Walzl, 'Ngatiawa' (doc A194), p 196). Walzl cited A Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Conflict in Taranaki, 1839–1859', 1991 (Wai 143, doc A1(a)).

The making of this threat was also recorded by Te Ātiawa/Ngāti Awa chief Pirikawau. According to the evidence of Apihaka Tamati-Mullen Mack, Pirikawau's manuscript stated that Grey had ordered that the canoes being built at Pauatahanui for the migration should be destroyed.[104]

This option was considered quite seriously by the Crown. The first two years of Grey's governorship were characterised by bold moves and military action, such as the capture of Te Rauparaha, the Hutt war, the northern war at the Bay of Islands, and the declaration of martial law at Whanganui. In April 1847, Grey instructed Major Richmond, Superintendent of the Southern District, to seize the fleet of waka under construction at Petone: it was a 'matter of utmost importance for the protection of the isolated settlement of Taranaki and its undefended settlers,' he said, 'that the Ngatiawa should not be allowed to proceed for the present to that place'.[105] Richmond did not carry out this instruction. In July 1847, he visited Waikanae and conveyed Grey's order that they must not return to occupy Waitara. Richmond's report to the Governor stated that the chiefs did not want to act in opposition to the Government. Although they were 'still bent upon going to that district', they would not do so secretly or 'before consulting with the Governor, and learning the time he would permit of their removal'.[106]

Tony Walzl suggested that 'Wi Kingi maintained an open dialogue with Crown officials about his proposed return and this seems to have taken the edge off officials adopting a more militant stance'.[107] Te Rangitake continued his attempts to get the Crown to purchase the Waikanae district in 1847–48 but without success, probably because Grey made the relinquishment of claims on the south bank of the Waitara a condition to any sale at Waikanae.[108]

By March 1848, the Crown had changed its strategy. Rather than trying to prevent the Waikanae people from departing, it sought to persuade as many as possible to stay behind, and to make an arrangement with those who were leaving about the lands to the south of the Waitara River. Richmond reported in 1847 that some of the Waikanae residents did not want to return in any case. On 14–15 March 1848, McLean attended a hui at Waikanae and managed to dissuade some from returning but was unable to reach an agreement about the south bank.[109] Grey offered to come to Waikanae himself, telling McLean that 'it would be well to induce some of them to remain at Waikanae [so] that their numbers should not be so formidable at Taranaki and that their remaining would be a barrier to other tribes who might feel disposed to unite against the Europeans [presumably Ngāti Toa and Ngāti Raukawa]'.[110]

On 22 March 1848, McLean attended a second hui of about 500 people at Waikanae as preparations for the departure continued. The hui was attended

104. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), p 21
105. Grey to Richmond [?], 27 April 1847 (Walzl, 'Ngatiawa' (doc A194), p 196)
106. Richmond to Grey, 26 July 1847 (Walzl, 'Ngatiawa' (doc A194), pp 196–197)
107. Walzl, answers to written questions (doc A194(d)), p 7
108. Walzl, 'Ngatiawa' (doc A194), pp 196–202; Carkeek, *Kapiti Coast* (doc A114), pp 84–85
109. Walzl, 'Ngatiawa' (doc A194), pp 202–208
110. Walzl, 'Ngatiawa' (doc A194), p 203. Mr Walzl did not provide a reference for this quotation.

by chiefs from Queen Charlotte Sound and Wellington as well as Waikanae. According to McLean's account of the hui, a number of chiefs and hapū were changing their minds about – or reluctant – to leave Waikanae. He named 'Te Tupe (of Otaraua), Teretui and Toheroa (of Puketapu)'.[111]

On the one side, Wiremu Kingi and his supporters declared that 'they would not part with their land' in Taranaki and 'that their throats should rather be cut on the land than they should part with it'. This was the view of 'a great majority'. McLean's response was that land at Waitara had already been purchased by the settlers, and that the Governor's proposals were 'intended for their lasting and permanent good'. He also claimed that the Crown's officials were 'the parents who guided their persons and interests with impartial consideration for their safety and welfare', which – while consistent with earlier promises of protection – concealed the Crown's self-interest in attempting to prevent as many as possible from returning to Taranaki. Eruini Te Tupe, Teretui, and Hoani (whom Walzl identified as Hone Tuhata) then offered land at Waitara for sale, which resulted in 'anger and surprise at the evident break of one combined party under King's influence, being divided and broke into sections'. In retaliation, there were threats to hand Waikanae over to Ngāti Toa and Ngāti Raukawa when they left, although Te Rangitake swiftly contradicted this idea.[112]

McLean seems to have had some success with Puketapu, Ngāti Ruanui, and Taranaki (the iwi named 'Taranaki') but many still stuck with their determination to return to Taranaki and to reserve their lands there from sale. Te Rangitake accused the Crown of causing division and undermining his mana. Ultimately the departure to Taranaki took place unopposed by the Crown in April 1848.[113]

3.5.4 Te Ruru Mā Heke and its aftermath

3.5.4.1 *Te Ruru Mā Heke*

Ben Ngaia and Hemi Sundgren explained that the migration of Waikanae people back to Taranaki in April 1848 was entitled Te Ruru Mā Heke.[114] Mr Sundgren explained:

> Because of the concerns that the migrating party had for their deceased who had fallen during their tenure in Kāpiti, a number of bodies were exhumed, and their bones were transported with them back to Taranaki. This process occurred over a period of time as there were a number of journeys back and forth between Kāpiti and Taranaki.[115]

Most of those who departed on Te Ruru Mā Heke travelled in 44 waka and four 'European boats', while the rest 'went with forty-two horses overland'. The

111. Walzl, 'Ngatiawa' (doc A194), p 204
112. McLean to Lieutenant-Governor Eyre, 6 April 1848 (Walzl, 'Ngatiawa' (doc A194), pp 204–207)
113. Walzl, 'Ngatiawa' (doc A194), pp 206–211, 217–218
114. Benjamin Ngaia, 'Report on Cultural and Historical Significance', p 7 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [61]; Hemi Sundgren, brief of evidence (doc F19), p 18
115. Hemi Sundgren, brief of evidence (doc F19), p 18

Reverend Richard Taylor carried out a census when they stopped at Whanganui, counting a total of 580 people.[116]

The heke had a number of significant impacts at Waikanae, including:

- most of the people were gone and some pā became virtually deserted, although others migrated to Waikanae from the South Island and supplemented the numbers to some extent;
- there was a shift of leadership following Te Rangitake's departure; and
- the land became vulnerable to purchase from the Crown, even though those who had remained intended to follow Reretawhangawhanga's last words and 'maintain and protect the lands and resources within the Kapiti region.'[117]

Crucial questions arose about where authority lay now that so many chiefs and people – in particular Te Rangitake – had left Waikanae, and how a smaller population would fare if neighbouring iwi claimed the right to sell land in the Waikanae district.

3.5.4.2 *Arrangements made about the land and the northern boundary*

According to evidence in the Native Land Court, the departing chiefs made arrangements about the land and, in particular, its northern boundary with Ngāti Raukawa. The issue of who made these arrangements, and who succeeded to Te Rangitake's leadership role, were later hotly contested in the Native Land Court and the Ngarara commission. The question of whether those who were migrating to Waitara retained rights at Waikanae was also debated. This is an important question for chapter 4, which considers the issue of the omission of Te Rangitake's descendants and others who returned to Taranaki from the Ngarara title in 1873. In addition, the setting of a northern boundary with Ngāti Raukawa was said to have been formalised at this point, a step that was considered necessary as most of Waikanae's military strength was moving away and leaving the remainder exposed to possible encroachment from Ōtaki. We therefore discuss the arrangements made in 1848 here in its proper chronological place and note that it forms essential context for some of the issues covered in chapter 4.

Te Rangitake's parting words in April 1848 were broadly agreed by everyone. Wi Parata, for example, recalled in 1890 that Te Rangitake was angry that not everyone was leaving with him:

> When they returned to go W King said the whole of N Awa were to return to Waitara. Not one of them were to remain. Some of N Kura remained at Waikanae also some of N Rahiri. Because they would not go, W King said as parting words 'Remain there as bait to the trap.'[118]

116. Carkeek, *Kapiti Coast* (doc A114), p 86

117. Benjamin Ngaia, 'Report on Cultural and Historical Significance', pp 7, 9 (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [61], [63]); Sundgren, brief of evidence (doc F19), p 18; Walzl, 'Ngatiawa' (doc A194), pp 198, 218, 225–227

118. Napier Native Land Court, minute book 15, p 172 (Walzl, 'Ngatiawa' (doc A194), p 210)

Some stated that Hone Tuhata then responded to Te Rangitake. Mere Pomare told the land court:

> W King said when going 'If you stay there you will be trapped by N Raukawa' & Honi Tuhata [said] 'go by night and remain away' (Meaning enter the gate of darkness. Freely rendered 'go to blazes'). That was all that was said. These were the words of farewell spoken by W King.[119]

While Te Rangitake's parting words were generally agreed, there were two narratives in court about the land arrangements made by the departing chiefs and the settlement of a boundary with Ngāti Raukawa. According to the supporters of Wi Parata Te Kakakura's case, Te Rangitake and Kaingarara (brother of Huriwhenua) gave the land over completely to Metapere Waipunahau (Wi Parata's mother) and/or to all the people left behind. Some of these speakers also said that it was just Kukutauaki (the boundary with Ngāti Raukawa) that was given to Metapere.[120] In our hearings, Ben Ngaia said that Wi Tako Te Ngatata and Metapere Waipunahau both held leading roles at Waikanae up to the beginning of the 1860s, when Wi Parata assumed his mother's mantle.[121] Miria Pomare also gave evidence about Metapere Waipunahau's role at our Nga Korero Tuku Iho hearings, stating:

> When they left, they exhumed their dead and took them with them indicating the permanency of their departure. When Wi Kingi left the mantle of leadership for the Waikanae area passed to Te Rangihiroa's daughter – Metapere Waipunahau. My understanding [is] Wi Parata eventually assumed this leadership role from his mother at the time of her death.[122]

Tony Walzl's research identified another narrative in the Native Land Court evidence, which was that the various areas were given to the resident hapū who were staying. In respect of the Kukutauaki boundary area, for example, Eruini Te Marau said in 1890 that it was given 'into the charge of Paora Matuawaka and his elder brother Henare Te Marau as representatives of Ngati Rahiri'.[123]

In terms of the boundary discussions with Ngāti Raukawa in 1848, the closest evidence in time comes from 1873 when Wiremu Tamihana Te Neke gave an account at the Ngarara hearing. He related that he had gone with Te Rangitake and other chiefs to see Lieutenant-Governor Eyre[124] in 1847 or 1848 in an attempt to arrange a purchase of land at Waikanae before the planned departure to Taranaki.

119. Napier Native Land Court, minute book 15, p 172 (Walzl, 'Ngatiawa' (doc A194), p 210)
120. Walzl, 'Ngatiawa' (doc A194), pp 212–216
121. Benjamin Ngaia, 'Report on Cultural and Historical Significance', pp 7–12 (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [61]–[66])
122. Miria Pomare, brief of evidence, 22 April 2015 (doc A138), p 14
123. Walzl, 'Ngatiawa' (doc A194), pp 212–216
124. In 1846, the colony was divided into two provinces, New Munster and New Ulster. Lieutenant-Governor Edward Eyre was in charge of New Munster (the South Island and lower North Island) while George Grey was Governor of New Ulster and Governor-in-Chief of the whole colony.

According to Neke's account, Te Rangitake erected pou marking the area to be sold and the area to be retained for those who were staying. On the way back from Wellington, the chiefs discussed boundary issues with Ngāti Toa, who told them to see Metapere Waipunahau. When the Ōtaki chiefs came to Waikanae soon after to discuss the boundary, Metapere insisted on Te Hapua (which was north of Kukutauaki). Tuainane, a chief who returned to Waitara with Te Rangitake, was very angry at the Ōtaki chiefs' refusal of this, but eventually 'the old men of Ngatiawa and Wiremu Kingi' agreed to Te Maire. This decision was 'consented to by [a] large meeting of Ngatiawa held next day'.[125]

The 1890 rehearing was extremely contentious (as discussed in chapter 4). At that later time, the narratives placed more weight on the role of Metapere Waipunahau. Wiremu Kingi Te Rangitake, Te Heke, Te Patukakariki, Kaingarara, and other departing rangatira were said to have fetched Metapere back from Kāpiti and placed the whole Waikanae district under her authority. In these accounts, Metapere alone decided the issue of the northern boundary with the Ōtaki rangatira, and it was left undecided because she was not prepared to bring it south of Te Hapua.[126]

Counsel for claimants Andrea Moore and Robert Taylor submitted:

> When Te Rangitaake left, it is alleged he put his land interests in the care of Waipunahau. There is some debate around whether that amounted to an absolute gift or sale when it is logical that the Ruunanga [of those who were staying] would be so entrusted.[127]

Ms Moore and Mr Taylor cited a claim to Waikanae lands made in 1889 by Eruera Manukorihi, son of Wiremu Kingi Te Rangitake.[128] The documents relating to Eruera Manukorihi's claim showed that at least some of those who departed in 1848 considered that they had not relinquished their land entitlements at Waikanae.[129]

The question of whether some or all of those who departed in Te Ruru Mā Heke intended to retain land at Waikanae is not one that we can answer at this distance in time with the available evidence. We simply note that this question was fought over decades later in the political arena and the Native Land Court, and is addressed further in chapter 4.

3.5.4.3 *Deserted pā and the move to Tuku Rakau*

In the immediate aftermath of Te Ruru Mā Heke, Riwai Te Ahu recorded only 71 people at Waikanae and 38 men at Muaupoko (a future land court block settled by Otaraua), with an unknown number of women and children at Muaupoko. Te

125. Walzl, 'Ngatiawa' (doc A194), pp 199–200; Ōtaki Native Land Court, minute book, pp 180–183 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12)
126. Walzl, 'Ngatiawa' (doc A194), pp 200–202
127. Claimant counsel (Hope), closing submissions (paper 3.3.53), pp 6–7
128. Andrea Maria Moana Moore and Robert Trent Taylor, brief of evidence, 29 January 2019 (doc F20), pp [9]–[10]
129. A Moore and R Taylor, brief of evidence, app D (doc F20), pp [79]–[84]

Ahu, however, did not know how many were living at Te Uruhi (Paraparaumu), Whareroa, or Te Paripari. In July 1848, a local newspaper estimated a population of 200–300, and a Government survey in 1850 showed about 400 people at the various Te Ātiawa/Ngāti Awa settlements.[130] Wi Parata told the Native Land Court that the population was reinforced in 1849 by the return of a number of Kaitangata people from Arapaoa in the South Island. Also, some Ngāti Kura returned from Taranaki after the deaths of Rawiri Waiaua and five of his relatives in 1854 during a 'skirmish' provoked by Crown purchasing at Taranaki.[131]

In October 1848, the Marlborough earthquake damaged Kenakena Pā, destroying houses and the stockade. Sand encroachment was also a problem for this and other coastal pā. In the same year, the Crown arranged for the surveying and laying out of a 'model village' inland at Tuku Rakau as part of a more general policy to move Māori out of their pā and into more European-style settlements.[132] Ben Ngaia explained that the work to establish Tuku Rakau village was carried out by Lieutenant Thomas Bernard Collinson of the Royal Engineers.[133] Otherwise, there is 'very little information about direct government involvement'.[134]

Towards the southern end of the Te Ātiawa/Ngāti Awa lands, the Te Uruhi and Whareroa Pā remained occupied in 1850, as did the Mataihuka kāinga, although the number of people at Te Uruhi and Mataihuka was low.[135] According to Mr Ngaia, it was the rangatira Wi Tako Ngatata who led the move to Tuku Rakau at the Waikanae end:

> Wi Tako gathered the remaining occupants of the pa sites resting on the southern side of the Waikanae river, including Kenakena Pa, and brought them to the northern side to settle on a newly established site. Wi Tako named this site Tuku Rakau. The reason for this was due to the small numbers of Te Ati Awa people living on the southern side of the Waikanae river as opposed to a greater volume of Te Ati Awa people who were based on the northern side of this river. Resources like cultivations grounds were being overrun by the sand dunes, whilst the cultivations grounds of Taewapirau and Kawewai were still being maintained by its occupants. This shifting of people instigated by Wi Tako was an opportunity for those remaining Te Ati Awa sub-tribal groupings to focus their efforts in a collaborative manner. The pa sites on the northern side of the river, including Taewapirau, Upoko-te-Kaia, Waikanae, and Waimeha, had already been collaborating their efforts and utilising food resources which were apportioned between the families. These efforts were based around Tuku Rakau. Tuku

130. Walzl, 'Ngatiawa' (doc A194), pp 218, 227
131. Walzl, 'Ngatiawa' (doc A194), pp 227, 269–270; Waitangi Tribunal, *Taranaki Report*, p 51
132. Walzl, 'Ngatiawa' (doc A194), pp 223–224, 225–226; Carkeek, *Kapiti Coast* (doc A114), pp 88–90; Hemi Sundgren, brief of evidence (doc F19), p 18
133. Benjamin Ngaia, evidence to the Environment Court, 20 November 2001 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [11])
134. Walzl, 'Ngatiawa' (doc A194), p 223
135. Hemi Sundgren, 'Ngatiawa' (doc F19), p 18; Carkeek, *Kapiti Coast* (doc A114), pp 123, 149, 158

> Rakau was now becoming the primary site of communal gatherings. The political and economic aspirations of Te Ati Awa were to be managed from Tuku Rakau.[136]

The Crown's relationship with the remaining Te Ātiawa/Ngāti Awa communities was still positive at the end of the 1840s, partly as a result of the 'model village'. Waikanae and Ōtaki chiefs wrote to the Queen in February 1849. They expressed support for Governor Grey who, they said, had sorted out the 'quarrels' between settlers and Māori, explained the Queen's 'good intentions' towards Māori, established one law for all, and 'joined us to the works of Christ'. That was exemplified, they said, by the Governor's building of hospitals and his 'continually coming back here to induce us to lay out towns, in order that we may assimilate ourselves to the white people'. The people had therefore adopted the Governor as their father and the Queen as their 'mother in the love of Jesus Christ'. The chiefs quoted Isaiah 49:23: 'And kings shall be thy nursing fathers, and their queens thy nursing mothers', and asked that Grey remain as their permanent Governor.[137]

This letter and a second letter to the Queen in 1851 revealed the Te Ātiawa/Ngāti Awa vision of their relationship with the Crown and also their vision for their future development in the colonial economy and society. In the first letter, they referred to hospitals for their health care, towns for them, and their developing farming: wheat, cattle, and horses.[138] In the 1851 letter, which was written to combat settler criticisms of Grey, the chiefs referred to the 'good works' of the Governor and the 'good customs which are steadily gaining ground among us'. On the spiritual side, these included the building of new churches. But there was also the building of towns and new, European-style houses; the growing of wheat; horses and cattle; the flax industry, and 'everything necessary to our bodily wants'.[139] The question for the next decade would be: how far would this good relationship with the Crown persist, and to what extent did the Crown's purchases of Māori land in the Waikanae district ensure their retention of sufficient land for their continued development in the new colonial economy?

3.6 Crown Purchasing in the 1850s: Waikanae, Whareroa, and Wainui

3.6.1 Introduction

In the 1850s, the Crown tried to purchase all the lands of Te Ātiawa/Ngāti Awa on the Kāpiti coast. Although the land purchase commissioner, William Searancke, eventually had to give up on the Waikanae block in 1859, he did succeed in purchasing about 60 per cent of the lands claimed by Te Ātiawa/Ngāti Awa ki Kāpiti. These purchases – the Whareroa/Mataihuka and Wainui purchases

136. Benjamin Ngaia, 'Report on Cultural and Historical Significance', pp 9–10 (Ngaia, papers in support of brief of evidence (doc E3(a)), pp [63]–[64])
137. Chiefs of Waikanae and Ōtaki to Queen Victoria, 22 February 1849 (Walzl, 'Ngatiawa' (doc A194), p 228)
138. Walzl, 'Ngatiawa' (doc A194), p 228
139. Letter to Queen Victoria, 5 February 1851 (Walzl, 'Ngatiawa' (doc A194), p 229)

– encompassed some 64,000 acres at the southern end of their territory. In the southern-most of these blocks (Wainui), the claimants stated that they had shared interests with Ngāti Toa Rangatira, but they argued that they had exclusive rights in the Whareroa block. Ngāti Toa claimed both blocks.

In our inquiry, the claimants argued that the Crown's attempts to purchase all their land despite opposition was in breach of Treaty principles. As discussed in section 3.2, they also claimed that the Crown then left them out of the Whareroa purchase and pushed the Wainui purchase through against 'continuing opposition', granting reserves instead of acquiring consent.[140] The Crown denied that its purchases breached Treaty principles. Crown counsel submitted that purchase agents only wanted to buy land from willing sellers with a good title, and that they withdrew their efforts when resistance arose to sales. The Crown also argued that there is no evidence of bad faith; its purchasers dealt with people who 'asserted good title to the land and were willing to sell', and that 'the Tribunal should accordingly be cautious' in making a finding that the Crown did not purchase from the 'right people'. Further, the Crown submitted that it met its active protection obligations by ensuring that 'adequate reserves were set aside' for Te Ātiawa/Ngāti Awa.[141]

The Crown's purchase activities and reserve-making in the 1850s are the primary claim issues in this chapter so we devote substantial consideration to these matters in this section. We begin with a description of the southern part of the territory claimed by Te Ātiawa/Ngāti Awa (also claimed by Ngāti Toa), which the Crown succeeded in purchasing from Ngāti Toa in the 1850s.

Before we begin, we note that we did not hear from Ngāti Toa, who maintained a watching brief and supplied us with two research reports. We accept the evidence that Ngāti Toa had valid rights in the Wainui and Whareroa blocks.[142] It is also uncontested that the Crown purchased these lands from Ngāti Toa. The issue for our inquiry is whether the Crown also purchased from Te Ātiawa/Ngāti Awa and made sufficient reserves for that iwi's present and future needs.

3.6.2 The southern settlements of Te Ātiawa / Ngāti Awa ki Kāpiti

As noted above, Wiremu Tamihana Te Neke gave a description of tribal boundaries at the 1873 Ngarara hearing. He named Kaihapuku at Whareroa as the southern boundary.[143] A number of claimants told us that their rohe extended from the Kukutauaki Stream in the north to Whareroa in the south.[144] André Baker, chair of Te Ātiawa ki Whakarongotai Charitable Trust, gave the following whakataukī:

140. Claimant counsel, closing submissions (paper 3.3.51), pp 35–36
141. Crown counsel, closing submissions (paper 3.3.60), pp 43–45
142. Boast, 'Ngati Toa Lands Research Project Report One' (doc A210), ch 8
143. Ōtaki Native Land Court, minute book 2, p 180 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12); Walzl, 'Ngatiawa' (doc A194), p 432
144. Ane (Ani) Tamati-Mullen Parata, brief of evidence, 11 October 2018 (doc E21), p 2; Apihaka Tamati-Mullen Mack, brief of evidence, 10 May 2019 (doc F42(b)), p 4; Benjamin Ngaia, brief of evidence to the Environment Court, 20 November 2001 (Ngaia, papers on support of brief of evidence (doc E3(a)), p 5)

> Mai Kūkūtauākī ki Whareroa, tatu atu ki Paripari. Rere whakauta ngā tini tapu ko Wainui, Ko Maunganui, Pukemore, Kapakapanui, Pukeatua ūngutu atu. Ki te pou whakararo ki Ngawhakangutu, Ko Āti Awa ki Whakarongotai e.
>
> From Kūkūtauākī to Whareroa, to Paripari. Turn inland to the sacred places of Wainui, Maunganui, Pukemore, Kapakapanui to Pukeatua. To the pou to Ngawhakangutu, is Te Āti Awa ki Whakarongotai.[145]

Mahina-a-rangi Baker further explained that Te Ātiawa/Ngāti Awa acknowledged Ngāti Toa interests in the lands south of Whareroa: 'Te Ātiawa ki Whakarongotai (TAKW) are recognised as the mana whenua and kaitiaki from Kūkūtauākī to Whareroa with overlapping interests with Ngāti Toarangatira to Paripari.'[146]

This area was south of Te Uruhi (the name of both a Puketapu pā and the district south of Kenakena, including Paraparaumu Beach).[147] The land south of Te Uruhi was mostly occupied by Ngāti Maru and others but was also claimed by Ngāti Toa. The main pā and kāinga associated with Te Ātiawa/Ngāti Awa were (from north to south):

- Wharemauku – a Raumati Beach pā on a dune ridge on the north bank at the mouth of the Wharemauku Stream. Carkeek stated that the pā was given by Ngāti Toa to Ngāti Whakatere and then (after Ngāti Whakatere's departure) to 'a section of the Ati Awa tribe'. He also suggested that it had been abandoned by 1850, since H T Kemp did not record it as an area of settlement in his 1850 tour of the Kāpiti coast.[148] Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill described it as a Puketapu pā in their joint brief of evidence.[149]
- Mataihuka – a pā 'on the hills opposite Poplar Ave in Raumati',[150] which Rawhiti Higgott called an 'Eastern hills Pa settlement'.[151] Manu Parata stated that Mataihuka was an 'outpost and lookout position of Ngāti Maru/Ngāti

145. Andre Baker, summary of brief of evidence, 8 February 2019 (doc F6(a)), p 2
146. Mahina-a-rangi Baker, 'Cultural Impact Assessment for proposed Park and Ride car park on Parata Homestead Site', 5 March 2016 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 138)
147. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence, 20 January 2019 (doc F5), p 3; Bruce Stirling, brief of evidence for the Environment Court, 9 February 2009 (Hari Jackson and others, papers in support of brief of evidence (doc F5(b), pp [4], [7]–[8]); Carkeek, *Kapiti Coast* (doc A114), pp 137, 149; Susan Forbes, brief of evidence for the Environment Court, 6 February 2009 (Hari Jackson and others, papers in support of brief of evidence (doc F5(a), p 6)
148. Carkeek, *Kapiti Coast* (doc A114), pp 140, 157; Rawhiti Higgott, brief of evidence, no date (April 2015) (doc A129), p [6]
149. Hari Jackson and others, brief of evidence (doc F5), p 3
150. Susan Forbes, brief of evidence for the Environment Court, 6 February 2009 (Hari Jackson and others, papers in support of brief of evidence (doc F5(a), p 7)
151. Rawhiti Higgott, brief of evidence (doc A129), p [6]

Tama.'[152] Mataihuka had a small population of about 39 in 1850, which H T Kemp described as a 'sub-division of the Ngati Toa and Ngati Awa'. He noted that the Mataihuka community had three acres of maize, seven acres of potatoes, a quarter-acre of kūmara, and a half acre of other vegetables. In addition, they had a small number of horses, cattle, and pigs, as well as a 'half ton of flax awaiting transport to market'.[153] It was still a Te Ātiawa/Ngāti Awa settlement in the late 1850s, when the Crown's purchase agent was making reserves.[154]

- Whareroa – a pā on a 'high dune close to the mouth of the Whareroa Stream on its northern bank', was located between Raumati and Paekākāriki (and is now in Queen Elizabeth II Park).[155] According to H T Kemp's survey of Māori settlements in 1850, Whareroa was three miles south of Mataihuka. It had a population of about 104 people in that year, with horses and cattle, wheat and other crops, barns to store the wheat, and a busy flax industry.[156] Whareroa was a Ngāti Maru and Ngāti Mutunga settlement. There was also a Puketapu claim as far south as Whareroa.[157]
- Tipapa – a 'small settlement of the Ngati Maru' situated between 'Wainui pa at Paekakariki and the Whareroa pa a little north', but Carkeek stated that the exact location was no longer known.[158] Hemi Sundgren stated that Tipapa is also in Queen Elizabeth II Park.[159]
- Paripari – a pā on 'a series of small terraces overlooking the rocky coast a little to the south of Paekakariki', which Carkeek said was 'occupied mainly by Ati Awa people of the Manukorihi tribe'. Kemp reported that the pā was virtually deserted in 1850 with a small population of 22 people.[160]

In between Tipapa and Paripari stood Wainui, the main Paekākāriki pā, which was occupied by the Ngāti Haumia hapū of Ngāti Toa under the rangatira Ropata Hurumutu. Hauangi Kiwha described him as a 'mentor' of Metapere Waipunahau and her young sons, Wi Parata and Hemi Matenga, who lived with him on Kāpiti after the death of George Stubbs in 1838.[161] According to Paora Temuera Ropata, Wi Parata was Ropata Hurumutu's whāngai (adopted child). He also stated that

152. Manu Parata, 'Wai Claims 2006–2018 – Te Ati Awa no runga i te rangi, Te Ati Awa ki Kapiti: Manuscript of facts', no date (August 2018) (doc E13(a)), p 16
153. Carkeek, *Kapiti Coast* (doc A114), pp 123–124
154. Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti, Twentieth Century Land and Local Issues Report', December 2018 (doc A214), p 36; Searancke to McLean, 6 August 1858, AJHR, 1861, C-1, p 279
155. Carkeek, *Kapiti Coast* (doc A114), pp 42, 158; Ben Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP' (Ngaia, papers in support of brief of evidence (doc E3(a)), p [89])
156. Walzl, 'Ngati Awa' (doc A194), p 227; Carkeek, *Kapiti Coast* (doc A114), p 158
157. Rawhiti Higgott, brief of evidence (doc A129), p [6]. See also the evidence of Taniora Love in the Whareroa case in 1888: Wellington Native Land Court, minute book 2, pp 210–215 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)
158. Carkeek, *Kapiti Coast* (doc A114), p 144
159. Hemi Sundgren, brief of evidence (doc F19), p 16
160. Carkeek, *Kapiti Coast* (doc A114), pp 130, 134
161. Hauangi Kiwha, brief of evidence, 30 July 2018 (doc E7), p 2

Ropata Hurumutu's people had re-established an old hapū name, Ngāti Haumia, when they left Kāpiti to settle at Wainui.[162] In 1850, Kemp found a population of 195 people at Wainui, with 18 acres of potatoes, five acres of maize, three acres of wheat, three acres of kūmara, and half an acre of other vegetables. They also had 'nine horses, nine head of cattle, two sheep, forty tame pigs, and thirty goats'.[163]

Wainui, Whareroa, and Mataihuka were clearly thriving communities in 1850, although the population of the southern Te Ātiawa/Ngāti Awa pā had been reduced by Te Ruru Mā Heke. There was potential for the populations to grow again at any time due to reinforcements from the South Island or Taranaki. These communities were growing crops for consumption and for trade with the settlers at Wellington. Kemp also reported the early beginnings of livestock farming. This is an important point when we consider the sufficiency of reserves in section 3.6.7, and the aspirations of Te Ātiawa/Ngāti Awa to retain resources for their traditional economy while also participating in the colonial economy.

Miria Pomare commented on the 'close inter-relationships that have always existed between the Whakarongotai people at Waikanae and Ngāti Toa now based at Takapuwahia in Porirua'. These 'intricately woven kinship relationships', she said, formed the basis of the alliance which made the joint heke from Taranaki and Kāwhia possible.[164] In the 1850s, both Ngāti Toa and Te Ātiawa/Ngāti Awa claimed the lands south of Te Uruhi to Paekākāriki. Professor Boast, who prepared evidence for the Ngāti Toa negotiations, stated that the Ngāti Toa rohe included 'the Wainui block' (from Paekākāriki to Whareroa) and a 'shared interest in the Waikanae block'. These, he said, were included in the 'core' area beyond which lay 'a much larger zone of authority'.[165] Te Ātiawa/Ngāti Awa, on the other hand, had narratives of co-conquest with Ngāti Toa, tuku, gifts of canoes and food in return for land, occupation rights, and independence from Ngāti Toa, in all their settlements along the Kāpiti coast.[166]

3.6.3 Crown attempt to purchase all lands of Te Ātiawa/Ngāti Awa ki Kāpiti

3.6.3.1 *Unsuccessful negotiations, 1849–53*

In early 1849, Donald McLean visited Waikanae and discussed the possibility of purchasing land at either Waitara or Waikanae. Now that Te Ruru Mā Heke had already occurred against the Crown's wishes, the Crown changed its stance about not buying land at Waikanae. The response of the chiefs was unenthusiastic: Tuainane told McLean that they would not sell Waikanae 'unless ordered to do so'; and Eruini Te Tupe o Tu was not prepared to consider selling until the question of Waitara was settled. Tuainane advised that if they *did* sell, then they would all return to Taranaki and hold Waitara, which was the last thing that the Crown wanted. McLean left Waikanae after his visit, recording in his diary that 'the

162. Transcript 4.1.10, pp 60, 61
163. Carkeek, *Kapiti Coast* (doc A114), pp 42, 130, 152–153
164. Miria Pomare, brief of evidence (doc A138), p 18
165. Boast, 'Ngāti Toa Lands and Research Project Report One' (doc A210), p 50
166. See, for example, evidence in the 1888 Whareroa case in Wellington Native Land Court, minute book 2, pp 207, 214–216.

Waikanae natives are not desirous of selling their land; neither are they strongly opposed to it'. He also stated that the people were 'undecided' about selling, and that he would leave them to consider it further while the Rangitikei-Turakina purchase was being negotiated: 'Forcing these questions is imprudent', he observed.[167]

McLean's opening discussions were followed up in 1850 by offers to sell from two Ngāti Maru chiefs of Whareroa, Arama Karaka Mitikakau and Rakorako. According to the chiefs, the land had been gifted by Ngāti Toa but the authority lay with them because of the gifts they had made in return (including waka and food), and also 107 of the Whareroa people had indicated support for their proposed sale. The area offered appeared to stretch from Tipapa in the south to Paraparaumu in the north but opposition was quickly evident at Waikanae. Other Te Ātiawa/Ngāti Awa rangatira did not want to sell part of the tribal estate.[168] A joint letter from the chiefs of Ngāti Toa and Te Ātiawa/Ngāti Awa hapū stated that they had held three meetings at Waikanae to discuss Arama Karaka Mitikakau's proposal. They urged McLean not to agree to Mitikakau's proposed sale 'in case we all end up fighting again'.[169] According to Mr Walzl, this letter represented the views of the 'Ngati Toa from south of Paekakariki', the Ōtaki chiefs, and 'Ngatiawa of Waikanae'.[170] After the departure of Wiremu Kingi Te Rangitake and such a large number of the people who had resisted Ngāti Raukawa at Haowhenua and Kuititanga, renewed fighting over land was a possibility if the Crown persisted with a purchase.

Donald McLean attended an inter-tribal hui at Whareroa to discuss the purchase on 21 November 1850. It was attended by about 140 Ngāti Toa, the principal chiefs of Whareroa (Arama Karaka Mitikakau, Tipi Tamehana, and Rakorako), and about 100 Te Ātiawa/Ngāti Awa. McLean reported that there was 'great obstinacy' on the part of both Ngāti Toa and Te Ātiawa/Ngāti Awa as to who had rights in the Whareroa lands. According to McLean, Ngāti Toa did not 'dispute the right of Ngatiawa to possess and occupy the land for their own use, but they strongly object to their disposing of it to the Government'. While Ngāti Toa stated that they were the 'original conquerors', Te Ātiawa/Ngāti Awa asserted that Ngāti Toa could not hold the land and were forced to retreat to Kāpiti, and that Te Ātiawa/Ngāti Awa 'assisted in finally conquering the district'. Further, the Te Ātiawa/Ngāti Awa chiefs stated that Ngāti Toa transferred all rights (including the right of sale) at a 'public feast' at which they were given 'two large canoes and other produce'.[171]

In terms of opposition and support for a sale per se, McLean recorded that Ngāti Toa were opposed to the sale. He summarised Rawiri Puaha's speech at the hui:

167. Donald McLean, diary, 1949 (Walzl, 'Ngatiawa' (doc A194), p 232). Walzl does not give a specific reference for the diary.

168. Walzl, 'Ngatiawa' (doc A194), pp 234–236

169. Rawiri Puaha and others to McLean, 19 November 1850 (Walzl, 'Ngatiawa' (doc A194), pp 235–236)

170. Walzl, 'Ngatiawa' (doc A194), p 236

171. McLean to the New Munster Colonial Secretary, 26 November 1850, AJHR, 1861, C-1, p 258; Walzl, 'Ngatiawa' (doc A194), pp 236–237

> Rawiri Puaha spoke strongly against Arama Karaka for selling the land saying that he would become a slave if he sold his land that the pakehas would order him about to carrying bags and do whatever they wish 'do not sell the land, be wise eat men's food and not children's your ideas are those of a child.' His speech was the great favourite of many.[172]

The Whareroa chiefs and most of the Te Ātiawa/Ngāti Awa present were in favour of the sale except for what McLean characterised as 'a few from Waikanae'. He reported in his diary, however, that at a later, private meeting, Ngāti Toa 'gave up their opposition and begged that Arama Karaka [Mitikakau] would not forget them when the land was paid for . . .'[173]

In any case, McLean considered that the land offered at Whareroa was of no great extent or value, and that the 'greater portion of it' was in fact still 'necessary for the use of the natives'. He therefore decided not to push for a resolution at this point. McLean reported to the New Munster government that the rights of both the 'selling party' and their opponents must first be 'fairly established according to the prevailing customs of the country' so that if the land was later required by the Crown, 'no difficulty or disputed title may thereafter arise'.[174] It is important to note that this need to first establish the rights of sellers fairly and by Māori custom was not adhered to when the Crown purchased the Whareroa and Wainui blocks later in the 1850s.

Although McLean had characterised the Waikanae opposition as small, Wiremu Tuainane, Riwai Te Ahu, Wiremu Tamihana Te Neke, and other chiefs wrote to Governor Grey in December 1850. They explained that those who wanted to sell land would return to Taranaki whereas those who intended to stay did not want to alienate any of their land. Further, the land did not belong to the Whareroa chiefs alone, they said, because of shared customary rights: 'its theirs, and its ours'. The chiefs stated emphatically: 'we will never allow these men to sell the land to McLean'. They stressed their need to retain the land for both their customary resources and their aspirations to participate in the new colonial economy: 'Even the parts which are unoccupied shall not be sold, they shall remain as ours for our cattle, horses and pigs that there may be no disturbances.' The effects of land sales and small reserves elsewhere were obvious to them:

> We are exceedingly vexed about this sale of land, this is why we write to you. We moreover have seen these places which have been given up to the white man that there is no place left for the cattle, horses and pigs of the natives. Rather wait until we all desert this place it will there be [?] of you to purchase it, but we will never let it go while we are living here. This is our word in conclusion.[175]

172. McLean, diary, 13 October – 13 December 1850 (Walzl, 'Ngatiawa' (doc A194), p 238)
173. McLean, diary, 13 October – 13 December 1850 (Walzl, 'Ngatiawa' (doc A194), p 237)
174. McLean to the New Munster Colonial Secretary, 26 November 1850, AJHR, 1861, C-1, p 258; Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu* (Wellington: Waitangi Tribunal, 1996) (doc A165), p 69
175. Wiremu Tuainane and others to Grey, 31 December 1850 (Walzl, 'Ngatiawa' (doc A194), p 239)

In response, Governor Grey tried to secure the purchase in March 1851, meeting with the chiefs and people at a large hui called to discuss the sale. According to Tony Walzl, it is clear that the land discussed at this hui was the land offered by the Whareroa chiefs – 'Whareroa possibly extending to Paraparaumu'. The hui was attended by about 700–800 Māori, including Te Rangihaeata and 300 of his followers. There was still considerable Te Ātiawa/Ngāti Awa opposition but according to the newspaper accounts, the turning point was the firm opposition of Te Rangihaeata to the sale.[176] The Reverend Richard Taylor recorded:

> It would have been a subject for an artist to picture the indignant looks of the Chief; he flatly and rudely refused, telling him to be content with what he had got. 'You have had Porirua, Ahuriri, Wairarapa, Wanganui, Rangitikei, and the whole of the Middle Island given up to you, and still are not content; we are driven up into a corner, and yet you covet it.' Chagrined and disappointed, the Governor took his leave. He, however, was most highly esteemed and honored in his departure, by many tokens of regard and interesting addresses from those very natives, though they refused to accede to his wish and part with their land.[177]

The *New Zealander* described Grey's response at the hui as: 'Sir George Grey, with admirable tact, satisfied all parties by declaring that he did not wish to buy except from willing sellers, with a perfect title'. This was described as 'strengthening the native confidence in the justice of the Government'.[178] Grey's statement to the hui reinforced McLean's earlier statement that rights must first be fairly established according to Māori custom before a sale could occur; the Governor added that the Crown would only purchase from willing sellers with a perfect title. These statements are important because they represent the Crown's own standards for the purchase of land in the 1850s.

Following Grey's hui in March 1851, the offers of land for sale were no longer confined to Whareroa. A few chiefs of Te Paripari (at the far south of the rohe), Te Uruhi, and Waikanae began to make offers to McLean despite the opposition of others. Hone Tuhata of Kaitangata said that he wanted good Pākehā settlers at Waikanae who would provide advice and protection, while some Te Uruhi chiefs asked McLean to 'pay soon, pay tomorrow'.[179] Eurini Te Tupe of Otaraua also offered land and was paid a £50 advance. But Arama Karaka's Whareroa purchase was still the Crown's main objective and the Whareroa rangatira continued to push for a sale. McLean reported in June 1851 that one chief 'seized me, tying a piece of flax around me, to ensure my binding myself to them, in purchasing the land'.[180] When McLean met with the opponents of sale in the same month,

176. Walzl, 'Ngatiawa' (doc A194), pp 241–244
177. Richard Taylor, *Te Ika a Maui, or New Zealand and its Inhabitants* (London: Wertheim and MacIntosh, 1855), p 339 (Walzl, 'Ngatiawa' (doc A194), p 244)
178. *New Zealander*, 12 April 1851 (Walzl, 'Ngatiawa' (doc A194), pp 242–243)
179. Walzl, 'Ngatiawa' (doc A194), pp 244–248
180. Walzl, 'Ngatiawa' (doc A194), pp 248–249

The Letter from Metapere Te Waipunahau to Governor Grey and Kahu Ropata's Translation

Waikanae, Akuhata 2 1853.

E Te Kawana tena ra koe. Te kupu taku ki a koe mo Herewini Te Tupe me nga tangata o Ngati Awa e tuku nei i Waikanae i Waimea ki a korua ko Te Makarini kaore au e pai kia utua. Me waiho noa iho hei kai mo matou ko aku tamariki, ko aku tungane, ko aku matua. Hei kainga tupu mo aku tamariki no te mea ko te upoko tenei o nga kainga katoa ko Waikanae, ko Kapiti. He manga nga kainga katoa no Kapiti. Koia au i kī atu ki a koe kaua whatia te upoko kei hē. Whakarongo mai, na Te Pehi, na Te Rangihiroa, na Te Pokaitara. na Te Teke. na Ngati Toa katoa i hoatu ki a Ngati Mutunga ki te heke o mua, muri iho ka mahue i a ratou ka waiho ki a Ngati Kura, ki a Ngati Hinetuhi, ki a Ngati Awa katoa. me au ano e noho ana i runga i taua whenua nei matou ko aku matua ko Te Pahi, ko Te Rangihiroa nana au e noho nei ana au i Waikanae i Waimea inaianei.

He pani au kua mate aku matua, taku tungane a Te Hiko. Ko taku matua i ora ko taku whenua hei atawhai i a matou aku tamariki.

Heoi ano

Na Metapere Te Waipunahau
Ki a Te Kawana Kerei.

however, he attributed the opposition to Anglican influence, singling out Riwai Te Ahu, Hadfield's 'principal teacher' at Waikanae.[181]

H T Kemp continued McLean's negotiations but there is little record of his activities. As well as the Whareroa lands, about 10,000 acres at Waikanae was now also offered for sale.[182] Metapere Te Waipunahau protested to the Governor in August 1853, stating (according to the official translation):

> I have an address to make to you. It is in reference to Eruini Te Tupe & others, the people of the Ngatiawa who have been proposing to sell to you & McLean the land at Waikanae & Waimea. My desire is this that this land should not be sold, I had rather, that it remain as a residence for us, my children & relatives, & as a permanent inheritance for my children.

181. Walzl, 'Ngatiawa' (doc A194), p 249
182. Walzl, 'Ngatiawa' (doc A194), pp 250–253

Waikanae 2 August 1853

O governor, greetings. My word to you about Herewini (Eruini?) Te Tupe and other people of Ngāti Awa who have been proposing to sell to you and McLean the land at Waikanae and Waimea. My desire is this, that this land should not be sold I had rather that it remain as a residence for us, my children and relatives, as a permanent inheritance for my children. Waikanae is the most central of the many places in this neighbourhood, that is to say Waikanae and Kapiti together (do not break up the head) I say therefore spoil not its position and value to us by purchasing it.

Listen here!! these lands were given by Te Peehi, by Te Rangihiiroa, by Pokaitara, by Te Teke, by all of Ngāti Toa to Ngāti Mutunga of the first migration, who departed, then it was left to Ngati Kura, Ngati Hinetuhi, and all of the Ngāti Awa and for myself to reside here along with my fathers Te Peehi and Te Rangihiiroa, they who put me on this land at Waikanae and Waimea right up until now. I am bereft as my uncles have all passed, my brother Te Hiko (actually her 1st cousin this is the use of tungane in the context of referring to cousins as brothers as in the case of Te Hiko). When my father was alive the intention was that the land be left as a resource for me, my children and his descendants.[1]

1. Kahu Ropata, papers in support of brief of evidence, not dated (April 2019) (doc F14(b)), pp [1]–[2]

Waikanae is the most central of the many places in this neighbourhood that is to say, Waikanae & Kapiti together. I say therefore, spoil not its position & value to us by purchasing it.[183]

The rangatira added that her father Te Rangihiroa and other chiefs had given the land to Ngāti Mutunga, who then left and gave it to Ngāti Kura, Ngāti Hinetuhi, and 'generally to the "Ngatiawa tribe"'. She herself was resident on the land at the time, she said, but the passing of her father and Te Pehi had made her an 'orphan': 'The only parent I have remaining alive is the land, to which I look for support for my children and myself'.[184]

Tamihana Te Rauparaha wrote to Grey as well in 1853, warning that a breach of the peace would occur at Waikanae if Kemp did not desist with his negotiations, and also stating that Te Rangihaeata would never agree to a sale. The coastal Te

183. Metapere Te Waipunahau to Grey, 2 August 1853 (Walzl, 'Ngatiawa' (doc A194), p 250)
184. Metapere Te Waipunahau to Grey, 2 August 1853 (Walzl, 'Ngatiawa' (doc A194), pp 250–251)

Ātiawa/Ngāti Awa groups at Waikanae were in agreement with Te Rangihaeata that there should be no sale. Matene Te Whiwhi's wife Pipi also wrote to the Governor, advising that Te Rangihaeata would not sell and that 'Ngati Awa itself has the ruling over his land'. Her letter accords with later Te Ātiawa/Ngāti Awa evidence in the land court that Te Rangihaeata had protected the land from sale for either Metapere Te Waipunahau or for all those who were living at Waikanae (depending on what side the witnesses took in the 1890 rehearing dispute). Despite this opposition, Eruini Te Tupe persisted with his offer of sale in 1853, pointing out to Grey that his people wanted Pākehā to take their land, not Māori (meaning Ngāti Toa and Ngāti Raukawa).[185] Although the departure of so many to Taranaki in 1848 had left the remaining people vulnerable – as Wiremu Kingi had warned in his parting words – H T Kemp advised the Governor that Metapere Te Waipunahau's presence at Waikanae acted as a check on Ngāti Toa.[186]

Governor Grey met with all the chiefs at Ōtaki in September 1853 as part of his farewell tour before his departure to take up the governorship of Cape Colony. As at Wairarapa and Porirua, he took advantage of the expressions of goodwill and support to request that the sale of land to the Crown be finalised.[187] Tony Walzl was not able to find any official account of this hui in his research. The *Spectator* gave a brief description of what happened:

> upwards of three hundred natives, including Rangihaeata and the principal chiefs of the district, assembled in the large schoolroom, to talk over with the Governor the sale of the land. A good deal of speech-making by the natives took place, and a further meeting was held on Friday in the open air, at which the Governor also was present, where there was some very earnest discussion on the part of the natives; but the result was unsatisfactory, and the arrangements for the sale of the land may be considered as deferred for the present . . .[188]

Grey blamed Tamihana Te Rauparaha and Ngāti Raukawa, who he said had been 'behaving very badly about Waikanae, threatening to turn the Ngatiawa off the land by force'.[189] Kemp held further hui after the Governor's departure, and one newspaper account suggested that the iwi had agreed to leave the whole matter to the arbitration of Donald McLean, but in fact the purchase negotiations were abandoned by the Crown at this point.[190] As far as we can tell from the available evidence, the Crown gave up for the time being because of the persistent opposition

185. Walzl, 'Ngatiawa' (doc A194), pp 251–253, 257–260
186. H T Kemp, minute on Metapere Te Waipunahau to Grey, 2 August 1853 (Walzl, 'Ngatiawa' (doc A194), p 251)
187. Walzl, 'Ngatiawa' (doc A194), p 250; Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, pp 117–118, 121, 179; Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 395
188. *New Zealand Spectator and Cook Strait Guardian*, 21 September 1853 (Walzl, 'Ngatiawa' (doc A194), p 254)
189. Grey to McLean, 17 September 1853 (Walzl, 'Ngatiawa' (doc A194), p 255)
190. Walzl, 'Ngatiawa' (doc A194), pp 256–257

to the purchase in 1850–53. McLean and the other purchase agents concentrated their efforts in other, higher-value districts for settlement such as Taranaki.

3.6.3.2 *Unsuccessful negotiations, 1858*

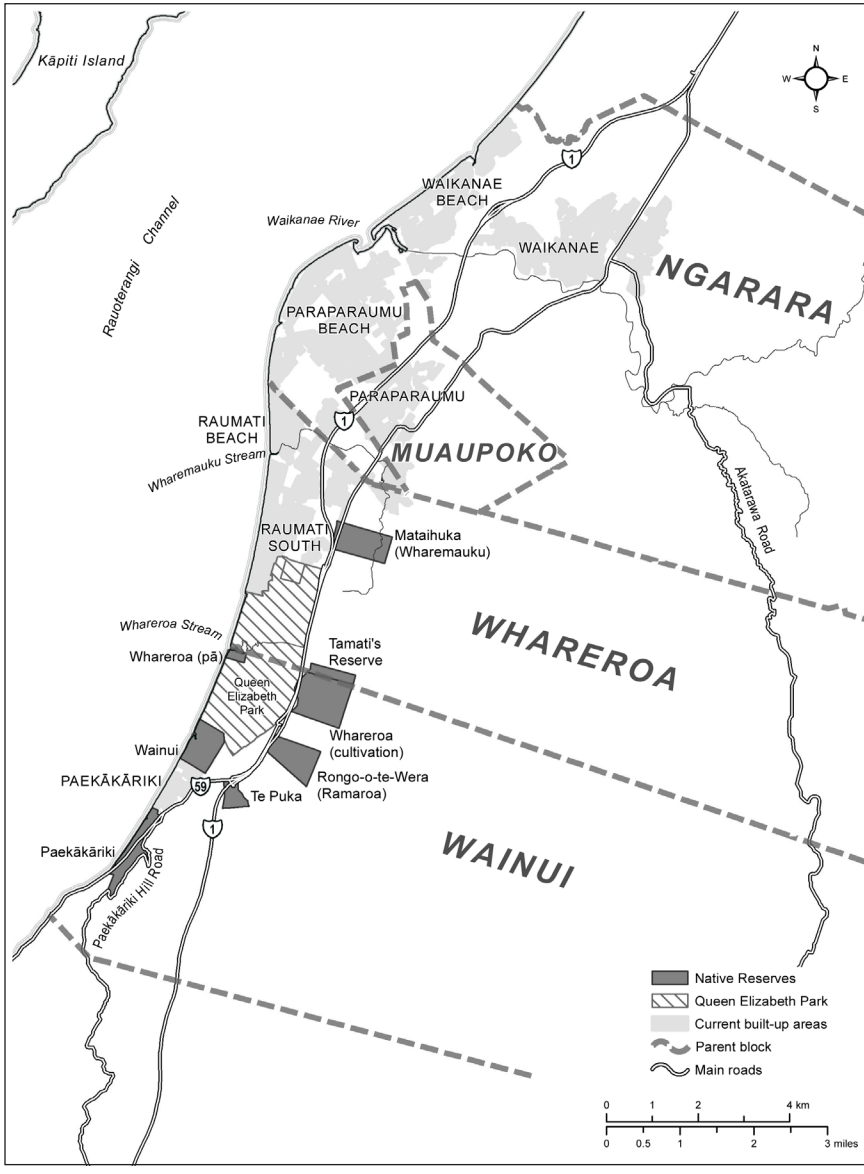
The Crown resumed its purchase attempts at Waikanae in April 1858. The Crown's purchase agent was William Searancke, who was 'said to have been "notorious for making secret deals and breaking promises"'.[191] Ngāti Toa and Te Ātiawa/Ngāti Awa chiefs signed a deed within six days of the reopening of the Crown's negotiations.[192] At first sight this was an astonishing development, given the chiefs' opposition to a purchase in 1850–53 and the mounting resistance to sales across the North Island which had led to the establishment of the Kīngitanga in 1856–58. A crucial obstacle back in 1853 had been the chiefs' concern to retain land for farming in the colonial economy as well as for their traditional resource-use, and their knowledge that previous Crown purchases had left Māori with too little land for either purpose.

Searancke, therefore, found that some chiefs were now willing to sell. They were, however, divided on the issue of reserves. One side wanted to ensure that a large amount of land was reserved and surveyed for them before the purchase was carried out. They became known to the Crown as the 'eka eka' (acre acre) 'party' for their attempts to specify large acreages for reserves. The others were prepared to agree with Searancke that the 'extent of reserves should be left for the Governor to decide'.[193]

The April 1858 deed was signed by 12 chiefs, of whom only two could definitely be identified by Tony Walzl as Te Ātiawa/Ngāti Awa: Eruini Te Tupe and Teira. The other 10 were: Matene Te Whiwhi, Rawiri Puaha, Nopera, Hori Tumu, Mohi Tiaho, Poihipi Te Ono, Tiaho, Hemi Wakata, Tamata, and Ropata. The deed did not encompass the whole of the lands claimed by Te Ātiawa/Ngāti Awa, and most of their rangatira did not sign it. The southern boundary was at Poawa, south of Paekākāriki. The northern boundary was the boundary of the future Muaupoko block (see map 3), described in the deed as running 'along the boundary of Heruwini Te Tupe's land to the sea at Waikanae'. The deed included all land between the coast and the mountains, with the inland boundary described as the boundary of the land sold by Ngāti Kahungunu in Wairarapa.[194]

The transaction was not complete. The deed stated that Searancke paid an advance of £140 but the final price would not be decided until after the block had been surveyed.[195] Searancke recorded in his diary on 14 April 1858, six days before the deed was signed:

191. Boast, 'Ngati Toa Lands Research Project Report One' (doc A210), p 253
192. Walzl, 'Ngatiawa' (doc A194), p 273
193. Anderson and Pickens, *Wellington District* (doc A165), p 79; Walzl, 'Ngatiawa' (doc A194), pp 272–275; Walzl, answers to written questions (doc A194(d)), p 13
194. Walzl, 'Ngatiawa' (doc A194), p 273; Waikanae deed, 20 April 1858 (H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (*Copied from the Originals*), 2 vols (Wellington: Government Printer, 1877), vol 2, https://nzetc.victoria.ac.nz)
195. Walzl, 'Ngatiawa' (doc A194), p 273; Waikanae deed, 20 April 1858



Map 3: The Whareroa and Wainui purchases, showing the reserves and the boundaries with the Ngarara and Muaupoko blocks.

Crossed Otaki River which was flooded and came on Waikanae, went up to Pa inland and had a large meeting of Natives in which opinion[s] were very much divided, one party wishing to have a large portion of the land divided into sections for themselves and other party wishing to sell all the land and leave it to the government

to return them a small portion for planting. &c &c did not come to any satisfactory conclusion.[196]

Following that hui, the 12 chiefs signed a deed without having agreed on either a price or reserves. Some may well have intended to return to Taranaki at this point or to migrate to other lands in Wellington, the northern South Island, or the Chatham Islands. On 31 May 1858, Searancke reported to his superior officer, Donald McLean:

> Waikanae block on the West Coast.—This is a large broken hilly country lying between the coast and the Wairarapa district, and contains about sixty thousand acres (60,000). On this I shall have the honor to report more fully as soon as I can make arrangements for its being surveyed. I have made an advance to the Ngatitoa and Ngatiawa tribes of the sum of One hundred and forty pounds (£140) on it, and trust to be able to complete the sale during the winter; the numerous conflicting claimants cause considerable delay.[197]

Opinion was still deeply divided when Searancke returned to Waikanae in June 1858.[198] At this point, he said that he was 'compelled' to agree to the 'eka eka [acre acre] notion', that large areas should be reserved and surveyed before sale.[199] Searancke reported attending a hui of about 300 people at which he said he had '[c]onsented to the Eka eka system', blaming Riwai Te Ahu (as McLean had earlier) for having to make concessions.[200]

By 1858, the Reverend Riwai Te Ahu had recently been ordained a deacon by Bishop Selwyn, becoming New Zealand's second Māori Anglican clergyman.[201] Crown officials often disparaged any Māori or group of Māori who opposed purchase or obstructed a purchase until their wishes were met. Searancke was no exception, referring to Te Ahu as a 'nigger parson', stating in his diary:

> found that Riwai, the nigger parson has got a small party called the eka eka party who seemed inclined to be troublesome, they proposed that the different pieces for them should be first surveyed etc and then whatever land was left should be sold to the Govt to pay for surveys etc etc. My opinion is that Riwai te ahu is a very ambitious man and having got over the novelty of being a parson now wishes to be a great chief, believe he will be a troublesome vagabond.[202]

196. Searancke, diary, 14 April 1858 (Walzl, 'Ngatiawa' (doc A194), p 272)
197. Searancke to McLean, 31 May 1858, AJHR, 1861, C-1, p 274
198. Walzl, 'Ngatiawa' (doc A194), p 274
199. Searancke to McLean, 26 July 1858 (Anderson and Pickens, *Wellington District* (doc A165), p 79)
200. Searancke, diary, 23 June 1858 (Walzl, 'Ngatiawa' (doc A194), p 274)
201. Octavius Hadfield, 'Maoris of Bygone Days', 1902 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 1416)
202. Searancke, diary, 23 June 1858 (Walzl, 'Ngatiawa' (doc A194), p 274)

There was much debate and wrangling after the initial June 1858 hui but ultimately an agreement was reached among Te Ātiawa/Ngāti Awa at Waikanae that about 6,000 acres should be reserved. They also expected that the reserves would be surveyed before a purchase was completed.[203] Searancke agreed to this in principle in order to 'overcome considerable opposition to the sale on the part of some of the Natives', and proposed that the reserves could be secured to them by Crown grants.[204] But he would not agree to the full 6,000 acres. Rather, he consented to 2,500 acres along with small reserves for Otaraua and for the Ngāti Maru at Mataihuka. He would not agree to reserve a further 1,500 acres, which he claimed was disputed between the hapū, proposing that they keep it for two years instead with a right to purchase it back from the Crown during that period. It is not clear whether the rangatira agreed to this significant reduction in reserves but there was some agreement as to price by July 1858. Searancke had originally proposed to McLean that the price be sixpence per acre, 'which, considering the extent of hilly and valueless land, I considered sufficient'. He now suggested a price of ninepence per acre, which would include the £140 advance payment, a second payment of £3,200, and proposed payments to Muaūpoko and Ngāti Kahungunu.[205]

According to Searancke, Te Ātiawa/Ngāti Awa had agreed to this price at Waikanae; it is not clear how far the Ngāti Toa chiefs continued to be involved in the negotiations by mid-1858, since no reserves had been proposed for Ngāti Toa at Wainui or anywhere else. Importantly, Searancke also reported that the extent of the purchase had been increased from that stated in the April 1858 deed to include all the lands of Te Ātiawa/Ngāti Awa:

> An extension to the Northward as far as the small stream named Kukutauaki, so as to include the whole of the lands claimed by the Ngatiawa tribe has been made. The area will now be, so far as I can judge in this very rough and hilly district, about ninety-five thousand (95,000) acres, allowing for reserves. The extent of level land in this block is very small, not exceeding ten thousand (10,000) acres; all the other portion of it is apparently hilly and covered with timber, and extending to the Eastward, to the boundary of the lands sold by the Ngatikahungunu to the Government, and to the Northward to Kukutauaki, a small stream Northward of Waikanae about three miles.[206]

Thus, Searancke proposed to purchase the whole of the lands of Te Ātiawa/Ngāti Awa with reserves of only about 3,000 acres, with the possibility of them having to buy back another 1,500 acres if allowed by the Crown. Whether such a bargain could have been completed is unknown because McLean refused to agree to Searancke's increased price or to Crown grants for the reserves.

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203. Walzl, 'Ngatiawa' (doc A194), pp 274–275
204. McLean to Searancke, 22 August 1858 (Boast, "Ngati Toa Lands Research Project Report One' (doc A210), p 255)
205. Searancke to McLean, 6 August 1858 (Walzl, 'Ngatiawa' (doc A194), p 275)
206. Searancke to McLean, 6 August 1858, AJHR, 1861, C-1, p 279

On the issue of Crown grants, McLean advised that the Governor had no 'legal power to issue Crown grants in the manner proposed by you', and suggested that the chiefs be persuaded instead to place their reserves under commissioners through the Native Reserves Act 1856.[207] On the question of price, the Government declined to offer more than sixpence per acre due to the 'hilly and rugged character of a large portion of the Waikanae block'.[208] Searancke explained his justification of 9d an acre to McLean, stating that he had agreed to raise the price 'taking into consideration the position of this block, the large actual extent, [and] also the jealousy existing among the various Natives resident on this land'.[209]

Searancke advised McLean in October 1858 that the completion of the Waikanae purchase would be 'at least very much delayed' due to the lower price but he would endeavour to carry it out.[210] But by November he had to report that the sale could not be completed, not only because the price was too low but also because 'the Natives were divided in opinion respecting the sale'.[211] This was not surprising since Searancke had in fact rejected the 'eka eka' position by only agreeing to half the acreage of reserves requested. Even the 6,000 acres originally sought would not have been enough for the present and future needs of the whole of Te Ātiawa/Ngāti Awa on the Kāpiti coast. Searancke's reduction of this to about 3,000 acres was clearly inadequate, especially since the purchase had been extended to Kukutauaki without making any additional reserves. Also, only two Te Ātiawa/Ngāti Awa rangatira had actually signed the deed; disagreement had persisted about the sale, and Searancke would have needed to acquire the signatures of the other rangatira at some time in the future. At this point in 1858, however, the purchase lapsed and the Crown turned its attention to completing a purchase with just Ngāti Toa instead (discussed in the next section).

3.6.4 The Whareroa purchase

3.6.4.1 *Searancke's purchase of the Whareroa block, November 1858*

William Searancke negotiated the purchase of the Whareroa block at Porirua in a week. There is little information about the details of this negotiation, although it was to some extent a continuation of the negotiations discussed in the previous section. This block was also called the Mataihuka block.

In Searancke's report on the purchase to McLean, he described the boundaries of the purchase as beginning at the mouth of the Whareroa stream and then running northwards 'along the coast . . . to the boundary of the Huruhi [Te Uruhi] settlement about four and a half miles, and back over the hills to the boundary of the land formerly sold by the Ngatikahungunu Natives about twelve miles'. Searancke estimated the total area of the Whareroa block was about 34,000 acres. In terms of resources and economic value, he stated that there was about 5,000

207. McLean to Searancke, 22 August 1858 (Boast, "Ngati Toa Lands Research Project Report One' (doc A210), p 255)
208. Searancke to McLean, 11 October 1858, AJHR, 1861, C-1, p 281
209. Searancke to McLean, 6 August 1858, AJHR, 1861, C-1, p 279
210. Searancke to McLean, 11 October 1858, AJHR, 1861, C-1, p 281
211. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 283

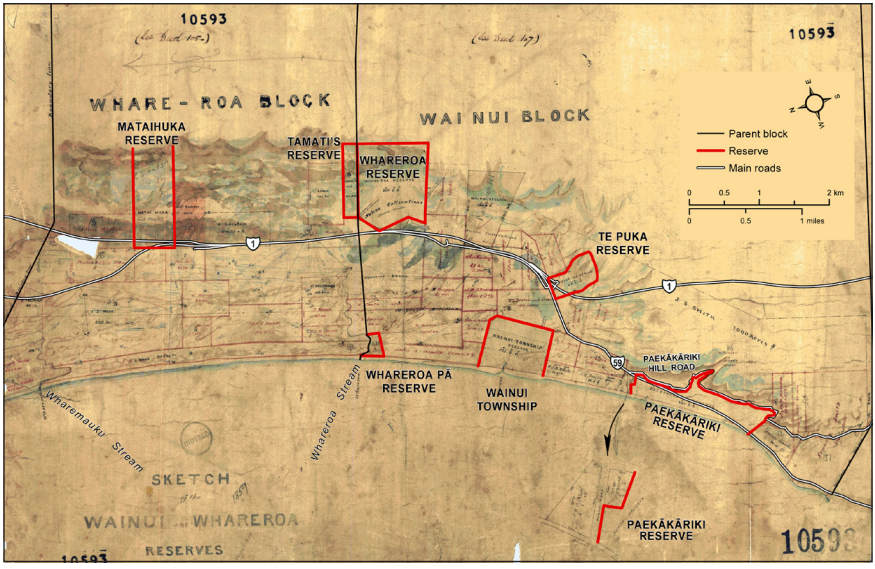
acres of pastoral land with 'the rest bush and heavy timber, a portion of which is very hilly and broken.'[212] This whole area was claimed by Te Ātiawa/Ngāti Awa as within their rohe, although claimant witnesses accepted that the lands south of the Whareroa block were shared with Ngāti Toa.[213]

On 20 November 1858, Searancke reported to McLean: 'On Monday I purpose going to Porirua and try and complete at 6d per acre the purchase of this [Wellington] end of the Waikanae [block], the other end towards Waikanae I shall give up[,] the Natives having retained all the best of the Land.'[214] Searancke thus claimed that he was giving up on the Waikanae end of the purchase because of the size and location of the 'eka eka' party's proposed reserves. This differed from his other explanations, which included that the purchase could not be completed because the price was too low and also because opinion was too divided about the sale (see above).

A week later, on 27 November 1858, Searancke reported: the 'Ngatitoa tribe were willing to sell their portion' of the original Waikanae block 'at a proportionate sum'. He had therefore 'at once completed the purchase' of the Whareroa block.[215] By Searancke's account, the Ngāti Maru inhabitants at Whareroa and Mataihuka and the Puketapu of Wharemauku were excluded from the negotiations, as were the remainder of Te Ātiawa/Ngāti Awa to the north. The deed was signed at Porirua on 26 November 1858, at which point the purchase money was handed over in one lump sum to the chiefs who had signed it.[216] Not only had the negotiations been completed at Porirua in a week, involving Ngāti Toa only, but the purchase money was also paid to that iwi. We have no information as to whether any of that payment was later shared with the resident Ngāti Maru, Ngāti Mutunga, or Puketapu hapū.[217] When Te Ātiawa/Ngāti Awa leaders brought their claim for the Ngarara block to the Native Land Court in 1873, they included within their claim 'a very large extent of Crown Land comprised within the Mataihuka [Whareroa] and Wainui Blocks'.[218] This suggested that they did not consider their rights to have been extinguished in these lands, regardless of the Crown's purchases.

It was also misleading for Searancke to claim that he had purchased the Ngāti Toa 'portion' of the Waikanae block, since the Paekākāriki area south of Whareroa was in fact omitted from this purchase. As we discuss in the next section, that southern-most part of the 'Waikanae' block became the Wainui purchase in 1859.

212. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, pp 283–284
213. Mahina-a-rangi Baker, 'Cultural Impact Assessment for Proposed Park and Ride car park' (Baker, papers in support of brief of evidence (doc F11(a)), p 138)
214. Searancke to McLean, 20 November 1858 (Walzl, answers to questions in writing (doc A194(d)), pp 8–9)
215. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 283
216. Whareroa deed, 26 November 1858, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 61)
217. Whareroa deed, 26 November 1858, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 61)
218. H S Wardell to Superintendent, 10 June 1873 (Walzl, 'Ngatiawa' (doc A194), p 433)



Map 4: Sketch map of the Whareroa and Wainui purchase reserves.

As noted above, the Whareroa deed (also known as the Mataihuka deed) was signed on 26 November 1858. This deed was not published in H H Turton's compilation of deeds. Dr Anderson and Dr Pickens stated:

> It appears, however, that the purchase was not fully accepted, objections to the northern boundary being later raised by Te Ati Awa. Nor does there appear to be a deed relating to this purchase, although witnesses before the Native Land Court subsequently referred to – and disputed – one dated 26 November 1858.[219]

Mr Walzl was able to locate the deed in the archives after research in response to questions from the Tribunal.[220] The text of the deed stated that it was signed by 38 of the chiefs and people of 'Ngatitoa and Ngatiraukawa':

> This deed conveying land written on this the 26th day of November in the year of our Lord 1858, being a deed of our true consent of us the chiefs and people of Tribes Ngatitoa and Ngatiraukawa, whose names are hereto signed for us and our relatives and our heirs who may come after us to fully sell and make over a portion of our land to Victoria the Queen of England and the Kings or Queens after her forever.[221]

219. Anderson and Pickens, *Wellington District* (doc A165), p 80
220. Walzl, answers to questions in writing (doc A194(d)), p 10; Walzl, 'Ngatiawa' (doc A194), p 375
221. Whareroa deed, 26 November 1858, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 60)

This deed appears to reflect the close kin relationships between some senior chiefs of Ngāti Toa and Ngāti Raukawa rather than a Ngāti Raukawa claim to the land south of Te Uruhi. The naming of these iwi in the deed also confirms Searancke's statement (cited above) that Te Ātiawa/Ngāti Awa were excluded from the purchase because of opposition among them at Waikanae to the sale.[222]

In his report to McLean, Searancke stated that having arrived at Porirua and finding the chiefs willing to sell, he 'at once completed the purchase (Deed forwarded herewith) for the sum of Eight hundred pounds (£800), seventy pounds of which they had received on the 20th of April last'.[223] The latter statement referred to half of the sum of £140 earlier advanced to Ngāti Toa and Te Ātiawa/Ngāti Awa chiefs on the Waikanae block back in April 1858. It is evident from the Whareroa deed that Searancke paid the balance of £730 at Porirua on the day of the signing.[224]

We have no further comment to make on the terms of the deed or the purchase price, since this arrangement was made with Ngāti Toa, but it is necessary to examine the reserve arrangements that were made for the resident Te Ātiawa/Ngāti Awa hapū.

3.6.4.2 *Reserves*

On 27 November 1858, Searancke reported to McLean: 'There are two small reserves made by the Natives for their own use, and also a claim made by a European on behalf of his half-caste children, which, when the block is surveyed, I will mark out and transmit for the approval of His Excellency the Governor, with particulars'.[225] This statement indicated that Searancke had not inspected or marked out the sites of these reserves before the signing of the deed, nor had he investigated the block in any detail to consider what reserves might be required for the present and future needs of the resident hapū. The reserves were not recorded in the deed.[226] Nor were they all recorded on the purchase map. A sketch map of the Whareroa and Wainui purchases, dated December 1859, showed only one reserve in the Whareroa block: a 200-acre reserve at Mataihuka (see map 4).[227]

Searancke had also stated that a reserve would be made for 'half-caste children' to meet a claim by their European father on their behalf. According to Heni Te Rau (Jane Brown), daughter of Kahe Te Rau-o-te-rangi and the whaler John Nicol, the Mataihuka reserve was for herself and her sister alone, and she later petitioned Parliament about it in 1877. She claimed that the land had been gifted to her mother by the Ngāti Toa chief Tungia, and she sought compensation for

222. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 283
223. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 283
224. Whareroa deed, 26 November 1858, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 61)
225. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 284
226. Whareroa deed, 26 November 1858, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), pp 60–62)
227. Whareroa and Wainui sketch map, 16 December 1859 (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 72)

the wrongful sale of this reserve by the Crown. The investigation into the petition sought evidence from Searancke:

> According to Mr Searancke, the Commissioner who purchased the Wainui Block in which Mataihuka was, writing from memory nineteen years after the event, Mrs Nicol before the purchase placed documents in his hands which showed that Tungia, a leading chief and a relation of hers, had given her Mataihuka. This and all other papers relating to the subject he lost. When the purchase was in progress he went with the sellers to inspect this Mataihuka, and told them that he was going to make it a reserve for Mrs Nicol. They all absolutely denied her right to it, and asserted that Tungia had no separate interest in it, and no right to give it to her, and that they had never heard of his having done so. Mr Searancke told them that unless they agreed to his proposal he would not make any reserve of it for them. He appears to have adhered to this, for in the deed of sale of Wainui to the Queen, though there are several reserves, Mataihuka is not among them, nor any which corresponds with it.[228]

Searancke thus claimed to have lost all the papers relating to the making of the reserve and he made a mistake (19 years later) about the block: Mataihuka was a reserve in the Whareroa (also called Mataihuka) block, not the Wainui block. He also claimed to have visited Mataihuka to talk about a reserve in the course of the purchase negotiations – and to have told the people there that ownership would be confined to the Nicol whānau – but none of this was evident in his official report.

The Mataihuka reserve of 210 acres was placed under the Native Reserves commissioners through use of the Native Reserves Act 1856.[229] It seems to have been the only reserve actually created out of the Whareroa purchase, despite Searancke's report to McLean in November 1858.[230] An 1862 return of native reserves showed this as a 200-acre reserve entitled 'Wharemauku' (which Carkeek and the claimants suggested was a Te Ātiawa/Ngāti Awa pā, as set out above). The reserve was recorded as a reserve for Ngāti Toa, which was the iwi named as vendors in the deed. The Nicol whānau were not mentioned.[231] The 1862 returns only showed one other reserve in the Whareroa/Mataihuka block: a 50-acre reserve for the chief Tamati Whakapakeke, which was actually set apart in the Wainui purchase of 1859 (see below).[232]

228. 'West Coast Royal Commission: Report of the Commissioner appointed under "The West Coast Settlement (North Island) Act, 1880"', 2 June 1882, AJHR, 1881, G-5, pp 31, 32

229. R N Jones, under-secretary, to Chairman of Native Affairs Committee, report on petition no 293 of 1927 – Mataihuka reserve (Barry Rigby and Kesaia Walker, papers in support of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues report' (doc A214(a)), p 410)

230. Searancke to McLean, 27 November 1858, AJHR, 1861, C-1, p 284

231. 'Return of General Reserves for Natives which have been made in Cessions of Territory to the Crown', AJHR, 1862, E10, p 11

232. 'Abstract of cases in which promises have been made, or engagements entered into by the Government with the Natives, that Crown Grants shall be issued to them', AJHR, 1862, E-10, p 23; petition of Inia Hoani Kiharoa and others, 4 August 1917 (Crown Forestry Rental Trust, Crown and private purchases and petitions document bank (doc A67(b)), p 11304)

Land administered by commissioners under the Native Reserves Act 1856 was supposed to be conveyed by the owners to be vested in the Crown.[233] We have no evidence as to how (or if) that happened, or who the Crown treated as owners. Barry Rigby and Kesaia Walker suggested that Mataihuka may actually have been put under the Act solely for the purposes of enabling a sale in 1866, thereby circumventing the owners' lack of a survey and legal title to the reserve.[234] Reserves under the 1856 Act were supposed to be inalienable except by way of lease for up to 21 years but could in fact be sold with the Governor's consent.[235]

In 1865, only seven years after Mataihuka had been set apart for its inhabitants as a reserve, the Native Reserves Commissioner, George Swainson, reported to the Government that the owners wished to sell it. He described Mataihuka as a reserve in the 'Whareroa & Wainui Blocks', which suggests that the commissioner was not sure which of these purchases had actually resulted in the reserve.[236] In a subsequent letter, he referred to it as located in the Wainui block.[237] This is especially puzzling since Swainson witnessed the Wainui deed at its signing in 1859.[238] Unfortunately, he did not identify the owners, simply stating that 'these natives' wanted to sell to Major Wood, the owner of the adjoining land, for a price 'slightly higher than the Govt price of 10 [shillings] an acre'. The commissioner commented that the price was 'fair and reasonable', observing that '[t]he reserve is hill and gully and of no particular advantage' to the Māori owners. Commissioner Swainson recommended that the Government allow the purchase, 'care being taken of course to ascertain the assent of all the owners'.[239]

The Governor gave his consent to the sale in an order in council dated 23 February 1866, authorising the commissioner to sell Mataihuka for £110.[240] The commissioner's memorandum, which had recommended the sale, commented on the fairness of the price but did not assess the extent to which its sale would leave the owners landless or without any land at all in the Whareroa block. His only comment in that respect related to the hilly location of the reserve, making it 'of no particular advantage to them [the owners]'.[241]

According to an 1882 report by a royal commission, the vendors were the 'resident Wainui natives', to whom the money was paid. But Commissioner Fox was also confused as to which block Mataihuka was located in. Certainly, the Ngāti

233. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 544
234. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 37–38
235. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 544–545, 813–814
236. GS [Commissioner George Swainson], memorandum, 11 October 1865 (Crown Forestry Rental Trust, Crown and private purchases and petitions document bank (doc A67(b)), p 11156)
237. George Swainson to Commissioner of Crown Lands, 23 May 1866 (Crown Forestry Rental Trust, Crown and private purchases and petitions document bank (doc A67(b)), p 11157)
238. Walzl, answers to questions in writing (doc A194(d)), p 65
239. GS [Commissioner George Swainson], memorandum, 11 October 1865 (Crown Forestry Rental Trust, Crown and private purchases and petitions document bank (doc A67(b)), p 11156)
240. Governor G Grey, order in council, 23 February 1866, *New Zealand Gazette*, 1866, no 13, p 83
241. GS [Commissioner George Swainson], memorandum, 11 October 1865 (Crown Forestry Rental Trust, Crown and private purchases and petitions document bank (doc A67(b)), p 11156)

Haumia residents at Wainui were not the residents of Mataihuka.[242] Under-secretary RN Jones stated correctly in 1927 that this reserve was located in the Whareroa/Mataihuka block purchased on 26 November 1858.[243]

The available evidence paints a confusing picture on some key points:

- it is not clear when or how the Mataihuka reserve was placed under the Native Reserves Act 1856;
- we do not know how the sale in 1865–66 was negotiated or to whom the purchase money was paid;
- we do not know whether all right holders were consulted or consented; and
- we do not know what inquiry the Governor made before consenting to the alienation of a supposedly inalienable reserve, although it appears that Commissioner Swainson's 1865 report was the only assessment as to whether the reserve should be sold. According to Swainson's report, the Crown had made a reserve that was mostly useless to its inhabitants.

3.6.4.3 *Later petitions about the Whareroa sale and reserves*

Chronologically, the first petition came from Heni Te Rau in 1877. As noted above, she claimed that the Mataihuka reserve had been wrongfully sold by the Crown. Following an inquiry,[244] the Government agreed that she had a claim and decided to provide her whānau with land in lieu of Mataihuka. The Special Powers and Contracts Act 1878 provided for 150 acres to be held in trust for Betty Nicol (Kahe Te Rau-o-te-rangi) and her children.[245] Officials, however, insisted that only 'lands of the lowest value' could be chosen. Commissioner Fox commented on the various conditions which officials put on the grant, making it so unattractive that the whānau effectively abandoned their attempts to obtain the land.[246] Following the report of the royal commission in 1882, 150 acres was finally granted at Whenuakura in Taranaki.[247]

The later petitions in 1912, 1914, 1917, and 1927 sought the permanent reservation of urupā in the Whareroa purchase block and the return of the reserve, which they claimed to have made many attempts to gain possession of through the Native Land Court. Some of these petitions may have been on behalf of Ngāti Toa rather than Te Ātiawa/Ngāti Awa – no hapū or iwi affiliation is mentioned in the petitions.[248] The 1917 petition of Inia Hoani Kiharoa, for example, related to the 'Mataihuka and Wharemauku Reserves and the graveyards therein'. It stated:

242. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 37; AJHR, 1882, G-5, pp 32, 33
243. RN Jones, under-secretary, to Chairman of Native Affairs Committee, report on petition no 293 of 1927 – Mataihuka reserve (Rigby and Walker, papers in support of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues report' (doc A214(a)), p 410)
244. 'Report on petition of Jane Brown', 3 September 1877, AJHR, 1877, I-2, p 9
245. Special Powers and Contracts Act 1878, sch, cl 10
246. AJHR, 1882, G-5, p 33
247. Chief Judge RN Jones, report to Native Minister, 30 July 1924, AJHR, 1924, G-6I, p 1
248. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 38

> Your Petitioners pray that the graveyards of our ancestors at Mataihuka Reserve, viz, Whareroa, be permanently reserved for ever . . . there are a great many dead in said graveyards. Therefore, your petitioners pray Honourable Members of the House to thoroughly inquire into this petition, viz, to return to us the said Mataihuka Reserve, viz Whareroa, and the graveyards of our ancestors. If this cannot be done, then let your Petitioners be paid a just sum equal to the amount of our loss.[249]

The petition also stated: 'Secondly, we have no land, and that is why we will always pray that these reserves be returned to us.'[250]

The 1912 and 1914 petitions were led by H K Tatana Whataupoko but, following his death, the 1917 and 1927 petitions were filed by Inia Hoani Kiharoa.[251] None of these petitions were successful.[252] Regardless of whether the petitioners were from Te Ātiawa/Ngāti Awa or not, the petitions underlined the Crown's failure to make even the most basic reserves for the inhabitants of the land contained in the Whareroa purchase, including no reservation of urupā. According to the evidence in this inquiry, the principal inhabitants of the Whareroa/Mataihuka block were Puketapu towards the north at Wharemauku and Ngāti Maru at Mataihuka and Whareroa (see section 3.6.1).

In sum, the Crown had reserved only 0.6 per cent of the estimated acreage of the Whareroa block in this purchase.

After 1866, the only piece of Māori land which remained in the Whareroa block was a 50-acre reserve created as part of the Wainui purchase, which is discussed in the next section.

3.6.5 The Wainui purchase

3.6.5.1 *The official record of Searancke's purchase of the Wainui block*

In October 1858, Searancke made an advance of £50 towards the purchase of the Paekākāriki end of the original 'Waikanae block'. This payment predated the negotiation of the Whareroa purchase and it was categorised as an advance on 'Waikanae' but later taken to be an advance on the Wainui block. The deed receipt stated: 'This is the second payment made on account of our land at Waikanae Pouawha the boundaries of which have been pointed out by us to Mr Searancke and written down by him'.[253] The first payment had been the £140 paid at Waikanae on April 1858, of which their half would be deducted from the price of the

249. Petition of Inia Hoani Kiharoa, Rongo Piripi Kohe, Nutera[?] Hori Kuti, Pirihia Mohi, Manihera Tauhanga, Harata Tauhanga, Heni Piripi, and Hakaraia Hoani, 4 August 1917 (Rigby and Walker, papers in support of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214(a)), pp 524, 525)

250. Petition of Inia Hoani Kiharoa, Rongo Piripi Kohe, Nutera[?] Hori Kuti, Pirihia Mohi, Manihera Tauhanga, Harata Tauhanga, Heni Piripi, and Hakaraia Hoani, 4 August 1917 (Rigby and Walker, papers in support of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214(a)), p 524)

251. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 38; AJHR, 1927, I-3, p 13

252. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 38

253. Deed receipt, 8 October 1858 (Walzl, answers to questions in writing (doc A194(d)), pp 67–68)

Whareroa block in November 1858. The receipt was signed by Ropata Hurumutu, the Ngāti Haumia and Ngāti Toa chief of Wainui. The other signatories were Wiremu Te Kanae, Nopera Te Ngiha, Horopapera, and Rawiri Waitere.[254]

Drs Anderson and Pickens commented:

> Deposits were paid and accepted without an exact understanding of which land was involved, with the consequence that potential vendors were led into making progressive alienations. Hurumutu told the court that Ngati Toa had understood that the initial payment [the £50 advance] was for the mountain Pouawha.[255]

Ngāti Toa chiefs signed the Wainui deed on 9 June 1859. We have virtually no information from Searancke about this important purchase. The only surviving document about the negotiations is a short report from Searancke to McLean on 6 July 1859:

> I have the honor to inform you, for the information and approval of His Excellency the Governor, that I have completed the purchase of the Wainui block, West Coast; also the survey, a tracing of which, together with the Deeds, I hand you herewith.
>
> The Wainui block, about thirty thousand acres (30,000) in extent, is a portion of the Waikanae district on the West Coast, having a frontage to the Westward of five and a-half miles, is principally heavily timbered laud and apparently hilly, and about three thousand acres of open fern and marshy land, is valuable from its proximity to Wellington, and being on the road from Wellington to Wanganui . . .
>
> The price paid altogether for this block is (£850) eight hundred and fifty pounds.[256]

The deed stated that it was made between Queen Victoria and the 'chiefs and people of Ngatitoa'.[257] There was no mention of Ngāti Raukawa this time. Professor Boast commented: 'Although the Waikanae transaction was a joint Ngati Awa–Ngati Toa sale, the Wainui transaction involved Ngati Toa only.'[258] The deed also stated that Ngāti Toa received £800 on the day the deed was signed, having already received £50 on 20 April 1858.[259] Searancke made a mistake with the date of the advance, confusing his payment at Waikanae in April 1858 with the advance made in October of that year. Mr Walzl stated that there is 'no specific evidence on who actually received the purchase money or how it was distributed' among the Māori

254. Deed receipt, 8 October 1858 (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 68)
255. Anderson and Pickens, *Wellington District* (doc A165), p 84
256. Searancke to McLean, 6 July 1859, AJHR, 1861, C-1, p 285
257. Wainui deed, 9 June 1859 (Walzl, papers in support of answers to questions in writing (doc A194(d)), pp 63, 65)
258. Boast, 'Ngati Toa Lands Research Project Report One' (doc A210), p 255
259. Wainui deed, 9 June 1859 (Walzl, papers in support of answers to questions in writing (doc A194(d)), pp 63, 65)

vendors,[260] other than the statement in the deed that the whole sum was handed over by Searancke on 9 June 1859.

Tony Walzl noted that the deed was signed by some Ngāti Maru chiefs and also by Hone Tuhata, Wi Parata, Hohaia Rangiuru, and Wiremu Kingi Te Koihua. These chiefs were connected with Te Ātiawa/Ngāti Awa but later evidence to the Native Land Court suggests that Wi Parata signed as a Ngāti Toa chief (see below).[261] The great majority of Te Ātiawa/Ngāti Awa ki Kāpiti chiefs, including most Ngāti Maru of Whareroa, did not sign the deed.

3.6.5.2 *Māori accounts of the purchase in the Native Land Court*

Most of the evidence we have about the Wainui purchase comes from the recollections of chiefs in their evidence to the Native Land Court. The Wainui chief Ropata Hurumutu described the Wainui purchase in his evidence on the Ngarara block in 1873. According to Hurumutu, he took the lead in the Wainui sale whereas Nopera [Te Ngiha] led the Whareroa sale. In terms of the £50 advance, he told the court that it was paid in Wellington after he had given the Pouawha mountain to McLean and asked him for a payment, which McLean arranged through Searancke. Hurumutu named several chiefs as involved with him in this sale of Pouawha: Poihipi, Rapihana, Nopera Te Ngiha, Rawiri Puaha, and Eruini Te Tupe (of the Otaraua hapū).[262] He added:

> We understood that money was for the mountain Pouawha. After we had received the £50 Searancke wished it to include the land at the bottom. All Wainui to Whareroa. Then we agreed to have the second payment. Mr Searancke desired us to include all the bottom part, the lower portion extending to the sea. The Whareroa people agreed to this. There were three instalments – or three divisions of the money – one to Nopera, one to me and one to Eruini Te Tupe – for the mountain.[263]

According to Ropata Hurumutu, therefore, one Te Ātiawa/Ngāti Awa chief was involved at the early stage of the Wainui sale in 1858 (Eruini Te Tupe). He also stated that the Whareroa people agreed to the sale of the whole Wainui block in 1859. None of that is evident in the official record of the Wainui purchase. Hurumutu's evidence about the payments is confusing. Under questioning by the Crown agent, he acknowledged that a second payment of £800 had been made for Wainui, stating that Searancke made this payment at Paekākāriki. But he also suggested that a further payment of £140 was also made at Paekākāriki after the Ngāti Toa chiefs (including Wi Parata) went with Searancke to point out the boundaries

260. Walzl, answers to questions in writing (doc A194(d)), p 12
261. Walzl, 'Ngatiawa' (doc A194), p 376. Wiremu Kingi Te Koihua lived mostly at Pakawau in Golden Bay where he was the principal chief.
262. Ōtaki Native Land Court, minute book 2, pp 206, 208 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12)
263. Ōtaki Native Land Court, minute book 2, p 207 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12)

of the Whareroa purchase so that it could be surveyed.[264] This may in fact refer to a part of the £800 payment, which other Native Land Court evidence suggested was offered to – and rejected by – the Whareroa people and then redistributed among Ngāti Toa.

In 1888, the Whareroa reserve, which was made as part of the Wainui purchase, was passed through the Native Land Court. The purchase was discussed at this hearing. Wi Parata, who was present at the Wainui sale, gave evidence in his capacity as a Ngāti Toa chief.[265] According to Wi Parata, Ngāti Toa arranged for a reserve at Whareroa for Ngāti Maru during the Wainui purchase:

> Res[erve] was made by the Ngatitoa. Our subdivision was handed over to the Komihana [the land purchase commissioner, Searancke] to confirm. Ropata [Hurumutu] was the chief of the Ngatitoa. They held a meeting at Wainui and matter was ventilated. When they heard that Tamati [Whakapakeke] intended to hold back they were troubled. The Ngatitoa went to Whareroa to see the Ngatimaru. An arrangement was made whereby Ngatimaru and Tamati agreed to the sale. Then the Ngatimaru kaumatua went to Wainui. Land was handed over to Ngatitoa to sell. Then Ngatimaru were asked what part they wished reserved and they pointed out [a] piece as also did Tamati. Subsequent to that arrangement payment was made for land. The subdivision of the money was made for Ngatimaru, Ngati Toa, Ngatihaumia and Ngatiawa. The portion apportioned for Ngatimaru was brought to them but the young people wouldn't accept it. When we heard they wouldn't take money we sent for it and divided the £400. The Ngatimaru's share was £200.[266]

Wi Parata also stated that the reserve was made 'in consequence of opposition' from the Whareroa people.[267] His statement that part of the money was paid to 'Ngatiawa' may refer to the sum which Ropata Hurumutu said was paid to the Otaraua chief Eruini Te Tupe, as there is no other mention of a payment to Te Ātiawa/Ngāti Awa in any of the evidence. This payment of £50 was not shared more widely among others except perhaps for Eruini Te Tupe's whānau. It was made to Te Tupe in 1851. A quarter of a century later, the Crown deducted this £50 from its payment to Te Tupe's son, Karaitiana Te Tupe, as part of the purchase of the Muaupoko block in 1875 (see chapter 4 for a discussion of this later purchase).

The other main accounts of the Wainui purchase at the 1888 hearing were given by Hamapiria Maiho for Ngāti Maru and Taniora Love for Puketapu. By the time of the sale in 1859, the Ngāti Maru chief Arama Karaka Mitikakau had returned

264. Ōtaki Native Land Court, minute book 2, pp 207–208 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12)

265. Wellington Native Land Court, minute book 2, pp 226, 229 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

266. Wellington Native Land Court, minute book 2, pp 223–224 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

267. Wellington Native Land Court, minute book 2, p 225 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

to Taranaki.[268] It is not clear how many returned with him but it appears that the population at Whareroa may have been significantly reduced, which left them in a weakened position to resist the sale of all their lands. It was also the case that some still wanted to return to Taranaki as at 1859, although the population was likely to be reinforced at any time from around the various territories occupied by the migratory Te Ātiawa/Ngāti Awa. Some did make the journey 'home' after the 1859 sale and the establishment of small reserves, but the dilemma posed by the sale was exemplified by the following exchange between Hamapiria Maiho questioning Taniora Love:

> **Q:** According to [the] Deed it is said that Ngatitoa still believed they were owners and that the other hapus were only occupiers.
> **A:** I have heard that Ngatitoa took a prominent part in the sale and Ngatimaru also took part. I believe Ngatimaru were there because they ret[urne]d to their own places. If they had remained they would have had a large share of the land. They sold the land because they were anxious to leave for Taranaki.
> **Q:** Didn't they go because Ngatitoa sold the land over their heads?
> **A:** That may be so. The Reserve was made for those who didn't wish to go to Taranaki.[269]

Taniora Love also pointed out that there was a generational difference growing at Whareroa (as elsewhere in the Te Ātiawa/Ngāti Awa settlements). The younger people had developed 'new associations when young'; their ties to the new lands at Kāpiti meant that 'they didn't care to return' to Taranaki.[270] There was certainly a potential for the population to expand and prosper if sufficient land was retained.

The strong difference between the young people and their elders was mentioned by Wi Parata and was also clear in Hamapiria's account of what happened at Whareroa when Ngāti Maru and Puketapu were confronted with the Wainui sale:

> The reserving of this land by the Ngatimaru (numbering 100). Some of the Ngatihaumia [the Ngāti Toa hapū at Wainui] wanted to sell and go to Taranaki. Rata, father of Reweti, was among the sellers. Also Rua's parents. A quarrel arose in consequence of the chief of the Ngatimaru approving of the sale by Ngatitoa. The people armed themselves with axes to kill the elders. On the arrival of the Ngatitoa matters took a more amicable turn. The Ngatitoa said let a Reserve be made for those who do not wish to sell. I went to Porirua and it was through the intervention of Rawiri Waitere, Wiremu te Kumai [Te Kanae?] bro[ther] of Rawiri King, and Hohepa te Maihengia [Tamaihengia] that matters were brought to an amicable conclusion and £450 was given to Puketapu, Ngatimaru and Ngatimutunga. This money was in Te

268. Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Conflict in Taranaki, 1839–1859', 1991 (Wai 143 R01, doc A1(a)), p 134
269. Wellington Native Land Court, minute book 2, pp 216–217 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)
270. Wellington Native Land Court, minute book 2, p 217 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

> Wheti's house chief of the Ngatimaru. The persons who placed this money before the people were the descendants who gave the land in the first instance. Potete Te Tiki, Hakaraia. The money was placed before Ngati Maru. They took it to Tamati Whakapakeke's house. Tamati who was a non-seller didn't wish money divided in his house so it was taken to the house of Tamati's wife. Money was subdivided £250 to the sellers and £200 to the nonsellers. The £200 was taken to the nonsellers but they would not accept it. So the people of Ngatihaumia and Ngatitoa heard they would not take it so sent for it for themselves and it was divided.[271]

There are a number of commonalities between the accounts of Wi Parata (from the Ngāti Toa perspective) and Hamapiria (from the Ngāti Maru perspective):

- Ngāti Toa initiated and controlled the Wainui sale.
- When the Whareroa people found out about the sale (which included all their remaining lands), there was opposition to it. Wi Parata highlighted the opposition of Tamati Whakapakeke, the Puketapu chief living at Whareroa, and Hamapiria described the opposition among Ngāti Maru, especially from the young people.
- As a consequence of this opposition, Ngāti Toa went to Whareroa. In Hamapiria's account, the arrival of Ngāti Toa prevented a violent showdown between the younger people and those elders who supported the sale. Both accounts agree that an arrangement was made that defused the situation – Hamapiria stated that Ngāti Toa agreed then to a reserve for the non-sellers, whereas Wi Parata stated that it happened later at Wainui.
- Following the Ngāti Toa visit, the Ngāti Maru chiefs went to Wainui (Hamapiria merely stated 'I went to Porirua') where the purchase arrangements were finalised. It may be that the deed was signed at this point, as the names of five Ngāti Maru people from Whareroa are on the deed.[272]
- Half of the £800 purchase money was then taken to Whareroa – Wi Parata said £400, Hamapiria said £450. The non-sellers refused to accept any money so the share that had been allotted to them (£200) was taken back by Ngāti Toa. The Ngāti Maru who supported the sale kept a share – Wi Parata said £200, Hamapiria said £250.
- Reserves were made for the non-sellers, which in both accounts was equivalent to those remaining behind when the people who had supported Ngāti Toa's sale returned to Taranaki. The details of the reserve-making are discussed later.

271. Wellington Native Land Court, minute book 2, pp 205–207 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

272. These are: Rakorako, Te Whita, Raruhi Taukawa [name recorded on the deed as Raharuhi Taukawa], and Rota Takirau. A fifth probable signatory is Horopapera Rirangi. There are two names on the deed: Horo Rirangi and Horopapera. Either (or both) could be Horopapera Rirangi. The names on the Wainui deed have been compared with the list of names in the Native Land Court minutes for the Whareroa reserve: Wellington Native Land Court, minute book 2, pp 254–255 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18).

There are also points where the accounts differ. Wi Parata claimed that Ngāti Maru and the Puketapu chief Tamati Whakapakeke did agree to the sale after their initial opposition. Ropata Hurumutu also stated that the Whareroa people agreed to the sale. Hamapiria's account, however, suggests that both Tamati Whakapakeke and a significant number of Ngāti Maru continued to oppose it. Both Wi Parata's and Hamapiria's accounts agree, in fact, that there were non-sellers who refused to accept payment and for whom reserves had to be made (including Whakapakeke), which shows that Wi Parata's statement about full agreement was not correct. The evidence demonstrates that the Wainui sale was pushed through despite significant opposition at Whareroa, a point which Searancke must have been aware of when he came to Whareroa to mark out the reserves (discussed below).

Two other important issues arise from the Native Land Court evidence of Ropata Hurumutu, Wi Parata, and Hamapiria Maiho. The first is that there is no evidence of any involvement other than that of Ngāti Toa in the earlier Whareroa/Mataihuka purchase of 1858. Although that sale was mentioned in the minutes, Ngāti Maru seemed unaware at the time of the Wainui purchase that their pā, which was on the northern side of the Whareroa stream, had already been sold to the Crown. The second point was the lack of involvement from the other Te Ātiawa/Ngāti Awa communities in the area of the Wainui block, Tipapa and Paripari. Also, the chiefs and people to the north of the Whareroa and Wainui blocks were almost completely excluded. Ropata Hurumutu did state that Eruini Te Tupe had been paid £50. As discussed above, the Whareroa chiefs Arama Karaka Mitikakau and Rakorako had earlier offered to sell their land in 1850–53 but this was prevented by the Waikanae chiefs, who asserted the right of the wider iwi to control the sale of lands in the rohe.

3.6.5.3 *Searancke's creation of reserves in the Wainui purchase*

The main reserves created in the Wainui block were:

- the Whareroa Pā and settlement (18 acres, originally estimated as 17 acres);
- the Ngapaipurua cultivations, which were the inland cultivations of the people at Whareroa Pā (260 acres, originally estimated as 280 acres inclusive of the pā);
- Te Rongo o te Wera, also known as Ramaroa (149 acres, originally estimated at 160 acres);
- Te Puka (60 acres);
- Wainui township (155 acres, originally estimated at 135 acres); and
- Paekākāriki settlement and cultivations (135 acres).[273]

The Crown thus reserved about 788 acres out of the 30,000-acre Wainui block. Searancke actually considered this proportion (2.6 per cent of the block) to be 'large', commenting to McLean in 1859: 'The Reserves appear to be large; but when

273. Walzl, 'Ngatiawa' (doc A194), p 277; AJHR, 1862, E-10, p 11; Searancke to McLean, 8 July 1859, AJHR, 1861, C-1, p 286; Wellington Native Land Court, minute book 2, p 237 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18); Walghan partners, 'Block Research Narratives', 26 November 2017 (doc A212(b)), pp 170, 196, 267, 420, 478

the number of Natives resident within the boundaries is taken into consideration they could not in justice be made smaller.'[274] In addition to these community reserves, Searancke made some particular arrangements for individuals. He reported:

> There are also two pieces of land (tracings of which are forwarded) within the boundaries, conveyed by Deeds of gift to the half-caste children of John Nicol, and his wife Peti; and to Henry Flugent and his Native wife, in consideration of a residence of 28 years among them. I beg to recommend that Crown Grants should be given in these two cases.[275]

These two reserves consisted of about six acres for 'John and Peti Nicol' (Kahe Te Rau o te Rangi and her whaler husband) and two acres for Henry Flugent.[276] A 50-acre block was reserved for the Puketapu chief Tamati Whakapakeke, who had strongly opposed the purchase, but this area was actually on the Whareroa side of the boundary between the 1858 and 1859 Crown purchases. It was also adjacent to the Ngapaipurua cultivations.[277]

Of the reserves created out of the Wainui purchase, the Whareroa reserves (the 18-acre pā block, the Ngapaipurua cultivations, and the 50 acres for Tamati Whakapakeke) were definitely reserves for Te Ātiawa/Ngāti Awa groups. It does not appear from the evidence that any land was reserved for the Te Ātiawa/Ngāti Awa populations at Tipapa (near Whareroa) or Paripari (just south of Paekākāriki), if in fact those pā were still occupied by the late 1850s.

Searancke also reported that he was sending the deed and a tracing of the survey of the Wainui block to McLean with his letter of 6 July 1859. He noted:

> A small portion only of this land is at present available, the back country being unknown and unexplored. I propose, subject to your approval on the completion of the purchase of the Waikanae township block of land, to carry the survey from the West coast to Wairarapa, in order that the surveys of the East and West coasts may be properly connected.[278]

On 8 July 1859, he added that he had surveyed and marked out the boundaries of all the reserves in the Wainui and Whareroa blocks, 'pointing them out to the Natives, tho I fear but to little purpose they all with but few exceptions, looking northward' – that is, towards returning to their ancestral homes.[279] In our view,

274. Searancke to McLean, 6 July 1859, AJHR, 1861, C-1, p 285
275. Searancke to McLean, 6 July 1859, AJHR, 1861, C-1, p 285
276. AJHR, 1862, E-10, p 23
277. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 33–34, 39–40
278. Searancke to McLean, 6 July 1859, AJHR, 1861, C-1, pp 285–286
279. Searancke to McLean, 8 July 1859, McLean Papers, MS-Papers-0032–0565, Alexander Turnbull Library, https://paperspast.natlib.govt.nz/manuscripts/MCLEAN-1017175.2.1; Anderson and Pickens, *Wellington District* (doc A165), p 84

this goes some way to explaining the small size of the reserves that Searancke would allow, although he paid no consideration to the future needs of those who wished to remain (or their descendants). Nor did he know what resources in the block might need to be reserved, since it had not actually been explored at that time.

Also, what Searancke had in fact done was prepare a sketch map of the Whareroa and Wainui purchases, showing the location of the reserves and depicting the boundaries of the two purchase blocks as straight lines (see map 4). He had not surveyed the interior or the boundaries, admitting as quoted above that the 'back country' was unknown and unexplored, and that the surveys of the east and west coasts had not yet been connected. Mr Walzl located and filed the combined sketch map of the Whareroa and Wainui purchases, which was dated December 1859.[280]

It appears from the Native Land Court evidence that the handing over of the £400, and Searancke's attempt to mark the boundaries of the Whareroa reserve, must have occurred in the month between the signing of the deed on 9 June and Searancke's letter of 6 July 1859, forwarding the deed and the tracing of the 'survey'. According to Taniora Love's evidence to the Native Land Court, Tamati Whakapakeke's son Pirimona disrupted Searancke's survey:

> The survey spoken about as having been done by Searancke was disturbed by Pirimona. Pirimona seized an axe to cut the survey chain. The survey having been interrupted, Mr Searancke took plan of the whole block to Paekakariki and made subdivision on map, not on the land.[281]

One of Taniora Love's sources for this information was Wi Tako. Love suggested that Poihipi of Ngāti Mutunga had returned from the Chatham Islands and wanted to subdivide the reserve, and that this had led Pirimona of Puketapu to prevent the survey.[282]

3.6.5.4 *The alienation of the Whareroa reserves*

3.6.5.4.1 'Tamati's Reserve'

In 1862, the three Whareroa reserves were included in a return of reserves promised by the Crown as part of its purchase negotiations. Tamati Whakapakeke's 50-acre block was listed as one of the reserves for which a Crown grant had been promised.[283] It was common practice in the 1850s for Crown purchase agents to offer chiefs their own personal reserves as an inducement to agree to purchases.[284] Even so, this Puketapu chief remained adamantly opposed to the Wainui purchase

280. Walzl, answers to questions in writing (doc A194(d)), pp 69–70
281. Wellington Native Land Court, minute book 2, pp 211–212
282. Wellington Native Land Court, minute book 2, pp 211–212, 225, 240
283. 'Abstract of cases in which promises have been made, or engagements entered into by the Government with the Natives, that Crown Grants shall be issued to them', AJHR, 1862, E-10, p 23
284. See, for example, Boast, Ngati Toa Lands Research Project Report One' (doc A210), pp 247–248, 252.

and refused to accept any of the purchase money. His reserve was a 'strip of bush' adjacent to the Whareroa cultivation reserve (Ngapaipurua).[285] Ngapaipurua was described in the Wainui deed: 'There is one place at Ngapaipurua from thence along the swamp till it strikes the Northern boundary [of the Wainui purchase], 280 acres'.[286] These two reserves were next to each other and Tamati Whakapakeke's reserve was actually on the other side of the boundary in the Whareroa / Mataihuka block (as noted previously).

As promised, a Crown grant was issued to Tamati Whakapakeke in 1863 but the reserve was probably occupied by a wider group of Puketapu, not just Tamati and his whānau. The Crown grant did not treat the land as a reserve; no restrictions against alienation were placed on the title.[287] Dr Rigby and Ms Walker commented: 'It is clear that in the case of Tamati's Reserve the Crown grant offered no protection of the land from alienation and as a result it was lost as a permanent inheritance for the hapū.'[288] In 1867 the reserve's occupants approached the Crown seeking access from their reserve to the main road, and it is not clear whether or not this was arranged. It may well be that the land remained in bush as a result but, in any case, Tamati's successors sold it in 1896 to the Mackay Brothers, who owned 'considerable amounts of land in the district'.[289] It is unlikely that a 50-acre block could have sustained the Puketapu residents, perhaps not even Tamati Whakapakeke's direct descendants alone.

3.6.5.4.2 The Whareroa Pā and cultivation reserves

The Whareroa Pā and cultivation reserves were not Crown granted or placed under the Native Reserves Acts. The occupants eventually sought a title from the Native Land Court in 1888. The cultivations reserve, which was 260 acres in extent, was awarded to seven individuals of Ngāti Mutunga and 17 of Ngāti Maru. The Whareroa Pā block was awarded to the same individuals with the addition of five Puketapu members, including Tamati Whakapakeke and his son Pirimona. The court found that these were the people who were entitled as at 1859, when the reserves were made, although Hamapiria Maiho had stated that the reserve had been for 100 Ngāti Maru non-sellers (see above).[290] It is possible that some of these people had already left Whareroa for Taranaki and Whanganui by the time of the court hearing.[291]

285. Rigby and Walker, 'Te Ātiawa / Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 39
286. Wainui deed, 9 June 1859, contemporary English translation (Walzl, papers in support of answers to questions in writing (doc A194(d)), p 65)
287. See Rigby and Walker, 'Te Ātiawa / Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 39, 39 n
288. Rigby and Walker, 'Te Ātiawa / Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 40
289. Rigby and Walker, 'Te Ātiawa / Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 39–40
290. Wellington Native Land Court, minute book 2, pp 205, 240–241, 254–255 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18); Heather Bassett and Richard Kay, 'Porirua ki Manawatū Inquiry District: Public Works Issues', November 2018 (doc A211), pp 340–341
291. Bassett and Kay, 'Public Works Issues' (doc A211), p 341

The shares in both reserves were small even before successions were arranged. For the cultivation reserve, two owners (Poihipi Hikairo of Ngāti Mutunga and Ripini Haeretuterangi of Ngāti Maru) each received 20 acres. The other owners all received a 10-acre share although the reserve was not divided into small individual lots on the ground. No restrictions were ordered for either reserve, they were treated as ordinary Māori freehold land.[292]

The 1888 title orders also partitioned Whareroa Pā into three parcels and the cultivation reserve block was partitioned into four. Following the individualisation of title, further partitions occurred and the blocks – insufficient to support individual farms – were sold to private purchasers between 1893 and 1909. Only one rood of the cultivation reserve was ultimately retained for an urupā. All of the sales were to the Lynch or Mackay families.[293] These two Pākehā families presumably had capital and could concentrate and farm the land more profitably in conjunction with their existing operations than the 22 Māori owners could with their limited land and resources.

As far as we can tell from the evidence, the community was not able to continue living at Whareroa Pā once the cultivation lands were gone. As noted in the Native Land Court hearing, the cultivations reserve was inland from the pā: 'The land round the Pah was all sand not fit for cultivation, that is the reason why they cultivated some distance away.'[294] According to Carkeek, G L Adkin found the pā still occupied when he was 'very young' (in the 1890s or early 1900s) but 'only a few years later when he revisited the place he found it deserted and the houses had disappeared'.[295] No formal leases were arranged but the land could have been sold if the Whareroa community wanted to part with it. By the 1940s the neighbouring Pākehā landowner had simply been using the land for grazing alongside his own.[296] He advised the Crown that 'he has known the area since boyhood and, to his knowledge, no one has ever displayed any interest in it'.[297]

The Crown decided to take the Whareroa Pā reserve as part of a project to establish a large, 900-acre recreation reserve (later called Queen Elizabeth Park). Most of the area was now in Pākehā ownership apart from the Whareroa Pā reserve and part of the Wainui reserve further south. In 1946, the Crown's land purchase officer was unable to find out anything about the pā reserve because the records were missing. He advised: 'If it would not offend the Maori sentiment, this area should be acquired and the matter will be investigated further when possible.'[298]

292. Wellington Native Land Court, minute book 2, pp 240–241, 254–255 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

293. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), pp 479–480

294. Wellington Native Land Court, minute book 2, p 215 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 18)

295. Carkeek, *Kapiti Coast* (doc A114), p 158

296. Bassett and Kay, 'Public Works Issues' (doc A211), p 341

297. Under-secretary, Public Works, to under-secretary, Lands, 18 March 1947 (Bassett and Kay, 'Public Works Issues' (doc A211), p 341)

298. Land purchase officer to under-secretary, Public Works, 22 July 1946 (Bassett and Kay, 'Public Works Issues' (doc A211), p 336)

Whareroa Pā had a Government valuation of £4,005 in 1945 but a Government planning committee was concerned that the values would soon rise as the beachfront area became attractive for residential housing. The electrification of the railway and the provision of a 'modern State highway' had increased property values, a point which the committee feared would become more obvious after the end of the Second World War. In 1947, the Public Works Department approached the Māori Land Court to ask if it had located the Whareroa reserve file, and whether the owners of the reserve were likely to object if the Crown acquired it under the public works legislation.[299]

In March 1947, the court forwarded the minutes of the 1888 hearing to Public Works. The registrar had no other definite information:

> Most of the owners are dead and I do not know the addresses of those who may be alive but it would appear that all the owners and their probable successors live or lived in the Wanganui or Taranaki districts.
>
> I am not in a position to advise whether the Native owners would object to the acquisition of the land by the Crown.[300]

Whareroa Pā had become the forgotten reserve, very clearly a consequence of the small size of the original cultivation reserve and of the piecemeal sales that followed its individualisation of title. In 1948, the Māori Affairs Department advised the Ministry of Works that the court's orders for Whareroa Pā had never been signed, and no boundaries or area had been assigned to its three tribal subdivisions. No successors had been appointed since the original title order in 1888. Māori ownership was therefore simply set aside.[301] Neither the department nor the registrar investigated further or tried to locate any tribal representatives or probable successors. The Under-Secretary for Māori Affairs 'gave permission for the Crown to acquire the block, based on the Māori Land Court registrar's advice that "there seems to be no special reasons of policy or expediency why this land should not be taken"'.[302] After receipt of this advice, the district engineer reported to the Acting Commissioner of Works about Whareroa Pā (and one of the Wainui blocks): 'The land is no title Maori-owned and the Department of Maori Affairs sees no reason why these areas should not be taken.'[303]

In November 1948, the Crown gave notice of its intention to take Whareroa Pā for 'better utilisation'.[304] The Finance (no 2) Act 1945 had given the Crown 'very wide' powers to take land under the Public Works Act 1928.[305] Any land could be

299. Bassett and Kay, 'Public Works Issues' (doc A211), pp 337–340
300. Registrar to Under-secretary, Public Works, 18 March 1947 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF 5479)
301. Bassett and Kay, 'Public Works Issues' (doc A211), pp 343–344
302. Bassett and Kay, 'Public Works Issues' (doc A211), p 344
303. District engineer to Acting Commissioner of Works, 26 October 1948 ((Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF 5370)
304. Bassett and Kay, 'Public Works Issues' (doc A211), p 344
305. Bassett and Kay, 'Public Works Issues' (doc A211), p 32

taken for the purposes of 'subdivision, development, regrouping, or better utilisation'. The Minister was empowered to 'carry out the subdivision of land, the regrouping of land, and the improvement of and development of land for industrial, commercial, residential, and recreational purposes'.[306] Historian Cathy Marr noted: 'Just in case, the Governor-General also had the power under the same [Finance] Act, to declare by Order in Council, that any work or undertaking was a public work for the purposes of the [Public Works] Act'.[307] These very broad powers were coupled with the fact that, under the Public Works Act 1928, the taking authority was not required to notify owners directly and give an opportunity to object if the land was not registered under the Land Transfer Act. Most Māori land was not registered. Notification in those cases was restricted to the newspapers.[308] Whareroa Pā, where the orders had not been signed and the partition not formally carried out, would not have been registered under the Land Transfer Act.

What this meant was that the Crown could take Whareroa Pā for the extremely broad and undefined purpose of 'better utilisation', and the only notification needed was a notice in the newspapers. This was because the title was not registered under the Land Transfer Act. Indeed, the Crown was aware that the title had not even been completed and that there were no currently identified owners. Instead of initiating steps to consult with tribal leaders to identify likely successors and rectify this omission, the Crown took advantage of it to take the land without opposition. Heather Bassett and Richard Kay examined the relevant files and concluded that there was no record of Works attempting to contact the owners or any possible representatives. The notice was advertised in the *Evening Post* and the *Southern Cross*, even though the registrar suggested that any probable successors would be living in Taranaki or Whanganui. Unsurprisingly, no objections were received and the land was gazetted as taken for better utilisation in May 1949.[309]

3.6.5.5 *The alienation of the other Wainui purchase reserves*

The Whareroa reserves were granted to individuals of Ngāti Mutunga, Ngāti Maru, and Puketapu, which are all groups acknowledged as part of Te Ātiawa/Ngāti Awa ki Kāpiti (see chapter 2). The other Wainui purchase reserves, however, were awarded to Ngāti Toa, as far as our evidence allows us to examine the ownership of those reserves. We noted earlier that no reserves appear to have been made for the Te Ātiawa/Ngāti Awa of Paripari and Tipapa.

For completeness' sake, we note the alienation of the other Wainui purchase reserves as follows, although we think that these reserves were for Ngāti Toa:

- Te Rongo-o-te-wera, also called Te Ramaroa (168 acres): Described by Carkeek as a 'place at Paekakariki on the eastern side of the main highway about a mile inland from the site of Wainui pa on the coast'. It consisted of

306. Finance (no 2) Act 1945, s 30(1)
307. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981* (Wellington: Waitangi Tribunal, 1997), p 135
308. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 847–848
309. Bassett and Kay, 'Public Works Issues' (doc A211), pp 341, 344–345

several cultivation grounds and was leased by Ngāti Toa to the Mackay family in 1876. It was awarded by the court to 11 individuals in 1885 and sold to Archibald, William, and Alexander Mackay in 1887.[310]

- Te Puka (60 acres): Aperahama Mira of Ngāti Toa was described by Carkeek as the 'main claimant' to this land in 1872 but this small reserve was not actually put through the court until 1888. Aperahama Mira was one of the five people awarded this reserve by the court. Te Puka was the only one of the reserves to have restrictions placed on its title; it was made 'absolutely inalienable' except by leases of up to 21 years but sale was still possible so long as the consent of the Governor was obtained. In 1891, the owners applied for the restrictions to be removed, possibly so that a longer lease could be arranged. Researchers in this inquiry could not find details of how or when the reserve was sold, except to note that it was no longer in Māori ownership by 1916.[311]
- Wainui township (155 acres): Wainui was the centre of Ngāti Haumia occupation in the district and a model village had been planned for Wainui in the late 1840s (see above), which may explain why it was referred to as 'Wainui township'. This reserve was also put through the court in 1888 and awarded to 16 individuals with small shares – nine owners received about 16 acres each, two had three-quarters of an acre, and the remaining five only had a quarter-acre each. Wainui was partitioned in 1911 and half of it was sold by 1925. The remainder was either sold or taken under the Public Works Act 1928 for Queen Elizabeth Park. Only 10 perches are still in Māori ownership as an urupā.[312]
- Paekākāriki settlement and cultivations: The court initially awarded title for the Paekākāriki reserve in 1888 but the title was not finalised until 1896. At that point, five individuals were confirmed as owners of Paekakariki 1 (49a or 16p) and another five as owners of Paekakariki 2 (85a 2r 8p). The latter included Wi Parata and Hemi Matenga (apparently for their Ngāti Toa affiliations). These blocks were further partitioned and had mostly been sold by 1927, with the final areas taken by the Crown for public works in the mid-twentieth century.[313]

Thus, apart from a couple of tiny pieces retained for urupā, none of the Wainui reserves remain in Māori ownership.

310. Carkeek, *Kapiti Coast* (doc A114), p 139; Tony Walzl, 'Block Research Narratives: Ngatiawa Edition', June 2018 (doc A203), p 132; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 47

311. Carkeek, *Kapiti Coast* (doc A114), p 137; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 45–47

312. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 43–44, 49–51

313. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 41–43; Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), pp 169–172

3.6.6 The Crown resumes its attempt to purchase the Waikanae block

Following the completion of the Whareroa purchase in 1858 and the Wainui purchase in 1859, the Crown attempted to complete the purchase of the entire Te Ātiawa/Ngāti Awa ki Kāpiti lands. This demonstrates the Crown's relentless drive to extinguish Māori title over whole districts save for a handful of small reserves, also exhibited at this time across the whole of the South Island and elsewhere in the lower North Island.[314] As discussed above, the purchase of the Waikanae end of Te Ātiawa/Ngāti Awa ki Kāpiti lands had fallen over because:

- Searancke was not prepared to accept the extent of reserves stipulated by the 'eka eka' chiefs and generally agreed to by the rest;
- McLean refused to approve a higher price than sixpence an acre, which was significantly lower than the price that Te Ātiawa/Ngāti Awa were prepared to accept; and
- there was still significant opposition to the sale of all their lands which Searancke had not been able to overcome, despite offering a higher price and agreeing to a greater quantity of land to be reserved than he wanted.

Following the completion of the Wainui purchase, Searancke returned to Waikanae in August 1859 and tried to complete the remainder of the purchase there. He sought to force the chiefs' hand by starting to survey the Waikanae block as if the purchase had been finalised, which he saw as 'the only practical way of bringing the matter to an issue'.[315] But after a week of attempting to start the survey, he found that 'a large number of Natives headed by Wi Tamihana[316] were still violently opposing the sale'. As a result, one of the key proponents of sale, Eruini Te Tupe, told Searancke that 'as the sale if carried out would breed disputes etc etc among them and that he (consequently) would therefore rather withdraw his offer of sale'. Searancke reported to McLean: 'I determined to relinquish an affair which I feared would lead to Bloodshed and therefore left it'.[317] Searanck carried on with other purchases, leaving Waikanae alone for the time being.

Tony Walzl commented that the Crown had withdrawn similarly in 1853 but never agreed to stop its purchase efforts altogether:

> [T]he Ngatiawa community remaining at Waikanae remained in a state of agitation for over a decade as the Crown maintained its preparedness to acquire land there by purchase. The Crown's viewpoint appears to be that as long as offers were being made, the negotiations would be kept open. This positioning by the Crown, meant that the varied perspectives over the nature of customary rights between Ngati Toa and Ngatiawa, as well as within Ngatiawa, came to the fore. With the Crown keeping the matter open, and trying on at least a half dozen different occasions to negotiate

314. See Waitangi Tribunal, *Te Tau Ihu*, vol 1, chs 5–6; Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 2, chs 6, 8–12; vol 3, chs 13, 15; Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, ch 3A; Waitangi Tribunal, *Mohaka ki Ahuriri*, vol 1, chs 4–6; Boast, 'Ngati Toa Lands Research Project Report One' (doc A210), chs 7–8

315. Searancke to McLean, 5 August 1859, MS-Papers 0032–0565, Alexander Turnbull Library

316. This is probably Wi Tamihana Te Neke.

317. Searancke to McLean, 5 August 1859 (Walzl, 'Ngatiawa' (doc A194), pp 280–281)

> for land, tensions between and within iwi were evident. Eventually, some land in the south of the district was acquired primarily as the result of the actions within Ngati Toa. Ngatiawa held onto their northern lands at Waikanae.
>
> Although, overall, there is little detailed evidence on the negotiations that occurred, and the many discussions that took place in relation to the nature of customary rights over the decade-long negotiation period, those snippets that do exist reveal that completely different understandings were in place. These varying viewpoints brought dissension which the Crown sought to ride out in the hope of eventually acquiring land. Whenever opposition reached a critical point (such as the declared opposition at hui attended by Grey in 1851 and 1853), then the negotiations would be suspended for a time only to be picked up at a later date.[318]

While Searancke and McLean may have intended to resume purchase negotiations after things had settled down at Waikanae, the Crown's attempts to purchase the remaining lands of Te Ātiawa/Ngāti Awa ki Kāpiti were in fact brought to a halt the following year. This was due to the widespread support of the Kīngitanga in 1860 at all the Waikanae settlements. In June of that year, Searancke recommended suspending all purchasing in the Wellington region, reporting to McLean:

> two-thirds of sums of money paid on account of land during the year 1859 and to the end of March, 1860, has been devoted solely to the purchase of arms and ammunition; also that large sums of money have been forwarded to Waikato for the use and purpose of the Maori King.[319]

We discuss these new developments in section 3.7.

We turn next to consider whether the Crown's purchase and reserve-making practices in the Whareroa and Wainui purchases conformed to the Crown's own standards at the time. Our Treaty analysis comes later in section 3.8.

3.6.7 Did the Whareroa and Wainui purchases meet the Crown's standards for purchasing?

3.6.7.1 *Standards for Crown pre-emption purchasing*

Crown counsel submitted that nineteenth-century Crown actions should not be judged by today's standards, and that policy alternatives available to the Crown at the time should be considered.[320] In the 1840s and 1850s, the Crown developed a series of official standards or expectations for:

- the Crown's protection of Māori and their interests;
- the conduct of purchases of Māori land by Crown officials; and
- the reservation of sufficient land for the vendors' present and future needs.

318. Walzl, 'Ngatiawa' (doc A194), p 377
319. Searancke to McLean, 18 June 1860 (Anderson and Pickens, *Wellington District* (doc A165), p 87)
320. Crown counsel, closing submissions (paper 3.3.60), pp 14–16

The Central North Island Tribunal quoted Dr Angela Ballara on this point, who stated that many of the 'publicly acknowledged and promulgated standards of official behaviour in land purchasing' in the nineteenth century were 'much higher' than is sometimes acknowledged. These standards were 'in accord with the Treaty of Waitangi, and with Lord Normanby's instructions of 1839 to Lieutenant Governor Hobson out of which the terms of the Treaty were constructed'. 'The problem', she argued, 'was not that nineteenth-century standards of official behaviour were not based on the Treaty, but that these acknowledged Treaty-based standards were often knowingly breached or ignored by Crown officials'.[321]

Normanby's instructions gave the earliest official indication of the standards required for Crown purchasing:

> it will be your duty to obtain, by fair and equal contracts with the Natives, the Cession to the Crown of such Waste Lands as may be progressively required for the occupation of Settlers resorting to New Zealand. 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 . . . [Material about the resale of lands funding colonisation] To the Natives or their Chiefs much of the Land of the Country is of no actual use, and in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased, by the introduction of Capital and of Settlers from this Country. In the benefits of that increase the Natives themselves will gradually participate.
>
> All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of Land by the Crown for the future Settlement of British Subjects must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves. To secure the observance of this rule will be one of the first duties of their official protector.[322]

In brief, therefore, the British Government in establishing the New Zealand colony stated its clear instruction and expectation that:

- purchases would be conducted on the principles of sincerity, justice, and good faith;

321. Angela Ballara, 'Tribal Landscape Overview, c1800–1900 in the Taupo, Rotorua, Kaingaroa, and National Park Inquiry Districts', 2004, pp 640–641 (Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 182)

322. Normanby to Hobson, 14 August 1839 (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Brooker and Friend Ltd, 1987), p 196)

- purchases must constitute fair and equal contracts;
- purchasers must take care that Māori vendors did not enter into sale agreements that injured their interests;
- purchasers must only buy land which was not necessary or 'highly conducive' to the vendors' 'comfort, safety or subsistence'; and
- specially appointed protectors would watch over the interests of the vendors and ensure that they did not injure themselves by selling land that they needed.

Later Secretaries of State for the Colonies added to these instructions. Lord John Russell, for example, instructed in 1840 that the 'protection of Maori interests was a sacred duty', and that Māori land should be registered so that the Government could 'investigate what parts Maori needed to retain'. He further instructed that any disputes between Māori as to land should be investigated by commissioners, and that the protectors would act as 'advocates and attorneys for Maori' in such investigations.[323] When Sir George Grey was appointed as Governor in 1845, Lord Stanley instructed him to carry out the instructions of both Normanby and Russell, and that he must 'honourably and scrupulously fulfil the conditions of the treaty of Waitangi'.[324] Land was supposed to be investigated and registered prior to Crown purchase, so that the Crown could only buy from Māori with a proven, registered title.[325]

We have already mentioned a number of the Crown's standards or expectations for purchasing earlier in this chapter. In section 3.5.1, we noted Governor Grey's letter to the Te Ātiawa/Ngāti Awa chiefs in 1846 assuring them of the Queen's promises of protection:

> The Queen has directed me to do all in my power to ensure your safety and happiness. Maoris and Europeans shall be equally protected and live under equal Laws, both of them are alike subjects of the Queen and entitled to her favor and care. The Maoris shall be protected in all their properties and possessions, and no one shall be allowed to take anything from them or to injure them.[326]

The Crown's pre-emptive power to buy land gave it all the advantages of a monopoly, especially since the Native Land Purchase Ordinance 1846 made the leasing of Māori land illegal as an alternative to sale.[327] The Queen's promises of protection in this context meant that the Governor and his officials had to be especially careful in how they exercised that pre-emptive power.

In section 3.6.3.1, we discussed Donald McLean's statement to the New Munster officials in 1850, when land was first offered by Arama Karaka Mitikakau at

323. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 291
324. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 294
325. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 294
326. Grey to the 'chiefs of Ngatitoa, Ngatiawa & Ngatimutunga', no date (c January 1846) (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 739)
327. Native Land Purchase Ordinance 1846, preamble and cl 1; Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 28

Whareroa, that the rights of both the 'selling party' and their opponents must first be 'fairly established according to the prevailing customs of the country'. This had to be done before a purchase could occur.[328] Similarly, in the same section, we noted Governor Grey's statement at the 1851 hui that 'he did not wish to buy except from willing sellers, with a perfect title'. The making of this declaration was described at the time as necessary for 'strengthening the native confidence in the justice of the Government'.[329] Octavius Hadfield, however, warned the Governor in 1856 that Crown practice was not living up to this official standard. In his view, purchase agents were selecting groups to deal with and accepting the claims of those who were 'more disposed to sell'. They were not operating on the basis of 'any intelligible principle as to ownership of the land'. There was, he said, 'nothing more likely than this to lessen their respect for law, or to lead to disaffection with the Government'.[330]

The statements from Grey and McLean quoted above reflected the instructions of Normanby, Russell, and Stanley in the 1840s. But some changes in practice occurred on the ground in the 1840s and 1850s. First, Grey abolished the protectorate in 1846, removing a key part of the framework for protecting the interests of Māori vendors.[331] Secondly, no registration of titles occurred. Rather, the Crown developed a practice in the early to mid-1840s of holding large hui at which all claims were discussed and considered. In the North Island, this method was used originally in conjunction with purchases of relatively small blocks. The process of holding large hui of all claimants continued for a time. But, under Grey in particular, the Crown began extinguishing claims across large districts rather than buying smaller, more defined blocks of land from assemblies of all right-holders. This development was partly influenced by the instructions of Earl Grey, who considered that Māori had no claim to 'unoccupied' (that is, uncultivated) 'waste lands'.[332]

Nonetheless, the fundamental principle developed in the 1840s was reaffirmed by both Earl Grey and Governor Grey in 1848: 'In purchasing land, it [the Crown] had to identify the correct right holders under Maori law, and the nature of their rights under Maori law, and provide for their free and informed consent to the alienation of those rights to others.'[333] This is one of the standards against which we assess the Wainui and Whareroa purchases.

3.6.7.2 *Application to Searancke's purchase of Whareroa and Wainui*

The Crown's purchase policies and practices almost never lived up to the official standards discussed in the previous section. The Whareroa and Wainui purchases were no exception. In 1858, Searancke began by trying to purchase a district of

328. McLean to the New Munster Colonial Secretary, 26 November 1850, AJHR, 1861, C-1, p 258; Anderson and Pickens, *Wellington District* (doc A165), p 69
329. *New Zealander*, 12 April 1851 (Walzl, 'Ngatiawa' (doc A194), pp 242–243)
330. Hadfield to Gore Browne, 15 April 1856 (Walzl, 'Ngatiawa' (doc A194), p 272)
331. Waitangi Tribunal, *Ngai Tahu Report*, vol 2, pp 271–272, 634
332. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 292–304
333. Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 303

over 100,000 acres from Te Ātiawa/Ngāti Awa and Ngāti Toa. This 'blanket' purchase of all the rights of an iwi in a district was typical of the 1850s. If successful, it would have left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless. When Searancke encountered too much opposition to continue with it, however, he went to Porirua and Wainui to purchase one end of the district from Ngāti Toa alone; the Whareroa block in November 1858 and the Wainui block in June 1859. Having decided to only purchase part of the original Waikanae block, the Crown needed to ensure it was dealing with all of the customary owners of that part. Instead, Searancke followed a strategy of excluding Te Ātiawa/Ngāti Awa, and this strategy facilitated the Crown's acquisition of some 64,000 acres of land.

As discussed above, some Te Ātiawa/Ngāti Awa inhabitants of the Whareroa block did not even know that their lands north of the Whareroa Stream had been sold. The evidence suggests that Ngāti Maru, for example, were unaware in 1859 that their pā at Whareroa had been alienated in the 1858 Whareroa/Mataihuka purchase. When they did become aware of the Wainui purchase in 1859, and some chiefs and younger people opposed it, Ngāti Toa (not the Crown) negotiated and included some of them. According to the Native Land Court evidence of both Wi Parata from the Ngāti Toa side, and Hamapiria Maiho from the Ngāti Maru side, the continuing opposition at Whareroa was ignored. The opponents' rejected share of the purchase money was simply taken back by Ngāti Toa (see section 3.6.4.1).

Searancke did not call a hui of all interested chiefs and peoples, nor did the Crown hold any prior inquiry as to the nature or extent of rights in these two blocks. Instead, the Crown purchased from Ngāti Toa and relied on that iwi to sort out the rights of others – with no Crown oversight or involvement to ensure that all valid right-holders consented to the purchase and its reserve arrangements. As noted, Te Ātiawa/Ngāti Awa north of Whareroa Pā were almost entirely excluded but some Ngāti Maru leaders from Whareroa did eventually participate in the Wainui purchase over the objections of others.

For all these reasons, it is clear to us that the Whareroa and Wainui purchases did not meet the Crown's standards of the time. Grey's promise that he would only buy from 'willing sellers with a perfect title' was not honoured in either the Whareroa or the Wainui purchase. In saying this, we acknowledge the evidence that Ngāti Toa had valid customary rights in these blocks, and that the claims of Ngāti Toa are outside the jurisdiction of this Tribunal.

3.6.7.3 *Standards for reserve-making*

In the case of reserves, we have already noted Lord Normanby's instructions that the Governor must not permit Māori to 'enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves'. Nor was the Governor permitted to purchase any land which was essential to 'their own comfort, safety or subsistence'. The Crown was supposed to limit its purchases to land that Māori could sell 'without distress or serious inconvenience

to themselves'.[334] In terms of what these requirements meant in practice, Crown officials developed a fundamental principle: reserves should be made in all purchases, and those reserves must be sufficient for the 'present and future needs' of the vendors.[335]

The question arose as to what constituted sufficient land for 'present and future needs'? At the time, officials understood this in its most basic form as land for cultivations – that is, for crops such as kūmara and potatoes, which were a staple source of food and trade for Māori communities in the 1840s–1850s. It was also generally accepted in the early 1840s that pā, kāinga, and urupā should be reserved. The clearest example of this is the New Zealand Company transactions, where FitzRoy's Crown grants to the company in 1845 reserved all pā (including dwellings outside the pā), cultivations, and urupā, although Grey later revised this position in favour of the company.[336]

In addition to reserving land for dwellings and cultivation, there was some recognition from the Crown at the time that Māori required sufficient land to maintain their customary resource use, at least for the foreseeable future.[337] As noted by the Te Tau Ihu Tribunal, Governor Grey reported to the Colonial Office in 1847:

> The natives do not support themselves solely by cultivation, but from fern-root, – from fishing, – from eel ponds, – from taking ducks, – from hunting wild pigs, for which they require extensive runs, – and by such like pursuits. To deprive them of their wild lands, and to limit them to lands for the purpose of cultivation, is in fact, to cut off from them some of their most important means of subsistence, and they cannot be readily and abruptly forced into becoming a solely agricultural people. Such an attempt would be unjust, and it must, for the present, fail, because the natives would not submit to it: indeed they could not do so, for they are not yet, to a sufficient extent, provided even with the most simple agricultural implements; nor have they been instructed in the use of these.[338]

This was a crucial acknowledgement of what Māori required for their 'present and future needs'. According to Professor Alan Ward, however, the Crown only had a 'brief dalliance' in practice with 'making large reserves for the continuance of the traditional Maori economy'.[339] Crown purchase agents on the ground sometimes saw the need to set aside various spots as fishing reserves. Such reserves

334. Normanby to Hobson, 14 August 1839 (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, p 196)

335. See, for example, B Stirling and E Subasic, 'McLean Project – Complete Table', not dated (Crown Forestry Rental Trust, McLean project document bank, vol 1 (doc A3(1)), pp 26, 31, 88, 107, 139, 140, 168, 174, 297, 320)

336. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa*, pp 131–132, 185–186, 251–254; Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 219–220

337. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 102

338. Governor Grey to Earl Grey, 7 April 1847 (Waitangi Tribunal, *Te Tau Ihu*, vol 1, p 301)

339. Alan Ward, *National Overview*, 3 vols (Wellington: Waitangi Tribunal, 1997), vol 2, p 134

were created, for example, in the South Island reserves of the 1840s and 1850s.[340] In the Wairarapa district, 'key coastal fishing sites' were also reserved where they were not expected to 'interfere with settlement'.[341]

The Wairarapa Tribunal summarised these early standards for reserve-making in this way:

> Circulating in the early colonial period in New Zealand were many opinions about what needed to be done to secure the long-term welfare of Māori.
>
> At their most expansive, Crown officials contemplated that Māori would keep a range of lands and resources: forested lands in which they could snare birds, hunt, gather firewood and rongoā; narrow strips of coastland and river valleys for shifting their cultivations; and their important fishing spots, both freshwater and coastal. Such thinkers accepted that if reserving sufficient lands to ensure the continuation of traditional practices proved impossible in the face of settlement, Māori should be actively assisted by the Government to make up for that loss. They also thought it important to ensure Māori retained land near, or in, new settlements. Sometimes, they considered the quality and quantity of land they would need.[342]

Increasingly, however, the 'future wants' of vendor tribes were interpreted by Crown officials as sufficient land for 'subsistence agriculture' only (growing crops for food with no surplus).[343]

Finally, the retention of sufficient land to participate in the colonial economy, usually cattle or sheep farming at this time, was crucial for the present and future needs of Māori vendors. They would also need enough land to lease some for income and to gain capital to develop the rest. In this respect, Governor Grey refused the advice of the Legislative Council of New Ulster that he should allow Māori to lease land directly to settlers.[344] Instead, he told the council in 1849 that he would buy 'large tracts of land from the Natives, (on the plan that has, by my directions, been pursued in the South of New Zealand [New Munster province])', which involved 'making ample reserves for the Natives, which they would be at liberty to lease to Europeans'.[345] He issued instructions in 1850 to ensure that 'sufficient reserves are made for the present and future needs of the Natives, for which they will receive conditional titles authorising them to lease such portions of the land as the Government may not think necessary for their present wants'.[346] He clarified that reserves were thus 'in theory to provide both for the subsistence needs and revenue needs of Maori'. In reality, Grey did not enforce these instructions and this policy was not carried out to any considerable extent.[347]

340. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 554, 572, 594–595, 723
341. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 223
342. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 259
343. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 259
344. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, pp 57–58
345. *New Zealander*, 28 August 1849 (Waitangi Tribunal, *Wairarapa ki Tararua*, vol 1, p 58)
346. Grey to Colonial Secretary, 25 October 1850 (Ward, *National Overview*, vol 2, p 141)
347. Ward, *National Overview*, vol 2, p 141

From reports such as Kemp's in 1850 (see section 3.6.3), the Crown was aware that Māori in the Whareroa and Wainui blocks as elsewhere were beginning to keep livestock and had the potential to become pastoral farmers if they retained enough land for that purpose. But the reservation of land for pastoral farming was not a feature of either Crown theory or practice in the 1850s. How, then, if Māori were reduced to subsistence farmers on small reserves, would they benefit from settlement through the increased value of their remaining lands? After all, that idea was a key part of the Crown's justification for purchasing large amounts of land at low prices.[348]

3.6.7.4 *Application to the Whareroa and Wainui purchase reserves*

In terms of Whareroa and Wainui, McLean reminded Searancke in 1858 of the fundamental standard for reserve-making:

> *Native Reserves to be of Sufficient Extent*
> I need scarcely draw your attention to the necessity of having reserves of sufficient extent for the present and future requirements of the Natives themselves set apart in the blocks now under negotiation in your district.[349]

This injunction, however, fell on deaf ears. In addition, neither McLean nor the Governor queried the miniscule reserves created by Searancke in the Whareroa and Wainui purchases.

For the Whareroa purchase in 1858, the Mataihuka reserve was only 210 acres, which amounted to 0.6 per cent of the land alienated in that purchase. The other reserve was 50 acres for the Puketapu chief Tamati Whakapakeke. The sum total of reserves in the Whareroa/Mataihuka block was therefore 260 acres (only 0.76 per cent of the block).

The Mataihuka reserve, although supposedly made inalienable under the Native Reserves Act 1856, was soon sold in 1866. The Governor gave his express permission for the reserve to be sold, although the evidence does not enable us to determine who wanted to sell this last piece of land or who was paid for it. Worryingly, officials at the time referred to the Wainui vendors, whereas this reserve was not in the Wainui block, nor was it inhabited by the Ngāti Toa of Wainui and Porirua. The sale meant that no land base was retained for any future development in this 34,000-acre block. Nor did Searancke reserve any urupā, which was a matter of great concern to petitioners in the early decades of the twentieth century (see section 3.6.4.3). No fishing spots or any other resource-use areas were reserved for the use of Puketapu, who had rights in this block even though they were not the inhabitants of Mataihuka. Similarly, the groups with rights originating from

348. Normanby to Hobson, 14 August 1839 (Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, p 196)

349. McLean to Searancke, 10 October 1858 (Crown Forestry Rental Trust, McLean project document bank, vol 4 (doc A3(4)), p 354)

Whareroa Pā in the southern half of the block retained none of this land for any present or future needs.

In respect of the Wainui purchase, Searancke did create reserves for some of the occupants. We note our uncertainty as to whether any land was reserved for the Tipapa or Paripari people (see above). For the Whareroa groups – Ngāti Maru, Ngāti Mutunga, and Puketapu – a residence area of 18 acres and cultivation lands consisting of about 260 acres were reserved. This represented about one per cent of the block's area and included no land for either customary resource-use or commercial development, both of which were crucial components for healthy, thriving Māori communities at the time and since. The 260-acre cultivation reserve was hardly adequate for even the present needs of the community, since each acknowledged owner received about 10 acres per person (with 20 acres for the two chiefs). We note by way of comparison that the New Zealand Company had a policy of reserving at least one-tenth of all land acquired by it (see section 3.4.3). The Native Land Act 1873, of which Donald McLean was the architect, set a minimum of 50 acres per individual in addition to tribal reserves as a standard.[350] Even this figure took no account of issues such as 'location, and quality of land needed for workable farms'.[351]

There is also the question of how many people lived at Whareroa in 1859. The Native Land Court awarded title to 24 individuals, but the population at the time of the Wainui purchase was much larger than this number. Hamapiria Maiho of Ngāti Maru told the court in 1888 that the reserve had been intended for about 100 people.

One of the factors that influenced Searancke in 1858–59 was his belief that many of the inhabitants intended to return to Taranaki. It was clear, however, that a community remained settled at Whareroa until the early decades of the twentieth century, when the sale of pieces of the cultivation land meant that even a very small community could no longer survive off their reserve. It is significant that almost the whole of the reserve was purchased by just two neighbouring farmers (to supplement their land), which shows how little scope there was for the Whareroa reserve to meet the future needs of a whole community.

The other Wainui reserves were similarly limited in scope.

Finally, we note that almost none of the reserves were protected against alienation. As Crown counsel conceded, individualisation of title made Māori communal land vulnerable to fragmentation and alienation. We saw this process very clearly in the Whareroa cultivation reserve (see section 3.6.5.4). Only Mataihuka, which was placed under the Native Reserves Act 1856, and Te Puka had restrictions on their titles. These particular restrictions, however, were ineffective (see sections 3.6.4.2 and 3.6.5.4).

350. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 439, 630–631

351. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 457

3.6.7.5 *Conclusion*

In sum, the Crown held no inquiry as to the customary ownership of the Whareroa and Wainui blocks. It also failed to identify, seek the consent of, or pay the Te Ātiawa/Ngāti Awa right-holders. Some Ngāti Maru at Whareroa Pā did agree to the Wainui purchase when approached by Ngāti Toa but others did not and were simply ignored.

The cultivation reserves were too small, no land was reserved for the customary use of resources, no land was reserved for leasing or commercial development, and no urupā were reserved other than small pieces later set aside in the residence or cultivation reserves. By the Crown's standards of the time, the reserves set aside from the Whareroa and Wainui purchases were clearly insufficient for the present and future needs of the resident Māori communities and those with wider resource-use rights in the blocks (including Puketapu). In our view, it must have been clear to Searancke's immediate superior, Donald McLean, and to Governor Gore Browne that reserving such a tiny quantity of these two blocks was inadequate.

The Crown's purchase practices and policies, as exemplified in the Waikanae, Whareroa, and Wainui blocks, drew increasing resistance across multiple iwi in the 1850s. One result was the development of the Kīngitanga as a means for expressing that resistance and (more generally) Māori authority over their lands and affairs. The Kīngitanga was adopted enthusiastically by Te Ātiawa/Ngāti Awa ki Kāpiti in 1860, as we discuss in the next section.

3.7 The Kīngitanga and the Impact of War in the 1860s

3.7.1 Introduction

In this section, we address the impact on Waikanae of events elsewhere in the North Island in the late 1850s and 1860s. These included the establishment of a Māori King, the Waitara purchase of 1859, the first Taranaki war, the Crown's invasion of the Waikato in 1863, and the Crown's declaration in 1864 that all supporters of the King were rebels facing the prospect of confiscation.

Fundamental issues underlay these events that had profound implications for Te Ātiawa/Ngāti Awa ki Kāpiti. One such issue was whether the Crown would recognise the Māori right to govern their lands and their tribal affairs by their own chosen institutions; for the Waikanae and Whareroa communities, this was the Kīngitanga rūnanga system. Another key issue was the unification of tribes under the King to protect themselves against massive and devastating land loss. The Whareroa 'Kingites' were already virtually landless by 1860, and the Kīngitanga promised a vehicle through which the Te Ātiawa/Ngāti Awa lands at Waikanae could be preserved in the face of unrelenting Crown purchasing. Thirdly, there was the issue of whether Governor Grey could reach an accommodation with the Māori King without resorting to war, and also whether his alternative 'New Institutions' might provide a better model of rūnanga for Waikanae, recognised and funded by the Crown.

We explore these issues in this section.

3.7.2 The establishment of the Kīngitanga

According to Waikato traditions, the earliest inspiration for the Kīngitanga was the chief Pirikawau.[352] In his evidence to the Compensation Court in 1866, he stated that he was of Ngāti Kura and Ngāti Tuiti hapū.[353] Pirikawau was educated by Hadfield and visited England in 1843–45 in the company of Beauchamp Halswell, son of the Wellington commissioner of Native Reserves.[354] There are various versions of the story, but apparently Pirikawau was impressed with the might of the British monarchy. He promoted the idea among the chiefs in 1845 that Māori must have a king – an idea later taken up in the 1850s by his contemporaries in the Kāpiti region, Matene Te Whiwhi and Tamihana Te Rauparaha.[355] One story from Whanganui chief Topine Te Mamaku stated that Pirikawau originated the Kīngitanga by sending circular letters home to many chiefs that Europeans had enslaved native races overseas.[356] Another story from Sir John Te Herekiekie Grace of Tūwharetoa was that Pirikawau, who accompanied Sir George Grey to South Africa as his secretary in 1853, wrote home in 1854 to warn that the fate of African tribes could be avoided by uniting under a king.[357]

Dr Tom Roa told the Te Rohe Pōtae Tribunal that Māori established the Kīngitanga 'to retain the land, to stop the shedding of blood and to maintain Mana Māori Motuhake'.[358] The concerns about Māori authority, colonisation, and Crown purchasing were widespread and many North Island iwi were involved.[359] These concerns were 'exacerbated by the exclusion of rangatira from the exercise of state power, and the exclusion of all Māori from representation in the settler Parliament, which first sat in Auckland in 1854'.[360] The search for a king culminated in the Pūkawa hui in 1856, called by Iwikau Te Heuheu of Ngāti Tūwharetoa. The Waikato ariki Te Wherowhero was chosen at this hui.[361]

At our Nga Kōrero Tuku Iho hearing at Whakarongotai Marae, Paora Tuhari Ropata explained how Te Heuheu

352. Vincent O'Malley, *The Great War for New Zealand: Waikato, 1800–2000* (Wellington: Bridget Williams Books, 2016), pp 77–78

353. *Taranaki Herald*, 23 June 1866 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 3221 [3188]). This is a transcript. The original article states 'Ngati Tutaeiti', which has been corrected in the transcript as 'Ngati Tuiti'. These particular affiliations were stressed by the claimant witness, Ms Tamati-Mullen Mack. Pirikawau has also been described as a Te Ātiawa and Ngāti Toa chief.

354. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), pp 21–22

355. O'Malley, *The Great War for New Zealand*, p 78

356. G H Scholefield, ed, *A Dictionary of New Zealand Biography*, 1940 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 3312 [3279])

357. Alex Frame, *Grey and Iwikau: A Journey into Custom/Kerei Raua ko Iwikau: Te Haerenga me nga Tikanga* (Wellington: Victoria University Press, 2002), pp 19–20; Vincent O'Malley, 'Te Rohe Potae Political Engagement, 1840–1863', 2010 (Wai 898 R01, doc A23), p 174

358. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2018), pt 1, p 372

359. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 224–225

360. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 373

361. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 373–374

called all the rangatira o te motu ki tētahi hui i Pūkawa, i te taha o te moana a Taupō. Kei reira rātou e noho tahi ana, e kōrero tahi ana, mō te Kīngitanga. Nā rātou i kī atu ki a Pōtatau Te Wherowero, 'Māu e tū ake hei kīngi mā mātou te iwi Māori, engari ka whakakahorengia e Pōtatau Te Wherowhero ki a rātou. I kī a ia ki a rātou, 'Me whakaae koutou ki tēnei, māku hei tū ake hei kīngi. Whakautu – kāti rā te whakautu a tētahi tangata ki tētahi tangata. Kāti rā te pakanga a tētahi iwi, ki tētahi iwi. Kāti rā, te hokohoko whenua.'

[Interpreter: They gathered at Pūkawa beside Taupō Lake, they gathered there, the southern end of Taupō Lake and spoke about the kaupapa establishing a Māori King. They requested that Pōtatau stand as King for all Māori, but Pōtatau refused them. He said to them, 'You must agree to this if I am to stand as King. Stop the taking of revenge one upon the other. Stop inter-tribal warfare, and cease selling your lands.']

Our Māori people were trying to establish a system to control themselves. From this coastline, Tamihana Te Rauparaha and Mātene Te Whiwhi were the two instigators of the King Movement, and it was Wiremu Tamihana who completed that. But it started down on this coastline.[362]

The Pūkawa hui was called 'Hīnana ki uta, Hīnana ki tai (search the land, search the sea)', at which there was a 'symbolic weaving of the flax strands to make one rope, representing the strength and unity of all the iwi involved'.[363] Mr Ropata explained:

Te Heuheu had dug a pole into the ground, called it Tongariro and from that pole hung strands of rope and he asked, 'Ko wai te rangatira o Ngongotahā?' And [a] man step[s] forward from Te Arawa and he said, "Nā." And that man took that rope and sealed his bond with this ōhākī and he asked for somebody from Kāpiti Island and that brings us into the picture.

So we are bound to that rope as well.[364]

In terms of Te Ātiawa/Ngāti Awa ki Kāpiti, Ben Ngaia's evidence stressed the role of Wi Tako Ngatata and the young Wi Parata in supporting the Kīngitanga:

Wi Tako orchestrated the construction of an assembly house, which became known as Puku Mahi Tamariki. The intention of this construction was to be a headquarters for Te Ati Awa supporters of the King. It was an opportunity, if the Kingitanga was to ever come to Waikanae, to house these guests amongst Te Ati Awa. It was through the drive of Wi Tako and the kinsmen of young leaders within the Kapiti district that led to the mantle of King being placed upon Potatau Te Wherowhero. Potatau, the son of Te Rauangaanga, and who was once a mortal enemy of the Ngati Raukawa, Ngati Toa, and Te Ati Awa peoples, was established as King at a gathering that took place

362. Transcript 4.1.10, pp 11–12
363. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 254
364. Transcript 4.1.10, p 12

> at Pukawa, within the Taupo region. When Wi Tako returned to his residence of Te Mako Pa [at Taita] he established one of the pillars of the Kingitanga there, named Nukutewhatewha. . . . Wi Te Kakakura Parata also became a strong supporter of the Kingitanga like his Te Ati Awa kinsmen.[365]

Wi Tako became an advocate for the Kīngitanga in the lower North Island. In 1859, he gathered 500 Māori and Pākehā in the Wairarapa to hear from Māori and Government speakers. He hoped to 'convince both races of the value of the King movement'.[366]

3.7.3 The Waitara purchase and the outbreak of war in Taranaki

As we discussed in section 3.5, Te Ātiawa/Ngāti Awa ki Kāpiti had a positive relationship with the Crown in the 1840s, especially with Governor Grey. But they were dissatisfied with their treatment by the Crown in the purchase negotiations of the 1850s.[367] This dissatisfaction was galvanised by events in Taranaki in 1859 and 1860, which have been explained in some detail by the Tribunal in its Taranaki report. The process of land purchasing in Taranaki since Te Ruru Mā Heke in 1848 had resulted in enormous pressure on those who chose to retain their lands, bitter tribal divisions, and bloodshed. In 1859, the Crown accepted an offer to sell the Waitara block from a minority of right-holders led by Te Teira, despite the determined opposition of Wiremu Kingi Te Rangitake and the majority of right-holders.[368] As will be recalled, Te Rangitake held fast to the dying wish of his father, Reretawhangawhanga, that Waitara must never be sold.[369] Governor Gore Browne insisted on forcing the purchase through in March 1860. After Te Rangitake's people obstructed the survey peacefully, the Governor's response was to declare martial law and send in his troops to occupy Waitara. This was the beginning of the first Taranaki war.[370]

The Waitara purchase and the Governor's attack provoked outrage at Waikanae. The protests were led at first by the Reverend Riwai Te Ahu, supported by the chiefs Hohepa Ngapaki, Henare Te Marau, Paora Matuawaka, Wi Aperahama, and Pinerape Te Neke.[371] In March 1860, a Te Ātiawa/Ngāti Awa rūnanga reported the result of an inter-tribal hui held that month:

> The tribes of Ngatiraukawa, Ngatitoa, Ngatiawa, Ngatiapa, Muaupoko, and Rangitane, have held a meeting to consult about the proceedings of the Governor, and William King Te Rangitake, they determined what to say; it was this – That Governor

365. Benjamin Ngaia, 'Report on Cultural and Historical Significance', p 10 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [64])
366. Catherine Maarie Amohia Love, brief of evidence, 6 June 2019 (doc F43(b)), p 10
367. Walzl, 'Ngatiawa' (doc A194), p 378; transcript 4.1.16, p [141]
368. See Waitangi Tribunal, *The Taranaki Report*, chs 2–3.
369. Walzl, 'Ngatiawa' (doc A194), p 176; Riwai Te Ahu to Superintendent Richmond, 23 June 1860 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 3153)
370. Waitangi Tribunal, *The Taranaki Report*, pp 75–77
371. Walzl, 'Ngatiawa' (doc A194), pp 380–381

> Browne must go back to England. Yes, and we say, we do not wish another Governor to be sent – who can tell whether his opinions will differ from those of Governor Browne; we like the Bishops and Clergy to govern us.[372]

The chiefs' first impulse in response to the attack on their people, therefore, was to turn the clock back to 1839, prior to the arrival of the first Governor, but the inter-tribal hui resulted in a petition with a more limited request. The March 1860 petition asked the Queen to recall the Governor immediately. The petitioners stated that Gore Browne had unjustly taken the land and attacked the Queen's loyal subjects, 'who had no wish to oppose the law, but simply to retain possession of land inherited from their ancestors, and which they had no wish to alienate'. 'We are quite sure', they added, 'that your Majesty has not sanctioned the principle that land is to be forcibly taken away from your Majesty's subjects'. No doubt recalling Grey's earlier promises of the Queen's protection, they asked the Queen to send a new Governor who would 'govern in accordance with the law, and your Majesty's instructions, that we and the white inhabitants may dwell together in peace'.[373] Octavius Hadfield commented that 'the government was lucky that one man should be seen by Māori as the problem rather than the whole of the government'.[374] This is especially the case given the initial intention to repudiate governors altogether.

The petition was signed by about 500 people from the iwi of the south-western North Island and caused a great deal of controversy. The Government blamed Hadfield for it and some Manawatū chiefs denied that they had agreed to attach their names to it. A subsequent letter with 100 signatories was sent to the Governor in June 1860, objecting to the allegation that they had not signed the petition.[375]

The British Government did not recall the Governor. Their petition having failed, Te Ātiawa/Ngāti Awa ki Kāpiti had to consider their next response. In April 1860, a delegation of Te Ātiawa, Taranaki iwi, and Ngāti Ruanui travelled from Taranaki to Waikato to put Waitara under King Potatau's protection and give their adherence to the King. They sought a flag to take back with them to hoist at Waitara.[376] In May 1860, a large hui of about 300 people was held at Ōtaki to consider whether the southern tribes would also give their adherence to the King and raise his flag in their district. Wi Tako played a leading role in the discussion, but ultimately the hui did not reach consensus as to whether to raise the flag.[377]

No inter-tribal decision having been made about the Kīngitanga, the Waikanae chiefs started a letter-writing campaign to defend the actions of Te Rangitake and deny Te Teira's ownership claims. They also asserted their own customary rights in

372. *Wellington Independent*, 19 October 1860 (Walzl, 'Ngatiawa' (doc A194), p 296)
373. Petition, 30 March 1860 (Walzl, 'Ngati Awa' (doc A194), pp 296–297. The English copy of the petition quoted here is located in Octavius Hadfield's papers.
374. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 204
375. Walzl, 'Ngatiawa' (doc A194), pp 296–297; Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 204
376. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 387–388
377. Walzl, 'Ngatiawa' (doc A194), p 297

the Waitara block, which they pointed out had not been identified or extinguished by the Crown. Although the Reverend Riwai Te Ahu and the other chiefs tried to refute Donald McLean's assertions about the nature of title to Waitara and the respective rights of Te Teira and Wiremu Kingi Te Rangitake, the Governor and the settler Parliament were determined to continue with the Waitara purchase and the war in Taranaki.[378]

By mid-1860, Te Ātiawa/Ngāti Awa ki Kāpiti were without solutions. They wrote to Isaac Featherston, the Superintendent of Wellington, in June, stating:

> What we wish to ask is this. What are we to do, who are persons living quietly, and take no part in war, when the Governor wrongfully takes away our lands? Should we look to the Queen; or to whom? We had always thought that the law afforded protection from wrong. We are at the present time wholly at a loss as to what course to adopt.[379]

This was a very real dilemma. The solution adopted by the chiefs was to turn to the Kīngitanga.

3.7.4 Te Ātiawa/Ngāti Awa ki Kāpiti turn to the Kīngitanga

In July 1860, the Governor convened a conference of chiefs at Kohimarama in Auckland, which he hoped would pass resolutions condemning Te Rangitake and the Kīngitanga.[380] Wiremu Tamihana Te Neke attended from Waikanae. He defended Te Rangitake but not the taking up of arms in Taranaki. Many Te Ātiawa/Ngāti Awa ki Kāpiti chiefs did not attend. According to Wi Parata's evidence in the Native Land Court, the chiefs attended a Kīngitanga hui in Wairarapa instead.[381] Wi Parata stated that after their return from Wairarapa, they went to Wi Tako's pā and told him that 'we would come and fetch [him] as the Gov[ernmen]t and Europeans were becoming very suspicious of him.'[382]

In September 1860, a delegation of 30 people from Whareroa and Waikanae travelled to Wi Tako's residence at Taita in the Hutt Valley. Their goal was to bring Wi Tako to Waikanae to assume leadership of the iwi in this troubled time.[383] Searancke reported to McLean that the enterprise took on a martial air:

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378. Walzl, 'Ngatiawa' (doc A194), pp 297–302; transcript 4.1.16, p [142]
379. Hoani Ngapaki and others to Superintendent of Wellington, 29 June 1860 (Walzl, 'Ngatiawa' (doc A194), p 298)
380. O'Malley, *The Great War for New Zealand*, pp 125–127
381. Walzl, 'Ngatiawa' (doc A194), pp 299, 304. Wi Parata recalled that they attended this hui at the invitation of Ngāti Kahungunu chief Te Manihera. This may be an error as Te Manihera attended Kohimarama and his biographers doubt that he supported the King: Angela Ballara and Mita Carter, 'Te Rangitakaiwaho, Te Manihera', *Dictionary of New Zealand Biography*, 1990, Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies
382. Napier Native Land Court, minute book 15, pp 173–174 (Walzl, 'Ngati Awa' (doc A194), p 304)
383. Walzl, 'Ngatiawa' (doc A194), pp 303–305

> On the 7th instant Wi Tako with about thirty seven followers in all and an escort of thirty men from Waikanae and Whareroa who had arrived two days previously left the Hutt for Waikanae, they were all mounted on horseback marching in regular order – two and two. [They] were nearly all armed with either single or double barrelled guns and the majority had either two or three Cartridge boxes full of ammunition. [I]n their centre were four drays of luggage. I subsequently spoke to Wi Tako about this threatening display, he informed me that it was against his wish but that it was not in his power to prevent it, fortunately the party started from the Hutt at an hour when there were but few travellers on the Road.[384]

Searancke also reported, however, that Wi Tako was anxious for peace and that 'no outbreak or disturbance of any sort will take place without some extraordinary provocation.'[385]

Mere Pomare stated in the Native Land Court that '[w]hen Wi Tako came he assumed the Chieftainship of Waikanae[,] he was the King's delegate'. There was also a King's rūnanga, which conducted its business in the 'big house'.[386] This was a reference to Puku Mahi Tamariki, which had been built at Tuku Rakau. The purpose of this house was 'to serve as a Whare Rūnanga or assembly house to discuss broader matters associated with the Kīngitanga and the retention of Maori land and Mana Motuhake [Māori autonomy]'.[387] Wi Parata became 'a scribe and secretary to Wi Tako in capturing the minutes and notes of meetings had with respect to the Kingitanga'.[388] According to Ben Ngaia, it was at this time that Wi Parata Te Kakakura 'began to rise to prominence'.[389]

Wi Tako's arrival resulted in a flurry of planting at Whareroa, Te Uruhi, and Waikanae as well as the immediate construction of a new pā for defensive purposes only.[390] Pare Tawhara told the court in 1890: 'We thought the Europeans would commence fighting and built this for our protection.'[391] Wi Parata told the court that three houses were also built to 'put our belongings in in anticipation of the war stretching down this way', including a house for Ngāti Maru (at Whareroa), although it is not clear whether these were actually built or whether land was just cleared in preparation.[392]

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384. Searancke to McLean, 28 September 1860 (Walzl, 'Ngatiawa' (doc A194), pp 303–304)
385. Searancke to McLean, 28 September 1860 (Walzl, 'Ngatiawa' (doc A194), p 304)
386. Napier Native Land Court, minute book 15, 27 February 1890 (Walzl, 'Ngatiawa' (doc A194), pp 304–305)
387. Hemi Sundgren, brief of evidence (doc F19), p 19
388. Benjamin Ngaia, 'Report on Cultural and Historical Significance', p 10 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [64])
389. Benjamin Ngaia, 'Report on Cultural and Historical Significance', p 10 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [64])
390. Walzl, 'Ngatiawa' (doc A194), pp 303–304, 305
391. Napier Native Land Court, minute book 15, 5 February 1890, p 149 (Walzl, 'Ngatiawa' (doc A194), p 305)
392. Ōtaki Native Land Court, minute book 10, 7 February 1890, p 179 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, p [202])

Despite these precautions in case of attack, Wi Tako and Riwai Te Ahu were both committed to peace. In November 1860, Wi Tako wrote to the Superintendent of Wellington, stating that he had openly and publicly made his support for King Pōtatau known among Europeans and Māori. But now he found himself the victim of false rumours:

> When I had been here [Waikanae] five weeks, word came to me that I was building a fighting pah; this has proved false. Word came again that I had 800 men; this was false. Word came again that I had gone to Taranaki with 500 men; this proved false. Word came again that I was growing food to live upon whilst fighting. I then thought that the Europeans were desirous to fight: I judged from these falsehoods.[393]

In January 1861, with the fighting still going on in Taranaki, the Waikanae chiefs tried a second petition to the Queen, but it is not clear from the evidence whether the petition was actually completed and sent to Britain. Wi Tamihana Te Neke told Searancke that the petition essentially disputed the Government's claims of support at the Kohimarama conference and once again sought the recall of Governor Gore Browne. Wi Tako was not involved and Searancke blamed what he called 'the Missionary party' for the petition.[394]

In March 1861, Te Ātiawa/Ngāti Awa and some Ngāti Raukawa raised the King's flag at Pukekaraka near Ōtaki. We will discuss Ngāti Raukawa and the Kīngitanga in a later volume of this report.

The *Wanganui Chronicle* recorded:

> On the morning of the 12th March a party of Ngatiawa, 160 strong, armed to the teeth with guns, hatchets, mere mere, and other native implements of war, were marched in procession around the flagstaff three times, and then were drawn up in a body opposite it. At 9 o'clock Heremia and Hape te whakarawe, the two leading men connected with the movement, took their places in the ring around the flagstaff, with Prayer Book in hand. A few minutes afterwards the different tribes (hapu) were called upon by Heremia to show their allegiance to the King by kneeling and bowing with their heads uncovered. Prayers were then read by Heremia, and afterwards by Hape, all kneeling. The guard of honor were then commanded to load with blank cartridge, and salute the flag by firing three volleys in rapid succession.[395]

Three flags were then raised: the first was Wi Tako's flag, which was called Nuku Tewhatewha the name of the storehouse that he had built as one of the 'seven pillars of the Kingdom'; the second was the King's flag; and the third was the French flag.[396] The name of the King's flag was 'Tainui'.[397] The French flag may have

393. Wi Tako Ngatata to Superintendent of Wellington, 23 November 1860 (*Nelson Examiner and New Zealand Chronicle*, 26 December 1860); Walzl, 'Ngatiawa' (doc A194), pp 307–308
394. Walzl, 'Ngatiawa' (doc A194), pp 302–303
395. *Wanganui Chronicle*, 21 March 1861 (Walzl, 'Ngatiawa' (doc A194), p 307)
396. *Wanganui Chronicle*, 21 March 1861 (Walzl, 'Ngatiawa' (doc A194), p 307)
397. *Hokioi o Niu Tireni, e rere atuna*, 8 December 1862, p 2

been raised as a political statement but it may also have been included because Pukekaraka was the French Catholic mission site. Wi Tako received a lot of criticism from the colonial press, which recorded rumours of military training at Waikanae later in 1861.[398] The question of war with the Kīngitanga was becoming the focus of Government planning in that year, and the settlers' perception of the Waikanae and Whareroa communities as arming themselves and readying for war had serious implications.

3.7.5 The return of Governor Grey: peace or war for the Kīngitanga?

Kīngitanga and Taranaki leaders negotiated an indefinite truce in Taranaki in March 1861, the same month that the King's flag was raised at Pukekaraka. Governor Gore Browne's attentions then turned to subduing the Kīngitanga, as did those of Sir George Grey when he returned to New Zealand in September 1861.[399] News arrived in New Zealand in July 1861 that Gore Browne was to be replaced. He had to put his planned invasion of the Waikato on hold to await the decisions of his replacement. Sir George Grey returned from South Africa to New Zealand in September to take up the governorship. Grey's first answer to the Kīngitanga and its aspirations for the recognition of Māori authority was a policy that gave a degree of state-sanctioned self-government to Māori. His 'New Institutions' consisted of civil commissioners and resident magistrates working with rūnanga at the district and local levels to administer tribal affairs, make bylaws, decide land entitlements, control land sales in the district, and dispense justice.[400]

The Waikanae people refused to adopt the New Institutions when approached by Walter Buller in 1862. Wi Tako, speaking on behalf of the people, was reassured by the return of Grey but told Buller that Waikanae would only agree to the New Institutions if the King agreed:

> If Waikato will consent to these plans it will be good – very good. Waikato is the fountain – I am one of the streams. You may go on with your work here, stepping over the stream. Let the Governor dry up the fountain and the streams will vanish. Let the Governor be earnest in persuading Waikato to adopt these plans. Your words are pleasant – very pleasant to my ears. I shall sit quietly by – I shall not interfere with your work. Let the Governor keep softening the heart of Waikato. Tell the Governor Wi Tako has no thought at present – he is looking on. Listen not to the sayings at Ohau and Waikawa. They joined the King as it were yesterday: I commenced the work. Governor Grey has returned, and my heart is light. I am only waiting for Waikato.[401]

398. Walzl, 'Ngatiawa' (doc A194), pp 307–308
399. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 411–414, 425–430
400. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 431–432; Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 235–241
401. Walter Buller, report, 25 June 1862, in *Wellington Independent*, 12 August 1862 (Walzl, 'Ngatiawa' (doc A194), pp 308–309)

The Governor came to Ōtaki in September 1862 to try to 'promote' his New Institutions. Tony Walzl noted that a 'rival' inter-tribal Kīngitanga hui took place at the same time at Pukekaraka.[402] Governor Grey's 'mandate from the Colonial Office' at this time was 'to reach some kind of workable accommodation with the Kīngitanga and avoid war'.[403] The Te Rohe Pōtae Tribunal found that:

> the nucleus of a just solution existed: in December 1861, October 1862, and January 1863, it appeared that Kīngitanga chiefs were prepared to accept a compromise that was also acceptable to the Colonial Office: they would make their own laws through their rūnanga; the King would have the power to assent to those laws; and the governor would also have the power to assent. Such an accommodation could have reconciled the authority of Māori (tino rangatiratanga or mana motuhake) with the authority of the Crown (kāwanatanga).[404]

Grey's approach to Te Ātiawa/Ngāti Awa and Ngāti Raukawa leaders at Pukekaraka in 1862 was certainly not aimed at reaching an accommodation with the Kīngitanga. He sent a message to them with the following demands:

> Give the colour or [King's] flag into my hands
> Cut Tainui [flagpole] down
> Have done with this King work
> Let the King Runanga come to Otaki town, that I may see them and they may see me.[405]

Wi Tako's response was that 'the King work is strong', and that the Governor should 'come up here to the place of Tainui's Court to me'.[406] Wi Tako did suggest a compromise to the inter-tribal hui – that they should go and meet the Governor at the Pukekaraka bridge, which was considered a 'boundary between the King and Queen natives'.[407] Wi Tako still refused to go to Ōtaki the next day when Superintendent Featherston came in person to fetch him.[408]

A meeting did eventually occur, but accounts differed as to which side of the bridge that it took place.[409] This occasion was the only record we have seen of direct dialogue between the Governor and the Te Ātiawa/Ngāti Awa and Ngāti Raukawa supporters of the Kīngitanga. As noted above, we will consider the issues with regard to Ngāti Raukawa in a later volume of the report. The initial meet-

402. Walzl, 'Ngatiawa' (doc A194), p 309
403. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 432
404. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 445
405. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 309)
406. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 309)
407. *Wellington Independent*, 2 October 1862 (Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 233)
408. Walzl, 'Ngatiawa' (doc A194), p 309
409. Walzl, 'Ngatiawa' (doc A194), pp 309–310; Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 233

ing seems to have taken place between Grey and Wi Tako alone. The *Wellington Independent*'s account recorded the conversation as:

> When the Governor came, he said to Wi Tako: O Son! what were you doing that you did not come to me?
>
> Wi Tako said: Friend, I am making a bridge and bye and bye you make your bridge.
>
> Then the Governor said: E Wi, is there only one hand to make the bridge. Wi Tako, friend, if there is only one hand to make the bridge it will not be finished, but it is better to have two hands to make it. E Wi, come back and be fed with good food.
>
> Wi Tako said: Friend, if I were going to eat the heart of the dog fish, it would hurt or kill me, but if I eat fern root, it will make me well or satisfied.[410]

This exchange exemplified the degree to which the Governor was no longer trusted at Waikanae, a strong contrast to the view that the chiefs had taken of Grey in the 1840s (see section 3.5). The Governor met with the whole of the King's rūnanga later in the day. This meeting was said to have been attended by about 1,000 Kīngitanga supporters, but the *Wellington Independent*'s article recorded only a second exchange between Wi Tako and the Governor. Wi Tako first explained his reasons for joining the King.[411]

Grey responded:

> My word is you are wrong, you desire that evil may be averted, but it will never be averted this way. But these are my thoughts, that by and bye your work will be wrong; but the men that work with the good law, I will give them good things, as for you, our thoughts are to cry long for you, and this is what divides us. But come now, return back again to your work.[412]

The Governor's position reflected his policy at this point: to 'dig around the King' with his New Institutions until the King fell, while at the same time preparing for war.[413]

One version of Wi Tako's response to Grey was recorded in the memoirs of Thomas Bevan, a settler who provided the rope for hoisting the King's flag at Pukekaraka, and who had attended the hui. He later recalled Wi Tako's response as: 'Waitara was the source of evil, not the king. You go to Waikato and talk to him. Go to the roots. If the king is brought to naught by your plan, well and good – the branches will dry up.'[414]

In the contemporary newspaper account, Wi Tako's response to Grey used the metaphor of an uprooted seed for the Kīngitanga (and the Governor's approach

410. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), pp 309–310)
411. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 310)
412. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 310)
413. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 445
414. Thomas Bevan, *The Reminiscences of an Old Settler*, 1907 (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 1160)

to it), essentially saying that each side must work within their own sphere and see what resulted from each other's rūnanga system:

> Wi Tako said: Friend the Governor, let us go to the seed that is pulled up, if the seed is dead all the leaves will die, but if the seed is good, then the leaves will be well. But let us return to our work, you to yours, and me to mine, that you may see the goodness of mine, and that I may see the goodness of yours.[415]

Following his meeting with Governor Grey, Wi Tako set out his position in an October 1862 letter to the Kīngitanga's newspaper, *Hokioi o Niu Tireni*, published in December 1862, so that all the rūnanga would have no doubt as to where he stood:

> ko te tuatahi rawa ano o aku whakaaro ko te whakapono; hei oranga tena mo te wairua. 2 kia mau ki te whenua; hei waiu tena mo a tatou tamariki. 3 kia kaha te mahi i nga ritenga mo te kingi, hei matua te na mootatou tinana. 4 ki a pai te whakahaere i nga ritenga; o te kingi kaua e kawea ketia. 5 kati te pupuri i nga whakaaro a te kingi tukua kia haere, ma te perehi e kawa ki nga wahi katoa kaua ma te reta.[416]

> 1 My thoughts are faith which sustains the spirit. 2 holding to the land as breast-milk for our children. 3 establishing the customs/rules of the king for their sustenance. 4 carrying out those customs/rules and not straying from them. 5 not keeping back the king's ideas, but letting them be broadcast.[417]

As the Governor continued his preparations to invade the Waikato in 1862–63, Wi Tako worked to promote the Kīngitanga and keep the peace between the Crown and all the iwi of the region.

3.7.6 Waikanae and the Waikato War

The Taranaki war was reignited in May 1863 with an attack on British troops at Ōakura. This attack came after the Crown broke the truce by reoccupying Omata and Tataraimaka and moving troops onto the Māori land in between these blocks.[418] For various reasons, which are explained in part 1 of the Tribunal's report *Te Mana Whatu Ahuru*, the Crown invaded Waikato soon after on 12 July 1863.[419] This invasion caused a significant split within the Waikanae community and its leadership, although that was not necessarily apparent to Government and Pākehā observers. It had been obvious for some time that the Crown was preparing an invasion. The Governor had constructed a military road from Drury to the Waikato River, troops had been moved to a new fort built at the junction of

415. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 310)
416. *Hokioi o Niu Tireni, e rere atuna*, 8 December 1862, p 3
417. The Tribunal has provided this translation.
418. Waitangi Tribunal, *Taranaki Report*, p 89
419. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 447–460

the Mangatāwhiri and the Waikato, and the Governor planned to put an armed steamer on the river.[420] By January 1863, 'the military road, the fortifications, and the planned steamer all pointed to an immediate threat of invasion'.[421]

Native Land Court evidence suggests that about 100 of the Waikanae people planned to join the King in Waikato, an event which Tony Walzl suggests is best dated to the 'eve of the invasion of Waikato' in mid-1863.[422] Mr Walzl identified three speakers who referred to this event in court: Hira Te Maike of Puketapu and Kaitangata;[423] Mere Pomare, daughter of Kahe Te Rauoterangi; and Pare Tawhare, who was married to the Otaraua chief Paora Matuawaka. This incident was remembered in the Ngarara rehearing in 1890 because of the dispute that arose about how the expedition would be paid for, and what arrangements would be made for the land left behind. Wi Parata and Wi Tamihana Te Neke, who opposed the expedition, told the others that they might as well sell all the land and leave them in poverty, no longer chiefs, presumably because of the likely retaliation that would occur against those who remained exposed at Waikanae to retaliation from Wellington. Among the chiefs who planned to go to Waikato were Hohepa Ngapaki, Paora Matuawaka, Tamati Te Hawe, Henare Te Marau, and Eruini Te Tupe.[424]

Mere Pomare recalled that they all refused to sell any land and instead dispersed to various places to harvest food for the expedition. But the whole enterprise met with tragedy. According to all three accounts, they were struck down by a fever and many died. According to Hira Te Maike, the expedition got as far as Rangitīkei before illness forced them to return to Waikanae. Pare Tawhare's husband, Paora Matuawaka, died, as did Henare Te Marau.[425] There is no documentary evidence of this event – it seems to have gone unnoticed by the Government – but it is notable that the 1890 recollections came from both sides of the split in court and from people who had been present at the event they described.

In August 1863, Superintendent Featherston visited Waikanae and met with the local chiefs and a visiting party of Ngāti Raukawa supporters of the Kīngitanga. They met in the 'King's Runanga House' at Waikanae – presumably Puku Mahi Tamariki. By this time, any intention to send a party to Waikato seems to have disappeared, but Wi Tako's speech to the superintendent suggested a degree of uncertainty about his own people's willingness to keep out of the conflict: 'I have nothing encouraging to say; I had confidence in myself, I have none now; I could answer for my people, can I do so now?'[426] His main message, however, was that the colonial militia must be kept in Wellington and not sent out into the district:

420. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 436–439, 444
421. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 444
422. Walzl, 'Ngatiawa' (doc A194), p 311
423. W C Carkeek called this rangatira 'Hira Maeka' and identified him as affiliated with Puketapu and Kaitangata whose pā was Kaiwarehou: Carkeek, *Kapiti Coast* (doc A114), pp 95, 114
424. Walzl, 'Ngatiawa' (doc A194), p 312; Carkeek, *Kapiti Coast* (doc A114), p 95
425. Walzl, 'Ngatiawa' (doc A194), pp 312–313; Carkeek, *Kapiti Coast* (doc A114), p 95
426. 'Extracts from Wellington Spectator', not dated [August 1863], AJHR, 1863, E-3a, p 8

> Keep the Militia in Wellington, prevent them from coming on the Coast; leave the road to its original purpose, to drive sheep, cattle, horses, and carts, and the mail. I tell you that if the Militia and Soldiers are sent on the Coast, the peace will be broken. Have you not heard that we have received a letter from the King to prepare for war? We did not interfere with the Waitara or Tataraimaka war, although waged against our very relations; no, we are a peaceable people. Do keep away your Militia, keep them in Wellington if you think proper . . . I will end by telling you now, as the head of the Province, to keep the Militia away from the coast.[427]

At this hui and also at a second hui the following day at Ōtaki, Wi Tako admitted that he had kept the King's letter from his people for fear of what they might do if they read it.[428] Wi Tako was committed to peace and his Christian values. Ben Ngaia told us that Wi Tako had hoped the Kīngitanga would enable Māori and settlers to co-exist in a peaceful manner beneficial to both. He was deeply concerned about the outbreak of war, first in Taranaki and now in Waikato.[429] Wi Tako had in fact opposed the Kīngitanga's intervention in Taranaki and even its fighting in self-defence at Waikato.[430] But he was not prepared to bow to Government pressure to give up the Kīngitanga. At this Ōtaki hui, he told Featherston: 'If Kingism is to be put down, I come here to hear my doom. . . . Dr Featherston, like Governor Grey, is angry; but I won't abandon the King.' He added that the Waikanae people had taken no part in the Taranaki war, so what right did the superintendent have to suggest that they were a people who might now rise up and murder settlers?[431]

On the issue of where troops might be stationed, Featherston told the hui at Waikanae that he would not be 'guided by the wishes of the King natives', but so long as he was 'satisfied of the peaceful intention of the Natives, and that no danger need be apprehended at Waikanae, Otaki, and Manawatu', he would probably advise against a force being stationed there.[432]

3.7.7 Pressure for Waikanae to leave the Kīngitanga intensifies

Although the Government did not station troops at Waikanae in 1863, there was an intense political pressure to leave the Kīngitanga. As noted in the previous section, the leading chief, Wi Tako, was not prepared to give into this pressure in August 1863 despite his pacifism and his personal disapproval of the fighting at

427. 'Extracts from Wellington Spectator', not dated [August 1863], AJHR, 1863, E-3a, p 8; Walzl, 'Ngatiawa' (doc A194), p 311
428. 'Extracts from Wellington Spectator', not dated [August 1863], AJHR, 1863, E-3a, pp 8, 9
429. Transcript 4.1.16, p [610]
430. Benjamin Ngaia, 'Report on Cultural and Historical Significance', p 10 (Ngaia, papers in support of brief of evidence (doc E3(a)), p [64]); Catherine Maarie Amohia Love, brief of evidence (doc F43(b)), pp 12–13
431. 'Extracts from Wellington Spectator', not dated [August 1863], AJHR, 1863, E-3a, p 11
432. 'Extracts from Wellington Spectator', not dated [August 1863], AJHR, 1863, E-3a, p 9

Waikato. It should also be noted that Wi Tako used his influence to try to defuse the situation in the lower North Island.[433]

The situation changed very significantly in October 1863 with the election of a new Government under Frederick Whitaker as Premier. Confiscation had already been planned for some time but it was the Whitaker Government which introduced the legislative framework for it.[434] Tony Walzl explained:

> Within a few weeks of the Government being in power, radical legislation was passed. The Suppression of Rebellion Act 1863 had as one of its key aims the identification of those who remained in opposition against the Crown. Maori were required to swear an oath of allegiance to the Queen's sovereignty. To not do so risked a declaration that those who refused to sign effectively were in rebellion against the Crown. The Act recorded a number of draconian measures that could be taken against those deemed to be in rebellion. Soon after, in early December 1863, the New Zealand Settlements Act 1863 effectively authorised the confiscations of land belonging to those people deemed to be in 'rebellion.'[435]

Superintendent Featherston explained this legislation at Waikanae in the context of the Governor's determination to 'crush the rebellion at once and for ever, and to trample out kingism in every part of the Colony.'[436] The occasion for this explanation was a hui called by Wi Tako at Waikanae in January 1864 for the superintendent to come and 'discuss the implications of the legislation.'[437] By this point, the Crown's invasion force had occupied the King's capital, Ngāruawāhia, and was proceeding further south into Waikato towards Te Rore. The Kīngitanga leadership had attempted to negotiate peace with the Governor at the end of 1863 but their overtures after the battle of Rangiriri had been rejected. The war therefore carried on in the Waikato.[438]

Featherston's statements at Waikanae about the raupatu legislation were clearly threatening. He reported to the Native Minister, William Fox, that Wi Tako had admitted the hopelessness of their cause but would still not leave the Kīngitanga:

> Wi Tako remarked that he had always said that the battle of kingism would have to be fought at Waikato; that the battle had taken place, and the Waikatos were conquered; admitting repeatedly that all I had told him at my meeting with them last year had come true, and that the Maoris were engaged in a hopeless struggle; still

433. A R Cairns, 'Wiremu Tako Ngatata', *Dictionary of New Zealand Biography*, 1990, Te Ara – the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies
434. Waitangi Tribunal, *Taranaki Report*, pp 109–110
435. Walzl, 'Ngatiawa' (doc A194), p 313
436. Isaac Featherston, memorandum for William Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)
437. Walzl, 'Ngatiawa' (doc A194), p 313
438. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 477–482

> he gave no intimation that he intended to abandon the king movement, although he expressed uneasiness at the future of himself and people.[439]

Featherston reported to the Government that 'Wi Tako finds himself between two fires; he is afraid that he will be punished by the Government for the part he has taken in kingism'. This was a view that the superintendent himself had promoted to Wi Tako at their meeting. In Featherston's view, however, Wi Tako was still refusing to give up 'kingism' because he was also 'thoroughly convinced that if he suddenly gave it up he would be murdered by his own people'.[440] We do not consider for a moment that this was a genuine possibility. As Wi Parata told the Native Land Court, all the people at Waikanae and Whareroa were 'King people' or 'Kingites'.[441] They had brought Wi Tako from Taita to lead them in these troubled times. Featherston's allegation that Wi Tako feared murder was a pure fabrication, although Wi Tako likely feared a loss of mana were he to abandon his long-standing support of the King. He also would have feared a loss of autonomy if his people relinquished the Kīngitanga, as we discuss further below. On the other hand, Featherston had threatened punishment in the form of confiscation if 'kingism' was not eradicated throughout the North Island.

According to Featherston's account of the hui, there was neither 'surprise nor dissatisfaction' when he explained the Suppression of Rebellion Act and the New Zealand Settlements Act, and 'the determination of the Governor to crush the rebellion at once and for ever, and to trample out kingism in every part of the Colony'. The Waikanae people, however, were still not prepared to accede to the Government's demands that they give up the King and the laws and self-government institutions introduced by the Kīngitanga. For them, their defence against the Crown's new legislation was that they had taken no part in the wars, and no breach of the peace had occurred in the Wellington province:

> While freely confessing the part they had taken in hoisting king's flags, in issuing proclamations in his name, in arming and drilling, &c, they laid great stress upon their not having disturbed the peace of the Province, and upon none of them having gone to the war either at Taranaki or Waikato . . .[442]

Featherston left with a final warning: 'After suggesting to them that the time had arrived when it became them calmly to consider the position in which they would stand towards the Government if they did not soon return to their allegiance, I left them, with many thanks from them for my visit'.[443] This was another clear threat, even if 'calmly' delivered by the superintendent.

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439. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), pp 313–314)
440. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)
441. Ōtaki Native Land Court, minute book 10, 7 February 1890, pp 172–173 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, pp [195]–[196])
442. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)
443. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)

By the time that Featherston returned to Waikanae, the Crown had published its terms on 2 February 1864 for the surrender of the 'Maoris who have taken part in the War and in the King Movement'.[444] For those who had been involved in the fighting, they had to present themselves to a magistrate or military commander, give up their arms, and declare that 'they will be Queen's men, and obey the Queen's law'. The disposal of their land would rest with the Governor – a reference to confiscation under the New Zealand Settlements Act 1863. But for those who had joined with the Kīngitanga but had remained peacefully at home, the terms were vaguely threatening rather than specific:

> In reference to the Maoris who have not personally gone to the disturbed districts, but have gone into the king movement, and have joined in strengthening that work, that is to say by giving money, by hoisting king flags, and by other acts tending so to disturb the peaceable and well disposed. They must understand that all such acts are a trampling on the law, and that those who commit such acts will be considered as aliens to the Queen, and that if not discontinued, but persisted in, the consequences will lie trouble or disaster.
>
> This is another word. If the desire for peace arises in the heart of any man, let him speedily make known to the Government his wish to fulfil these conditions. The man who hastens to return to peace, his offence will not be regarded in the same way as that of him who hesitates and delays.[445]

Featherston explained to the Waikanae people 'the terms offered by the Government to the king and rebel natives'.[446] He explained their response as follows:

> Instead of glorying in what they had done in defiance of the Queen's authority, they pleaded that they had taken up the king movement in the belief that it would tend to elevate the Maori race, and that they had been induced to arm and drill by Pakehas constantly telling them that all our preparations were for the purpose of suddenly attacking them. Wi Tako again urged that during the whole period of the disturbances he had done his utmost to keep, and had succeeded in keeping the peace. Far from expressing dissatisfaction with the terms offered him, he seemed pleased to find that he was let off so easily, and fully to recognise the position in which he would be placed were he to reject them.[447]

444. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 554; 'Regulations in reference to Maoris who have taken part in the War and in the King Movement', 2 February 1864, AJHR, 1864, E-2, pp 32–33
445. 'Regulations in reference to Maoris who have taken part in the War and in the King Movement', 2 February 1864, AJHR, 1864, E-2, p 33
446. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)
447. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)

Although the superintendent does not appear to have believed what they said about not acting in defiance of the Queen, several Tribunal reports have found that the Kīngitanga was not incompatible with the Queen's authority.[448]

At this point, the Waikanae chiefs decided to test the Government's intentions. Featherston explained that Wi Tako put out a 'feeler' through Wi Parata: 'Since his interview, Wi Parata (who has for some years been Wi Tako's private secretary) has asked, with Wi Tako's consent, to be allowed to take the oath of allegiance. This is simply a feeler put forth by Wi Tako', which Featherston misinterpreted as an attempt to 'ascertain how his followers would act if he himself proved traitor to kingism'.[449]

In April 1864, the fighting in the Waikato essentially came to an end with the battle of Ōrākau. The Governor and Ministers wanted General Cameron to continue across the Pūniu Stream and attack Ngāti Maniapoto, but Cameron refused: 'Although no one knew it at the time, the shooting part of the war in Waikato was over.'[450] News about Ōrākau travelled fast. By May and June 1864, Native Minister Fox was travelling the lower North Island, seeking the surrender of any groups who had given their adherence to the Kīngitanga. In the Government's view, anyone who had supported the King was in rebellion, regardless of whether they had taken part in any fighting.

When Fox reached Waikanae on 2 June 1864, he found Wi Tako ready to take the step of surrendering. He reported:

> I take no credit to myself for obtaining Wi Tako's declaration of allegiance. His conversion is attributable partly to the very judicious manner in which he has been treated by Dr Featherstone, the Superintendent of Wellington, during the last two years, and partly to the conviction that the cause of Kingism was lost, forced upon him by the reports of Wi Hapi, Noa Te Rauhihi, and others, some of whom had been fighting in Waikato, and some sent there by the Government, in order that they might carry back truthful accounts, which they have done.
>
> Their reports of the defeat of the King party have convinced Wi Tako, and I trust all the Cook's Straits Natives, that the cause is hopeless.[451]

Nonetheless, the threat of confiscation was made at Waikanae in June 1864, regardless of how thin the legal justification might have been. The New Zealand Settlements Act 1863 defined persons in rebellion as:

- anyone who had levied war, made war, or carried arms against the Queen or the Queen's forces;
- anyone who had adhered to, aided, assisted, or 'comforted' those who were levying war, making war, or carrying arms against the Queen or her forces;

448. See, for example, Waitangi Tribunal, *Taranaki Report*, p 19.
449. Featherston, memorandum for Fox, 18 February 1864 (Walzl, 'Ngatiawa' (doc A194), p 314)
450. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 526
451. William Fox, 'Notes of Events at Taranaki, Whanganui, West Coast, and Wellington', 22 June 1864, BPP, 1865, vol 37 [3425], p 74 (IUP, vol 14, p 92)

- anyone who had 'counselled advised induced enticed persuaded or conspired with any other person to make or levy war against Her Majesty or to carry arms against Her Majesty's Forces', or who had joined with or assisted 'any such persons';
- anyone who had either taken part in or was an accessory to outrages against people or property in 'furtherance or in execution of the designs' of those who had waged or levied war; and
- anyone who, on being required by the Governor's proclamation to give up their arms, refused or neglected to do so.[452]

This Act meant that a state of rebellion was not to be 'judicially determined' after due inquiry by the courts but rather 'legislatively declared so that it came to exist in law, irrespective of the position in fact'.[453] The English common law definition of rebellion at the time required the 'use, or threatened use, of armed force by those who are "levying war" against the King'.[454] The Waikanae people never breached the peace in the Wellington province, never committed any 'outrages', and never fought at Taranaki or Waikato. In fact, the Crown was well aware that their leading chief, Wi Tako, had used his influence to dissuade anyone in the lower North Island from taking part in the fighting.[455] In the Government's view at the time, however, simply belonging to the Kīngitanga anywhere in New Zealand was an act of rebellion. Fox was very clear as to the terms now offered to Kīngitanga chiefs: 'the surrender of arms, declaration of allegiance to the Queen, and forfeiture of land, where the Government might choose to enforce it'.[456] The Native Minister told Wi Tako in June 1864: 'You are liable, as well as the rest, to have all your lands taken from you'. Wi Tako told Fox: 'my work is now crushed and I am virtually dead.'[457]

The full interview at Waikanae between Fox and Wi Tako was recorded by Walter Buller, who acted as interpreter. Fox stated:

> Those who have been hoisting King's flags, drilling soldiers, and committing other acts of that sort, are all rebels, and are liable to have their lands confiscated; but the Government is not obliged to take the lands of such, and if they voluntarily come forward, declare their allegiance, and endeavour by future good behaviour to atone for the past, their case will receive every consideration at the hands of the Government.
>
> With regard to you in particular, Wi Tako, I will say this: The Government have heard with satisfaction from Dr Featherston and others that the continued peace of

452. New Zealand Settlements Act 1863, s 5; Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 110
453. Waitangi Tribunal, *Taranaki Report*, p 119
454. Waitangi Tribunal, *Te Raupatu o Tauranga Moana*, p 111
455. Walzl, 'Ngatiawa' (doc A194), pp 314–316
456. William Fox, 'Notes of Events at Taranaki, Whanganui, West Coast, and Wellington', 22 June 1864, BPP, 1865, vol 37 [3425], p 73 (IUP, vol 14, p 91)
457. 'Report of an Interview at Waikanae on the 3rd June 1864, between the Honourable William Fox, Colonial Secretary, and Wi Tako Ngatata, a Leading Kingite Chief of the Ngatiawa Tribe' (Walzl, 'Ngatiawa' (doc A194), pp 315–316)

> this district has been owing in great measure to your individual exertions. You have restrained the violent ones, and you have always declared against the cowardly murder of unarmed pakehas. The Government are therefore disposed to consider your case very favourably. You are liable, as well as the rest, to have all your lands taken from you; but if you are prepared to-day to make your submission, – to give up Kingism for ever, and sign the declaration of allegiance, – the Government will not touch any of your land, nor punish you in any way. You will be received again into favour and all the past will be forgotten.[458]

In response to this ultimatum, Wi Tako's requests were focused on not just the Waikanae people but all those who had supported the Kīngitanga in the lower North Island. He tried to get Fox to agree that no confiscation would take place anywhere, asking the Crown to 'save all without distinction'.[459] Faced with the possibility of confiscation if he did not comply, and now considering that the Waikato was lost, Wi Tako agreed to sign the declaration of allegiance. He did so in the presence of Fox and Buller on 3 June 1864.[460]

Wi Tako's surrender marked the end of involvement in the Kīngitanga for Te Ātiawa/Ngāti Awa ki Kāpiti. In 1865 Wi Tako, accompanied by Wi Parata, Matene Te Whiwhi of Ngāti Toa and others, travelled to the east coast, where they took an active role in opposing Pai Marire and further warfare in Hawke's Bay and Turanga.[461] Wi Parata was among those who had been specifically invited to Turanga by Raharuhi Rukupo and other Turanga chiefs. In their letter of invitation, the Turanga chiefs referred to him as 'Wi Parata te Waipunahau'. This indicates the mana of both Parata, despite his relative youth at 28 years' old, and his mother, Metapere Waipunahau.[462] Ben Ngaia explained that once Wi Tako had 'become disillusioned with the Kīngitanga' at that time, he and his people returned to his earlier home (Taita), leaving Tuku Rakau 'under the leadership of Wi Te Kakakura Parata of Ngāti Kaitangata'.[463] Ben Ngaia told us that Wi Tako's departure from Waikanae was a 'demonstrable "distancing" himself from the movement, by physically removing himself from Pukumahi Tamariki', and Wi Tako 'did not return to Waikanae after that in any active way'.[464]

Wi Tako was appointed a member of the Legislative Council (the upper house) in 1872.[465] Wi Parata had assumed leadership at Waikanae and he had been elected to Parliament in 1871, representing the Western Māori electorate. We discuss how the settler Parliament dealt with the aspirations of Te Ātiawa/Ngāti Awa for eco-

458. 'Report of an Interview at Waikanae' (Walzl, 'Ngatiawa' (doc A194), pp 315–316)
459. 'Report of an Interview at Waikanae' (Walzl, 'Ngatiawa' (doc A194), pp 315–316)
460. William Fox, 'Notes of Events at Taranaki, Whanganui, West Coast, and Wellington', 22 June 1864, BPP, 1865, vol 37 [3425], p 74 (IUP, vol 14, p 92)
461. *Hawke's Bay Herald*, 1 April 1865; *Waka Maori*, 6 May 1865; *Hawke's Bay Herald*, 6 May 1865
462. *Waka Maori*, 6 May 1865, p 9
463. Benjamin Ngaia, 'Cultural Impact Assessment: Mackay's to Pekapeka Expressway M2PP' (Ngaia, papers in support of brief of evidence (doc E3(a)), p [91])
464. Benjamin Ngaia, answers to questions in writing, 11 October 2018 (doc E3(d)), p 5
465. Walzl, 'Ngatiawa' (doc A194), p 317

nomic development and the continued exercise of tino rangatiratanga in the next chapter.

3.7.8 The end of the New Institutions

Grey's 1861 New Institutions were a potential mechanism for the Crown to work in partnership with Māori, and to accord to iwi bodies a degree of state-recognised self-government. In brief, Grey's plan was for a system of district and local rūnanga to work with civil commissioners (district) and resident magistrates (local), enact their own bylaws, administer local tribal affairs, dispense justice, decide land entitlements, and control leasing and land sales. The rūnanga would also establish and administer schools and hospitals, and would receive Government funding. A key missing component was a body at the central government level, which Grey was not prepared to establish.[466]

As noted above, Waikanae leaders were interested in Grey's New Institutions when Buller came to talk about them in August 1862 but would not adopt them unless the Governor went to Waikato and persuaded the King to do so. Wi Tako's initial enthusiasm must have been clear to the Crown, but he would not give up the Kīngitanga.[467] When the Governor came personally to promote the New Institutions, Wi Tako told him: 'let us return to our work, you to yours, and me to mine, that you may see the goodness of mine, and that I may see the goodness of yours.[468] He sought the 'middle ground', not outright rejecting the New Institutions but asking that both sides wait to see how effective their different rūnanga systems would prove to be in the long run.[469] This was a widespread approach in the region, as Dr Hearn explained:

> The hoisting of the King's flag at Pukekaraka allowed politicians to designate Wellington's west coast as a hot-bed of insurrection. Grey's appointment to the post of Governor appears to have allayed fears and suspicions among west coast Maori. Those loyal to the Crown, those who professed allegiance to the Maori King, and those yet to declare, all looked to Grey and his new institutions: should the latter work effectively as a means of self-government, their confidence in the government, it was widely hoped, would be restored.[470]

When Te Ātiawa/Ngāti Awa ki Kāpiti were compelled to give up the King's rūnanga in 1864, the question arose: would the Governor's rūnanga system still be available for them?

The Crown had already begun to amend some of the most important powers of the New Institutions in 1862. The Native Lands Act of that year provided

466. Walzl, 'Ngatiawa' (doc A194, p 308; Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), pp 223–229; Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 231–232, 235–239
467. Walter Buller, report, 25 June 1862, in *Wellington Independent*, 12 August 1862 (Walzl, 'Ngatiawa' (doc A194), pp 308–309)
468. *Wellington Independent*, 27 September 1862 (Walzl, 'Ngatiawa' (doc A194), p 310)
469. Walzl, 'Ngatiawa' (doc A194), p 382
470. Hearn, "One past, many histories' (doc A152), p 177

for a panel of chiefs with a magistrate to decide land titles instead of the New Institutions, and to allow direct dealings between individual owners and settlers,[471] but this Act would only come into force in districts declared by the Governor.[472] For the Governor and the settler Parliament, the real problem with the New Institutions by 1865 was that they did not have the desired effect; that is, they had been introduced partly to give a meaningful alternative to the Kīngitanga, secure allies for the Crown, and either avoid war or reduce its scope. In 1865, the settler Government abolished the New Institutions established by Grey because they had essentially failed to 'subvert the Kingitanga and prevent war'.[473] The official justification for getting rid of the whole system was its expense, but we agree with the Central North Island Tribunal that this was not the real reason.[474]

The fortunes of Te Ātiawa/Ngāti Awa ki Kāpiti were at a low ebb by the end of 1865. They had been forced to give up the Kīngitanga institutions of tribal self-government under the threat of confiscation. Further, they had lost the protection that the Kīngitanga promised against Crown purchasing and the indiscriminate loss of land and authority. The Queen's protection, which had seemed a secure foundation in the 1840s, appeared hollow in the wake of the Waitara purchase and the wars that followed it. While Wi Tako, Wi Parata, and others positioned themselves in opposition to Pai Mārire and in support of the Crown, they could not escape the massive confiscation of land at Taranaki in 1865, which created a burning sense of grievance at Waikanae as well as in Taranaki itself. Redress for confiscation became a constant theme in Wi Parata's political career.[475] Also, Waikanae continued to lose population as a result of the wars: some had to go to Taranaki and defend their rights in the Compensation Court, others to support Parihaka and the peaceful resistance of the prophets Te Whiti o Rongomai and Tohu Kakahi.[476] Furthermore, the Whareroa people had been rendered virtually landless by Crown purchasing of the 1850s.

There were, however, some strong points in favour of the Te Ātiawa/Ngāti Awa communities living to the north of the Whareroa and Wainui purchases. They had 'retained the land that was closely held by the greater proportion of hapu members',[477] referring to the lands which became known as the Ngarara block in 1873. They had suffered no loss of life and no confiscation of Waikanae lands as a result of the Crown's military subjugation of the Kīngitanga. Also, they had in Wi Parata an astute leader who was capable of operating in both the Pākehā and Māori worlds.

471. Ward, *National Overview*, vol 2, pp 213–216, 219
472. Native Lands Act 1862, s 36
473. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 240; Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 237
474. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 179, 240
475. On this point, see Tony Walzl, 'The Public and Political Life of Wiremu Te Kakakura Parata, 1871–1906', May 2019 (doc A216).
476. Walzl, 'Ngatiawa' (doc A194), p 595
477. Walzl, 'Ngatiawa' (doc A194), p 378

The latter point was crucial because they were about to face their single biggest threat since their arrival at Waikanae: the individualisation of title through the native land laws, which eventually led to the loss of almost all of their lands. The New Institutions had been intended to provide tribal control over land titles and alienations, constituting a 'victory over the alternative view, that Maori title should be individualised and then sold directly to settlers'.[478] With both the abolition of the New Institutions and the loss of the Kīngitanga's protection, the Waikanae people were left particularly vulnerable to individualisation of title at the beginning of the 1870s.

We turn in the next chapter to the introduction of the Native Land Court and the struggle that ensued over ownership and alienation of the Waikanae lands in the final quarter of the nineteenth century.

First, however, we draw our conclusions and make any findings of Treaty breach as appropriate for the period covered in this chapter.

3.8 Conclusions and Treaty Findings

3.8.1 Te Ruru mā Heke

For Te Ātiawa/Ngāti Awa ki Kāpiti claims, the main issue in the 1840s was the Crown's attempts to prevent the majority of the Waikanae people from returning to Taranaki in 1847–48 (section 3.5). The Crown pressured the chiefs not to leave, and Governor Grey even ordered Superintendent Richmond to destroy the fleet of waka being constructed for their return. This was not done, however, and McLean was sent to Waikanae instead to persuade as many as possible to remain behind. This strategy had more success and some hapū did prefer to stay anyway. McLean's intervention was not motivated by the best interests of the Waikanae people but rather by the Crown's desire to purchase Waitara and other Taranaki land without resistance from Wiremu Kingi Te Rangitake and his people. That is mostly a Taranaki rather than Waikanae issue and therefore a matter for the settled Taranaki claims. On balance, we do not think any Treaty breach was involved in respect of Te Ātiawa/Ngāti Awa ki Kāpiti claims, especially since those who remained did not, in doing so, relinquish their ability to return to Taranaki later at a time of their own choosing. Many returned in the 1870s, for example, before and after the title to the Ngarara block was decided in the Native Land Court (see chapter 4).

3.8.2 The Crown's attempts to purchase all of Te Ātiawa/Ngāti Awa's lands in the 1850s

In the 1850s, the Crown made sustained attempts to purchase all of Te Ātiawa/Ngāti Awa's lands on the Kāpiti coast as well as Ngāti Toa's land north of the Porirua block (section 3.6.3). During negotiations in 1850–53, the Crown was unable to overcome the opposition to a purchase. Searancke tried again in 1858–59. Some Waikanae chiefs were prepared to consider selling land by that time but

478. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 236

others remained opposed. Those who were willing to sell some of their land were nonetheless determined to retain enough for both pastoral farming and traditional resource use. The Crown's purchase agent, William Searancke, called this group the 'eka eka [acre acre] party'. The Crown was determined to purchase the whole tribal estate for the low sum of sixpence per acre and paltry reserves of 3,000 acres in total for everyone. No one in Te Ātiawa/Ngāti Awa was prepared to agree to those terms and, given Donald McLean's insistence that a higher price would not be offered, the purchase of the whole district had to be abandoned. If the Crown had succeeded in purchasing the whole of Te Ātiawa/Ngāti Awa's land on those terms, it would have been a serious breach of the Treaty and would have left Te Ātiawa/Ngāti Awa virtually landless and without any opportunity for farm development in the future. But because the Crown's purchase attempts were unsuccessful, no Treaty breach arises from those events and no prejudice was incurred. Although there was division and dispute over the proposed purchase, the evidence shows that it did not result in any lasting divisions within Te Ātiawa/Ngāti Awa.

3.8.3 The Wainui and Whareroa purchases

Following his failure to purchase the entire Kāpiti coast lands of Te Ātiawa/Ngāti Awa and the remaining lands of Ngāti Toa, Searancke turned instead to buying the southern parts of the proposed purchase area (the Whareroa and Wainui blocks) from Ngāti Toa (see sections 3.6.4–3.6.5). The Crown breached the principles of the Treaty of Waitangi by its conduct of the Wainui and Whareroa purchases in 1858–59, its making of reserves from those purchases, and its taking of the Whareroa Pā reserve under the public works legislation.

We acknowledge Ngāti Toa customary rights in the purchase area and note that these findings do not relate to the claims of Ngāti Toa, which have been settled with the Crown in the Ngāti Toa Rangatira Claims Settlement Act 2014.

The Crown breached its own nineteenth-century purchase standards (see section 3.6.7) and the Treaty principles of partnership and active protection by:

- failing to investigate customary title in the Whareroa and Wainui blocks prior to purchasing;
- failing to engage with or seek the consent of the resident Whareroa community (mostly Ngāti Maru and some Ngāti Mutunga and Puketapu) or Puketapu at the northern end of the Whareroa block;
- imposing the purchases on Ngāti Maru, Ngāti Mutunga, and Puketapu – while some Ngāti Maru at Whareroa Pā did support the purchase because they wished to return to Taranaki, others at Whareroa Pā were opposed and their consent was neither sought by the Crown nor given; and
- failing to make sufficient reserves for the present and future needs of the Whareroa inhabitants, including failing to reserve urupā and other wāhi tapu (which was the subject of unsuccessful petitions in the twentieth century).

Ngāti Maru, Ngāti Mutunga, and Puketapu were prejudiced by these Crown Treaty breaches. Those who opposed the Whareroa and Wainui purchases (when they found out about them) lost their land without their consent and without any

payment. The Whareroa cultivation reserve was already too small for economic development when it was made (10 acres per person and 20 acres each for the two chiefs) and was not sustainable long-term, even for subsistence purposes. Nor were the reserves for the Whareroa community made inalienable. In order to obtain secure title, Ngāti Maru, Ngāti Mutunga, and Puketapu had to go to the Native Land Court and obtain individualised titles under the native land laws. Piecemeal sales of the cultivation reserve followed individualisation of title. These sales were made to local settlers who had enough land to use profitably and could therefore purchase these small sections to enhance their farms. Although the Whareroa Pā reserve was not sold, it was abandoned in the early twentieth century because there was too little land left by then for the community to survive. The 50-acre Puketapu reserve *was* Crown granted but it was only granted to the chief, leaving the other Puketapu residents landless except for their homes in Whareroa Pā.

The Crown further breached the Treaty principles of partnership and active protection by not attempting to find the successors to the owners of Whareroa Pā and seek their consent before taking the land compulsorily under the Public Works Act 1928 for 'better utilisation'. The compulsory acquisition of the pā severed any last remaining links to the land.

3.8.4 The Crown's pressure on Te Ātiawa / Ngāti Awa to give up the Kīngitanga

After the outbreak of the Taranaki war in 1860, the Whareroa and Waikanae communities brought Wi Tako from Lower Hutt to the main Waikanae settlement at that time, Tuku Rakau, to lead them through the crisis (see section 3.7). Wi Tako, Wi Parata, and the whole of the Waikanae people were committed to supporting the Kīngitanga. Pukumahi Tamariki was built at Tuku Rakau for the Kīngitanga rūnanga. As their leader, Wi Tako was also committed to peaceful co-existence with the settlers while maintaining Māori rights to keep their lands (in the face of aggressive Crown purchasing) and to govern themselves through Kīngitanga laws and institutions. He maintained this position despite appeals from Governor Grey to renounce the Kīngitanga in 1862 and the Crown's invasion of the Waikato in 1863.

Following the passage of the Suppression of Rebellion Act and the New Zealand Settlements Act in late 1863, Wi Tako invited Superintendent Featherston to Waikanae to discuss this legislation and its implications for Te Ātiawa / Ngāti Awa ki Kāpiti. Featherston met with Wi Tako and the Waikanae people twice in January 1864. The superintendent acknowledged that Wi Tako had worked hard to keep the peace in the lower North Island, but Featherston's statements amounted to a threat of confiscation if the Waikanae people did not relinquish the Kīngitanga. The Colonial Secretary, William Fox, was even more direct than Featherston. He stated at a meeting in June 1864 that everyone who had raised the King's flag and committed other acts (such as 'drilling soldiers') were rebels whose land was liable for confiscation. Fox told Wi Tako: 'You are liable, as well as the rest, to have all your lands taken from you; but if you are prepared today to make your

submission – to give up Kingism forever, and sign the declaration of allegiance – the Government will not touch any of your land, nor punish you in any way.'[479]

Under threat of classification as 'rebels' and confiscation, the Waikanae people gave up the Kīngitanga and their Kīngitanga rūnanga in mid-1864. Both Wi Parata and Wi Tako took the oath of allegiance to the Queen.

As previous Tribunal reports have found, the Kīngitanga was not incompatible with the Queen's authority. The Crown's Treaty obligations required the Governor to protect and provide for tino rangatiratanga. This included an obligation to negotiate and reach an accommodation with the Kīngitanga, and to empower, not suppress, Māori autonomy. Options included establishing autonomous native districts under the New Zealand Constitution Act, an option actively proposed by the Colonial Office but not pursued by Governors Gore Browne or Grey.[480] No attempts were made to reach an accommodation with Kīngitanga leaders at Waikanae or to recognise and empower their Kīngitanga rūnanga. Instead, Waikanae leaders were pressured and then threatened with confiscation if they did not give up the Kīngitanga. This was a breach of the Treaty principles of partnership and Māori autonomy. Whether the Crown could have actually carried out its threat of confiscation at Waikanae, where no fighting had occurred, is not known. This point does not subtract from the severity of the Treaty breach when the Crown compelled the Waikanae people to give up their political institutions instead of protecting and providing for their exercise of tino rangatiratanga.

The Crown's refusal to reach an accommodation with the Kīngitanga at Waikanae in 1860–64, and its suppression of the Kīngitanga there in 1864, had lasting consequences for Te Ātiawa/Ngāti Awa ki Kāpiti. Without the protection of the King, of a native district under the New Zealand Constitution Act, or of a rūnanga empowered by legislation, they were subjected to the full force of the Native Lands Act 1865 and the individualisation of title. This gradually eroded their remaining autonomy and their land base (see the next chapter for the details).

479. 'Report of an interview at Waikanae' (Walzl, 'Ngatiawa' (doc A194), pp 315–316)

480. See, for example, Waitangi Tribunal, *Taranaki Report*, p 19; Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 379–381, 444–446.

CHAPTER 4

TE ĀTIAWA / NGĀTI AWA IN THE NATIVE LAND COURT ERA

4.1 Introduction

In this chapter, we address the claims of Te Ātiawa / Ngāti Awa ki Kāpiti in respect of the Crown's nineteenth-century native land laws, the individualisation of title imposed by those laws, the Native Land Court process, and the loss of land and grievances that arose from the breaking up of the tribal estate.

The native land laws and the Native Land Court have been discussed in the *Horowhenua* volume of the report, focusing on the particular native land legislation relevant to the Muaūpoko claims.[1] We follow the same approach in this chapter, concentrating on the legislation and developments of particular importance to Te Ātiawa / Ngāti Awa. There are many similarities, however, including:

- the attempt of the rangatira to hold the tribal estate intact despite title conversion until defeated by the power of individuals to partition;
- lengthy and expensive litigation leading to further land loss; and
- the appointment of a royal commission to investigate some of the grievances caused by the title investigation and the freezing of customary title in a finite list of individual owners.

We discuss these issues as they apply to Te Ātiawa / Ngāti Awa in this chapter.

The context for this discussion is the Native Land Court's vesting of title in 1873 of Ngarara (45,250 acres), Muaupoko (2,634 acres), and Kukutauaki 1 (654 acres) in lists of individual Te Ātiawa / Ngāti Awa owners. This was followed by:

- the sale of over one-third of Ngarara (Ngarara East) to the Crown in 1874 (which helped pay the costs of obtaining title);
- the acquisition of almost the whole of the Muaupoko block by the Crown and private purchasers;
- applications to partition Ngarara West from some individuals in the 1880s;
- petitions and protests about the outcomes of the partition hearing;
- the Ngarara commission (established to hear some of the grievances);
- a statute to authorise a rehearing of the Ngarara West partitions by the court, which occurred in 1890–91, resulting in a complete individualisation of the title (with partitions into multiple blocks); and
- the rapid alienation of newly individualised sections to the Crown and private purchasers in the 1890s.

1. Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2017), chs 4–6

At the same time, those who felt that they had been left out of the original list of owners in 1873 were also petitioning the Crown and seeking a remedy through whatever legal avenues they could find. The claimants in this phase of the inquiry were particularly aggrieved at the omission of names from the original list of owners and the Crown's failure to provide an effective remedy despite repeated protests and appeals.

The claimants were also aggrieved by the individualisation of title, the loss of community control over land alienations that resulted, the system of private purchase (including the exploitation of debts incurred as a result of title litigation), and the Crown's purchase of land from individuals. Prior to 1873, Te Ātiawa/Ngāti Awa had turned to the Kīngitanga for assistance in dealing with the Crown, the settler Parliament, and the threat of large-scale land loss. After the long litigation over Ngarara West and faced with the rapid alienation of their lands, Te Ātiawa/Ngāti Awa supported the Kotahitanga movement and the Māori parliament in the 1890s as a vehicle for obtaining systemic remedies from the Crown. We address the 1900 legislation that resulted from negotiations between Kotahitanga and the Crown in the next chapter.

The Crown made some relevant concessions, submitting that individualisation of title made the tribal lands more 'susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Āti Awa/Ngātiawa ki Kāpiti'. The Crown also conceded that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa virtually landless, in breach of the principles of the Treaty of Waitangi.[2]

We begin our discussion by setting out a brief summary of the parties' arguments and identifying the key issues, followed by:

- an analysis of alternatives to the court that the Crown could have adopted;
- the title investigations in 1873 and the form of title available at that time under the native land laws;
- the attempts of individuals to partition Ngarara West and the five-year period of litigation that followed;
- the question of whether the Crown provided appropriate remedies for the various grievances raised by petitions; and
- Te Ātiawa/Ngāti Awa's search for systemic remedies through the Kotahitanga movement.

We turn first to describe the position of the Crown and claimants in respect of these issues.

4.2 The Parties' Arguments

4.2.1 The claimants' case

4.2.1.1 *The native land laws and the Native Land Court*

In respect of the Crown's native land laws, claimant counsel submitted: 'At all times the Crown has a duty to actively protect the land and resources of Māori and

2. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 29

to actively protect Māori in the exercise of tino rangatiratanga over their lands and resources, in accordance with their lore and customs.'[3] In the claimants' view, the Crown's imposition of the native land laws on Te Ātiawa/Ngāti Awa ki Kāpiti was in breach of that duty:

> The establishment and operation of the Native Land Court pursuant to the Native Land Act 1865 and successive legislation involved the deliberate imposition of a system of title that was intended to and did in fact lead to the alienation of Te Ātiawa land and to the undermining of their exercise of tino rangatiratanga.[4]

The claimants argued that Te Ātiawa/Ngāti Awa were not consulted about the imposition of the native land laws or the court in its 1865 form, and that the Crown 'allowed no alternative way of determining and legally formalising land rights and interests'.[5] According to the claimants, the Waikanae lands were not brought before the court in 1873 because they wanted a new form of title but rather because:

- there was pressure from the Crown to file a claim;
- there was pressure created by the filing of claims to their land by other iwi; and
- there was no alternative to the court if they wanted to use their lands in the colonial economy (by leasing).[6]

The claimants also argued that the individualised title imposed by the native land laws was fundamentally incompatible with custom and with community control of land alienation. It inevitably led to large-scale alienation and had been specifically designed to do so.[7]

Further, the claimants argued that there were flaws in the 1873 title investigation of the Ngarara block. Many Waikanae inhabitants had gone to Taranaki in response to various Crown actions, and the custom at Waikanae had a fluid component that allowed tribal members to come and go. The title system in 1873, however, froze legal ownership in a minority of individuals who were resident at the time. The claimants' view was that the court failed to inquire properly as to custom and ownership, and that the Crown failed to provide a remedy when it became aware of the flaws in the 1873 title. Even some of those who were resident at the time were left off the list of owners, and those who had been left out did not discover the fact until the block was partitioned in the 1880s.[8] Claimant coun-

3. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 16
4. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 16
5. Claimant counsel (B Gilling, S Dawe, and R Brown), closing submissions, 21 October 2019 (paper 3.3.51), pp 45–46, 52–53
6. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 46
7. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 41–45; claimant counsel (Jones), closing submissions (paper 3.3.49), p 17
8. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 46–47, 49–51; claimant counsel (Jones), closing submissions (paper 3.3.49), pp 18–19; claimant counsel (J Hope), 21 October 2019 (paper 3.3.53), pp 15–17; claimant counsel (J Mason), closing submissions, 2 December 2019 (paper 3.3.55), pp 20–23

sel accepted that 'the Crown is not to be held responsible for the decisions of the Court', but argued that it was responsible for both 'the legislation under which the Court operated' and its 'failure to correct the injustices' by providing an appropriate remedy when called upon to do so.[9] Among other things, the omission of people from the 1873 title caused conflict and dissension within the iwi, which triggered the partition application and numerous petitions.[10] According to the claimants, similar problems occurred with the title to the Kukutauaki block.[11]

In the claimants' view, there was an opportunity for the Crown to rectify matters when it appointed a commission to inquire into the petitions. But there were significant flaws in the Crown's establishment of the Ngarara commission in 1888: 'its membership, terms of reference and administrative support was such as to prevent an effective inquiry from taking place'.[12] The claimants submitted that, following the commission's report, the Crown limited its remedy to a rehearing of the partitions rather than of the 1873 title. In their view, this 'perpetuated the initial injustice' and excluded all those left out in 1873 from any form of redress.[13] Later petitions to the Crown did not result in any remedial action.[14] The claimants also argued that the Crown had still not provided any 'adequate title options' by the time it granted a rehearing in 1890. The 'effect of this protracted and flawed process', they said, was the 'fragmentation and individualisation of title into small sections' in 1890. These sections were vulnerable to alienation and outside the community's control.[15] The costs of the process, including survey costs, exacerbated the likelihood of alienation.[16]

4.2.1.2 *Land alienation*

The claimants argued that the Crown '[a]t all times . . . has a duty to actively protect the land and resources of Māori and to ensure that they retain sufficient land for their present and future needs'. In their view, the Crown failed in this duty.[17] Essentially, the claimants' argument was that the Crown 'did not act in good faith, it did not treat Te Ātiawa ki Whakarongotai as its partner, and it certainly failed to actively protect the rangatiratanga of Te Ātiawa ki Whakarongotai'.[18] The Crown did this, it was submitted, by purchasing from individuals and allowing private

9. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 18
10. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 47–50; claimant counsel (Jones), closing submissions (paper 3.3.49), p 18
11. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 52
12. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 18–19
13. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 19; claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 49–51
14. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 19; claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 50
15. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 19–20; claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 49–51, 53
16. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 45, 51; claimant counsel (Jones), closing submissions (paper 3.3.49), p 20
17. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 20
18. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 41

buyers to also purchase from individuals, thereby capitalising on the Ngarara West litigation which had left the owners in possession of individualised, fragmented interests and made them vulnerable to alienation. As a result, only 11 of the 41 subdivisions in Ngarara West C remained in Māori ownership by 1900. In the case of Ngarara West A, there were 78 subdivisions, of which 25 had been sold by 1900.[19] The claimants also argued that the Crown allowed private purchasers to use debts to acquire land, especially since a significant proportion of the debts came from the litigation and the costs of obtaining title under the Crown's native land laws.[20]

4.2.2 The Crown's case

4.2.2.1 *Crown concessions*

As noted above, the Crown has made two concessions of Treaty breach relevant to the native land laws and to land loss in the nineteenth century:

- The individualisation of title made 'the lands of Te Āti Awa/Ngātiawa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Āti Awa/Ngātiawa ki Kāpiti'. The Crown's failure to protect those structures was a breach of the Treaty.
- The cumulative effect of the Crown's acts and omissions 'left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development'. The Crown's failure to ensure the retention of 'sufficient land for their present and future needs' was a breach of Treaty principles.[21]

In addition to these concessions of Treaty breach, Crown counsel noted the Crown's acceptance of certain points in previous cases:

- the Crown 'failed to consult with iwi/hapū on native land legislation prior to enactment';
- the native land laws did not 'provide for the legal recognition of the full range of complex and overlapping traditional land rights previously held by Māori';
- the native land laws could 'compel those who otherwise did not want to participate in title determination to participate', although (a) there was a 'demonstrable need' for some kind of forum to determine competing claims and (b) applications were generally made by representative persons;
- the Native Land Court system 'contributed to or at times exacerbated' tribal divisions; and
- the Native Land Court system involved 'considerable expense and disruption' and in some cases compelled the debt or the sale of land to cover those

19. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 39–41, 51; claimant counsel (Jones), closing submissions (paper 3.3.49), p 20
20. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 42, 45, 51
21. Crown counsel, closing submissions (paper 3.3.60), p 29

costs, but the Crown argued that there is 'no conclusive evidence' of that in the present case.[22]

Finally, the Crown made a concession in the Muaūpoko phase of this inquiry:

> The Crown acknowledges that it failed to provide an effective form of corporate title until 1894, which undermined attempts by Muaūpoko to maintain tribal authority within the Horowhenua block and this was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[23]

This concession has also been made in other inquiries and we presume it was left out of the present Crown case as an oversight.

4.2.2.2 *The native land laws and the Native Land Court*

In general terms, the Crown argued that it has 'a Treaty obligation to take reasonable steps to protect Māori interests' to the extent reasonably practicable and 'in all the circumstances of the time'. The Tribunal, therefore, should consider any alternative policies or actions that were both practicable and available to the Crown at the time.[24] In the Crown's view, this requires an assessment of 'what was reasonably seen as feasible and reasonable at the time'. The Crown was not able to 'foresee every outcome of its policy choices', and did not necessarily intend 'every consequence that flowed from a particular decision'. While 'the Crown does not deny that significant decisions might have been taken differently', the 'visibility and practicality of alternatives to actors at the time must be considered'.[25]

In respect of the native land laws, the Crown submitted that there were good reasons for establishing a tribunal to determine titles and adapt those titles to meet the 'new needs' of Māori in the colonial economy. There were possible alternatives at the time to the Native Land Court but the Crown's view was that they all had 'significant weaknesses', and that they cannot be shown to have been significantly better than the court system chosen by the Crown.[26] Further, Crown counsel submitted that the right to alienate land was an article 3 ownership right which dovetailed with the Crown's general expectation in the nineteenth century that land would be sold by Māori and put into production. This policy was not conceived in bad faith but the Crown submitted that 'good intentions' sometimes have bad results. The Tribunal should therefore focus on whether any bad consequences of the native land laws were either (a) foreseeable or (b) adequately corrected by the Crown once identified.[27]

Further, in respect of bad outcomes, Crown counsel submitted that the court was an independent judicial body. The Crown was not responsible for its decisions. Rather, the Crown was responsible for the legislation and for responding to

22. Crown counsel, closing submissions (paper 3.3.60), pp 29–30
23. Crown counsel, closing submissions in the Muaūpoko phase, 31 March 2016 (paper 3.3.24), p 23
24. Crown counsel, closing submissions (paper 3.3.60), pp 14–17
25. Crown counsel, closing submissions (paper 3.3.60), pp 16–17
26. Crown counsel, closing submissions (paper 3.3.60), pp 25–26
27. Crown counsel, closing submissions (paper 3.3.60), p 26

problematic court decisions 'to the extent that issues with decisions were brought to the Crown's attention'.[28] Similarly, commissions of inquiry such as the 1888 Ngarara commission were independent and the Crown was not responsible for their findings. The Crown's responsibility lay in 'responding to any recommendations made by a Commission of Inquiry in a Treaty-consistent manner'.[29]

In the particular case of the Ngarara commission, the Crown submitted that it took appropriate action on the petitions by appointing a commission of inquiry. The Crown was not responsible for what the commission decided to recommend. Crown counsel also submitted that the Crown acted appropriately on the commission's recommendation to empower a rehearing of the partitions. The Crown agreed that it did not empower a *de novo* rehearing of the 1873 title but submitted that the 1873 list of owners was developed by the community with no Crown involvement. Crown counsel did not accept that the Crown could be criticised for its decision since 'the criteria for inclusion reflected community policy at the time'. Further, the commission found no evidence of impropriety by Wi Parata in leading the process of drawing up the list. In essence, the Crown's view was that the dispute over the 1873 title was an internal matter and not the business of the Crown.[30] The commission was faced with 'extremely conflicting evidence', and Wi Parata continued to maintain that the correct decision was made in 1873.[31] The Crown argued that this issue, which reflected the decisions made by Māori at the time (and not the Crown), is not the real source of current grievances; those relate more, it was submitted, to land loss and its consequences.[32]

Similarly, in respect of Kukutauaki, the Crown submitted that it was not responsible for either where the hearing was held or the court's acceptance of the ownership list prepared by Wi Parata. Objections about the outcome were not raised until the late 1880s. In response to the claimants' argument that it failed to provide adequate title options for Kukutauaki and other blocks to reflect communal ownership, the Crown responded that the issue of 'communal ownership has not been extensively considered in this phase of the inquiry and the Crown is accordingly not in a position to make any submission in relation to this claim'.[33]

4.2.2.3 *Land alienation*

In respect of the Crown's purchase of the 19,600-acre Maunganui block in 1874, otherwise known as Ngarara East, the Crown submitted that the purchase was conducted with Wi Parata and with the agreement of all the registered owners. There was no evidence of 'duress' or bad faith, and therefore the Crown cannot be criticised for this purchase.[34] The Crown also submitted that its concessions relating to individualisation of title and landlessness are relevant to other purchases

28. Crown counsel, closing submissions (paper 3.3.60), p 27
29. Crown counsel, closing submissions (paper 3.3.60), pp 27–28
30. Crown counsel, closing submissions (paper 3.3.60), pp 32–35
31. Crown counsel, closing submissions (paper 3.3.60), p 34
32. Crown counsel, closing submissions (paper 3.3.60), pp 37–38
33. Crown counsel, closing submissions (paper 3.3.60), pp 36–37
34. Crown counsel, closing submissions (paper 3.3.60), pp 35–36

but the substance of the Crown's submissions were directed to twentieth-century private purchases, especially in respect of protection mechanisms.[35] The exception to this was the issue of costs. The Crown argued that there was only one piece of evidence about the impact of the costs of obtaining title on the sale of land, and that there was 'no conclusive evidence' in this particular inquiry that 'the costs of the titling process was a cause of land sales'. Crown counsel urged caution in making any findings on this point.[36]

4.2.3 The claimants' replies

The claimants responded to a number of points raised by the Crown. They agreed with the Crown's submission that some form of tribunal was required to decide titles, but argued that the tribunal need not have taken the form of the court set up by the Crown in 1865. Claimant counsel submitted:

> It is hard to conceive of a form and system that was further removed from doing effectively and fairly what was ostensibly its primary task of ascertaining Maori customary rights to whenua. A Pakeha judge presiding over a British court, located in centres of colonial settlement, applying statute law and regular processes for gathering, accepting and hearing evidence, supported by haphazard processes of informing those affected can hardly be argued to be a system Maori would have designed to achieve that aim.[37]

In terms of the Crown's submission that the native land laws were conceived in good faith and were not intended to result in Māori landlessness, the claimants argued that the damaging effects of the native land laws were already clear by 1867. In the claimants' submission, the Crown never took effective action because it remained committed to colonisation and – as it was put at the time – ending the 'beastly communism' of Māori society.[38]

In respect of the Crown's submissions about the 1873 Ngarara title, and its view that the list of owners was an internal matter for which the Crown was not responsible, claimant counsel submitted that the Crown's responsibility was to provide a remedy. The Crown had an opportunity to do so as a result of the Ngarara commission but chose not to require a *de novo* hearing in its remedial legislation. This was a breach of the Treaty.[39]

In respect of the Crown's submissions about land alienation, the claimants argued that the Crown had focused on pre-Native Land Court transactions, whereas their submissions encompassed later nineteenth-century purchasing as well. The claimants also disputed the Crown's submission about the impacts of costs on sales, arguing that the 'dots may be joined', that this district was no

35. Crown counsel, closing submissions (paper 3.3.60), pp 38–40
36. Crown counsel, closing submissions (paper 3.3.60), pp 29–30
37. Claimant counsel (Gilling), submissions by way of reply, 14 February 2020 (paper 3.3.69), p 6
38. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 6
39. Claimant counsel (C Beaumont), submissions by way of reply, 12 February 2020 (paper 3.3.66), p 3

different from others in that respect, and that the 'likelihood of this cost-sale nexus should be given weight by this Tribunal'.[40]

Overall, the claimants also queried the utility of the Crown's concession, submitting:

> the Crown does indeed concede that the cumulative effect of its acts and omissions left Te Atiawa landless, yet there are hardly any such acts and omissions to which it admits. They are apparently rather the fault of Te Atiawa themselves, or its then leadership, or the court which has little or nothing to do with the Crown. In counsel's submission, this continual avoidance of responsibility robs the Crown concession of most of its meaning and effect. And certainly of its reconciliatory power and potential.[41]

4.3 Issues for Discussion

The major issues for discussion in this chapter are:

- Was the Native Land Court imposed on Te Ātiawa/Ngāti Awa ki Kāpiti and were there alternatives to the court?
- Were there flaws in the title investigation for the Ngarara, Muaupoko, and Kukutauaki blocks and in the form of title available for those blocks in 1873?
- Did the Crown provide appropriate remedies when it was made aware of Te Ātiawa/Ngāti Awa grievances about the native land laws and the 1873 investigation of title?
- What was the impact of individualisation on the ability of Te Ātiawa/Ngāti Awa to retain their lands after 1873, and what role did the Crown play in purchasing those lands?

4.4 Was the Court Imposed on Te Ātiawa / Ngāti Awa and Were there Alternatives to the Court?

4.4.1 Introduction

As discussed above, we are not considering the origins of the native land laws or all aspects of the establishment of the Native Land Court in this phase of our inquiry. We will address those matters more fully after hearing the evidence and submissions of all parties. In this section, we address a key issue that was raised by the parties in this phase: was the Native Land Court imposed on Te Ātiawa/Ngāti Awa ki Kāpiti and were there alternatives to the court?

The Crown accepted that it 'failed to consult with iwi/hapū on native land legislation prior to enactment'.[42] The Hauraki Tribunal observed that this was an important consideration in appraising the native land laws, as was the issue of consent for the introduction of the court in particular districts and whether free and willing applications were made to the court:

40. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), pp 7, 9
41. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 8
42. Crown counsel, closing submissions (paper 3.3.60), p 29

> However well-intended the tenure changes might be, in the absence of full consultation and consent of Maori, it is very difficult to see how the Legislature can interfere without infringing the tino rangatiratanga recognised under article 2 of the Treaty.
>
> It is therefore important to know whether the Native Land Acts were designed and implemented with Maori consent and cooperation, whether their constant adjustment through the following century reflected serious discussion with Maori and reflected their wishes, and whether they actually did include realistic provisions for Maori advancement as well as that of settlers. For if this were not the case, the 'civilising' aspect of land policy was merely a cloak for settler self-interest and the overriding of Maori rangatiratanga.
>
> A further important question for our appraisal is whether, once the court's new tenurial system was introduced, Maori were obliged – or subject to excessive pressure – to bring their land under it, or whether they were actually free to choose to keep their land in customary tenure.[43]

We will not be discussing some of the general points raised in the above quotation at this point but we will consider whether Te Ātiawa/Ngāti Awa ki Kāpiti supported the introduction of the court in their district and made a free and willing decision to bring their remaining lands under it. We will also consider the question of whether there were any alternatives to the court. This issue has two dimensions: first, whether the Crown considered alternative forms of tribunal for determining title; and, secondly, whether there was an alternative available to Te Ātiawa/Ngāti Awa if they wished to use their lands in the colonial economy.

According to the claimants, the Crown refused to provide any alternatives to the form of court selected in 1865. They also argued that they had little choice but to file a claim with the court in 1872, due to pressure from the Crown, pressure from the filing of rival claims, and the need to formalise leases so that they could obtain a return from their lands (see section 4.2.1). The Crown, on the other hand, relied on the 'Hot Tub' statement in the Whanganui inquiry to argue that all the alternatives to the court had 'significant weaknesses', and that no alternative could be shown to be 'significantly better' than the court that was actually developed by the Crown after 1862. In the absence of a significantly better alternative, the Crown argued that 'it would have been at best imprudent to dismantle' the 1865 court system altogether.[44] Crown counsel made no submission about the reasons why Te Ātiawa/Ngāti Awa ki Kāpiti made an application to the court in 1862, but the Crown did stress that 'Māori were not passive' in the process, pointing to Wi Parata as a leader who 'exercised choice and who engaged with processes of change', including the Native Land Court.[45]

The Whanganui 'Hot tub' statement was an agreed position on the native land laws formulated by six expert historians in the Whanganui inquiry, modelled on

43. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 671
44. Crown counsel, closing submissions (paper 3.3.60), pp 25–26
45. Crown counsel, closing submissions (paper 3.3.60), p 27

the process of 'hot tubs' used in the courts. It contained many points of qualification or dissent by the various participants.[46] This statement was not filed on our record of inquiry but we note that the alternatives canvassed in that statement have all been discussed in the evidence for this inquiry and in previous Tribunal reports. Claimant counsel did not respond specifically to the statement in their reply submissions. We therefore put no weight on the 'Hot tub' statement itself but rely on the evidence and submissions in this inquiry.

4.4.2 Alternatives to the Native Land Court

For the purposes of this phase of our inquiry, we broadly accept the point that some form of tribunal to determine title was necessary in the wake of the Waitara purchase and the failure of Crown pre-emption to correctly identify and deal with all the appropriate right holders. We saw evidence of that failure in chapter 3 (see section 3.6). But the parties debated whether the form of tribunal selected by the Crown in 1865 was an appropriate body to ascertain and determine customary title.

One of the obvious alternatives to the court has already been discussed in chapter 3, where we considered the 'New Institutions' established by Governor Grey in 1861 (see section 3.7). District rūnanga, a civil commissioner sitting with about 12 chiefs, would have powers of title determination (as well as other powers of self-government). These included the power to adjust the 'disputed land boundaries of tribes, of hapus, or of individuals, and for deciding who may be the true owners of any Native lands'. These rūnanga would also have the power to recommend Crown grants for tribes, hapū, or individuals (as they saw fit), and would pass regulations to control the alienation of land to settlers in conjunction with the Governor.[47] The Government agreed to fund this system but, in reality, Ministers were unwilling to allow the rūnanga to control land alienation.[48] As we discussed in chapter 3, Governor Grey and the resident magistrate for the district, Walter Buller, offered the New Institutions to Te Ātiawa/Ngāti Awa in 1862 as well as to the other iwi of the district. Wi Tako Ngatata's response was positive in principle but he announced that Waikanae would await the decision of the Kīngitanga leadership in Waikato (see section 3.7.5).

In May 1862, William Fox introduced the first Native Lands Bill, which

> reflected Grey's plan to empower district runanga, under officials to be called Civil Commissioners, to define the ownership of customary land, [and] make regulations

46. 'Agreed Historian Position Statement on Native Land Court Issues', May 2009 (Wai 903 ROI, paper 6.2.5)

47. T J Hearn, 'One past many histories: tribal land and politics in the nineteenth century', June 2015 (doc A152), p 219; 'Minute by Governor Sir George Grey on His Excelleny's plan of native government', 1861. AJHR, 1862, E-10, pp 10, 12

48. Hearn, 'One past many histories' (doc A152), p 219

governing the sale or leasing of it directly to settlers at the rate of not more than one farm per settler.[49]

The rūnanga model also influenced the form of body to decide land titles when Alfred Domett replaced Fox as Premier in August 1862. But it was not to be the district rūnanga of Grey's New Institutions. Rather, the Government proposed to create a specific court for the purpose. The Native Minister, Francis Dillon Bell, explained that the court would consist of chiefs who would determine tribal titles:

> If a Tribe is desirous of having its title defined to the tribal lands belong[ing] to the entire tribe in a certain District, application will be made by or on behalf of the Tribe to the Court appointed for that District; which Court, though presided over by a European Magistrate, will be mainly composed of Native Chiefs. The Court will investigate the title of the tribe according to Native custom, and declare the custom under which it is held, and before coming to any decision will cause the land to be carefully surveyed and marked off on the ground, and a proper plan of it made.[50]

After this court had decided upon title, the Governor would confirm their proceedings – this was a check to ensure that the court's proceedings had been 'regular and just'. The Governor could also make tribal reserves or other reserves for the benefit of the tribe or for particular chiefs or families. This was a carry-over of the Crown's role in the 1840s and 1850s (see section 3.6.7), which was still seen as necessary in 1862. Once the title was confirmed, the tribe could either get a new certificate of title appointing trustees to lease or sell on their behalf or could further subdivide the land to the point of individual titles if they chose to do so.[51]

The Native Lands Act 1862 incorporated many of these ideas, including 'not only for the appointment of Maori judges to each court but that those judges should have the power of decision: in short, the Native Land Court established under the Act was a predominantly Maori body'.[52] The court, composed of local chiefs and a resident magistrate as chairperson, was established in various localities in Kaipara and Northland.[53] This form of court was therefore clearly a feasible and practicable option at the time but a large part of the Porirua ki Manawatū district was exempted from this Act's coverage. That issue will be addressed in a later phase of this inquiry. The Waikanae lands, however, remained within the scope of the Act and its successor, the Native Lands Act 1865.[54]

49. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 674–675; Alan Ward, *National Overview*, 3 vols (Wellington: Waitangi Tribunal, 1997), vol 2, p 214
50. F Dillon Bell, minute, 6 November 1862 (Hearn, 'One past many histories' (doc A152), p 227)
51. Hearn, 'One past many histories' (doc A152), p 227; F Dillon Bell, minute, 6 November 1862, AJHR, 1863, A-1, pp 10–11
52. Hearn, 'One past many histories' (doc A152), p 229
53. Hearn, 'One past many histories' (doc A152), p 229; Waitangi Tribunal, *The Kaipara Report* (Wellington: Legislation Direct, 2006), pp 59–61
54. See Hearn, 'One past many histories' (doc A152), map 4.2, p 231.

As has been addressed in a number of Tribunal reports, the form and composition of the Native Land Court was fundamentally altered in 1864–65, resulting in a new kind of tribunal to determine titles. The Whanganui Tribunal explained:

> From December 1864, before any further cases could be heard, a number of proclamations ushered in wholesale change. The five court districts proclaimed under the 1862 Act were abolished and replaced by one district covering the entire country. This established a single, centralised Native Land Court, and did away with the more localised regime. Francis Dart Fenton was appointed as the first chief judge of the new court in January 1865, and other European officials became judges. The 11 Māori who previously held office as judges were now assessors.
>
> In summary, a flexible and local court system with a high degree of Māori input was abandoned in favour of a centralised, formal, and European-dominated regime. The chief judge himself drafted these changes into the Native Lands Act of 1865.[55]

The establishment of the Native Land Court in its 1865 form was not the end of the story. There was a great deal of Māori protest. As we explained in the first volume of our district report, *Horowhenua*, Māori nationwide pressed for the Crown to recognise and accord legal powers to their rūnanga, including for deciding titles to land. Donald McLean, who had become Native Minister in 1869, agreed in 1872 to bring in a Native Councils Bill to meet this widespread demand.[56]

In introducing this Bill, McLean told the House:

> They [Māori] were themselves the best judges of questions of dispute existing among them. No English lawyer or Judge could so fully understand those questions as the Natives themselves, and they believed that they could arrive at an adjustment of the differences connected with the land in their own Council or Committee, very much better than it would be possible for Europeans to do. He hoped honourable members would accord to the Native race this amount of local self-government which they desired. He believed it would result in much good, and whatever Government might be in existence would find that such Committees, with Presidents at their head, would be a very great assistance in maintaining the peace of the country.[57]

The Native Councils Bill would have given elected native councils the power to determine titles (but with a right of appeal to the Native Land Court), as well as other powers of self-government.[58] Māori members supported the Bill, including the leading Waikanae chief at the time, Wi Te Kakakura Parata, who had been elected to the Western Māori seat in 1871. Wi Parata had been critical of the Native

55. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 384

56. Waitangi Tribunal, *Horowhenua*, pp 159, 168–169

57. McLean, 22 October 1872, NZPD, vol 13, p 895 (Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 190)

58. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 309–310

Land Court since his election, mostly with a focus on procedural matters. Outside of the House, he was one of many who advocated for its abolition in 1872.[59] Wi Tako, who was still living at Waikanae at this time, was also highly critical of the court for the impact of its new form of title on the authority of tribal leaders. Chief Judge Fenton acknowledged this point to McLean in 1871, casting such opposition in terms of the negative uses to which such authority (rangatiratanga) could be put:

> The objections to the present operation which are urged by such men as Wi Tako constitute, in my judgment, its greatest commendation. Shrewd men like him have not failed to observe that in the destruction of the communal system of holding land is involved the downfall of communal principles of the tribe, and the power of combination for objects of war or depredation.[60]

In supporting the 1872 Native Councils Bill, Wi Parata spoke strongly against the idea that expense should stop Parliament from adopting this new measure. As will be recalled from chapter 3, cost was given as the reason for abolishing the New Institutions in 1865. Parata told the House:

> Certain petitions were received last year from Natives in the Wairarapa district, against the Native Lands Court. This Bill was not asked for by the Maoris for the sake of obtaining money; they only wanted to get authority from the House to act. If the Bill were passed, he should propose that the assessors be done away with, and that all questions should be left to the Councils to decide. He did not think honourable members need be afraid on the score of expense as the Maoris did not ask that they should be paid; they only asked that those Councils should have authority from the House in order that their decisions might be carried into effect. If these were European Committees, they would not be objected to by the House.[61]

Wi Parata further stated that the councils were essential for Māori to have 'the management of their lands given back to them'.[62] Māori throughout the North Island wanted these councils but McLean withdrew the Bill without even putting it to a vote, ostensibly because it had been introduced so late in the session. Instead, he promised to submit a revised Bill in 1873, which never happened.[63]

At the time the Native Councils Bill was debated in October 1872, Te Ātiawa/Ngāti Awa had recently filed a claim with the court, and it was clear that Wi Parata hoped their claim could be resolved by Māori leaders in the councils rather than

59. Tony Walzl, 'The Public and Political Life of Wiremu Te Kakakura Parata, 1871–1906', May 2019 (doc A216), pp 8, 20–21, 24, 32, 37
60. Fenton to McLean, 28 August 1871 (Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 433)
61. Wi Parata, 22 October 1872, NZPD, vol 13, p 896
62. Wi Parata, 22 October 1872, NZPD, vol 13, p 896
63. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 311

the court. Instead of a second Native Councils Bill, McLean brought in the Native Land Act 1873 which repealed previous legislation but retained the 1865 form of the court.[64] By the time this Bill was debated in August 1873, the Ngarara block had already gone through the court under the Native Lands Act 1865, and Wi Parata had become a member of the Government as a member of the Executive Council (although not a Minister responsible for a portfolio).[65] He was therefore obliged to support his ministerial colleague's Native Land Bill.

Wi Parata's speech on the Bill suggested that the strongest point in favour of the Native Land Court was that it had kept the peace and prevented disturbances in cases such as Manawatu–Kukutauaki (discussed below). He believed that the previous legislation 'had not been brought into force with the intention of wasting the land of the Maoris', but rather that 'each Maori should have his Crown Grant, and hold onto his land'. Yet disastrous land loss had been the result of the 1865 Act, though Wi Parata did not at this time blame the court. He also noted that the Act 'did not compel the owners of the land to bring their cases before the Court'. Nonetheless, he reminded the House that he had 'raised several points of objection to the Native Lands Court last session, but no one supported him'. He said that he was 'told that the Court was a good thing', and emphasised that under the new Bill there was some protection because '[c]ertain portions were to be set apart for the hapu' before other land could be sold.[66]

In 1873, Te Ātiawa/Ngāti Awa had only just begun to engage with the native land laws and the court; looking back in 1892, Wi Parata recalled that Māori themselves had lodged their applications to the court:

> The wish of the natives was for the Native Land Courts. This evil item was not brought by the Europeans, but by the natives themselves. This was clever of the pakeha, but the natives found things had brought a strange destroyer upon them by an old familiar name.[67]

We turn next to consider the circumstances in which Te Ātiawa/Ngāti Awa lodged their application with the court in 1872.

4.4.3 Why did Te Ātiawa/Ngāti Awa apply to the court in 1872?

According to the claimants, there were a number of factors which led Te Ātiawa/Ngāti Awa to apply to the court in 1872. These included the growth of sheep farming and informal leasing as well as the Crown's efforts to 'encourage the titling

64. There was one important exception: the power of assessors was removed but partially reinstated the following year in the Native Land Act Amendment Act 1874.

65. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 6

66. Wi Parata, 25 August 1873, NZPD, vol 14, p 614. The final point was a reference to the new District Officers and reserve requirements of the Native Land Act 1873.

67. 'The Parikino Meeting', *Wanganui Chronicle*, 14 January 1892, p 2 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 99)

of all remaining customary land' in this district.[68] In particular, claimant counsel submitted that the reasons for bringing the land before the court at that time were:

- Crown pressure to complete title investigations to enable purchasing;
- the need to formalise leases to Pākehā; and
- pressure from claims by Ngāti Toa to the south.[69]

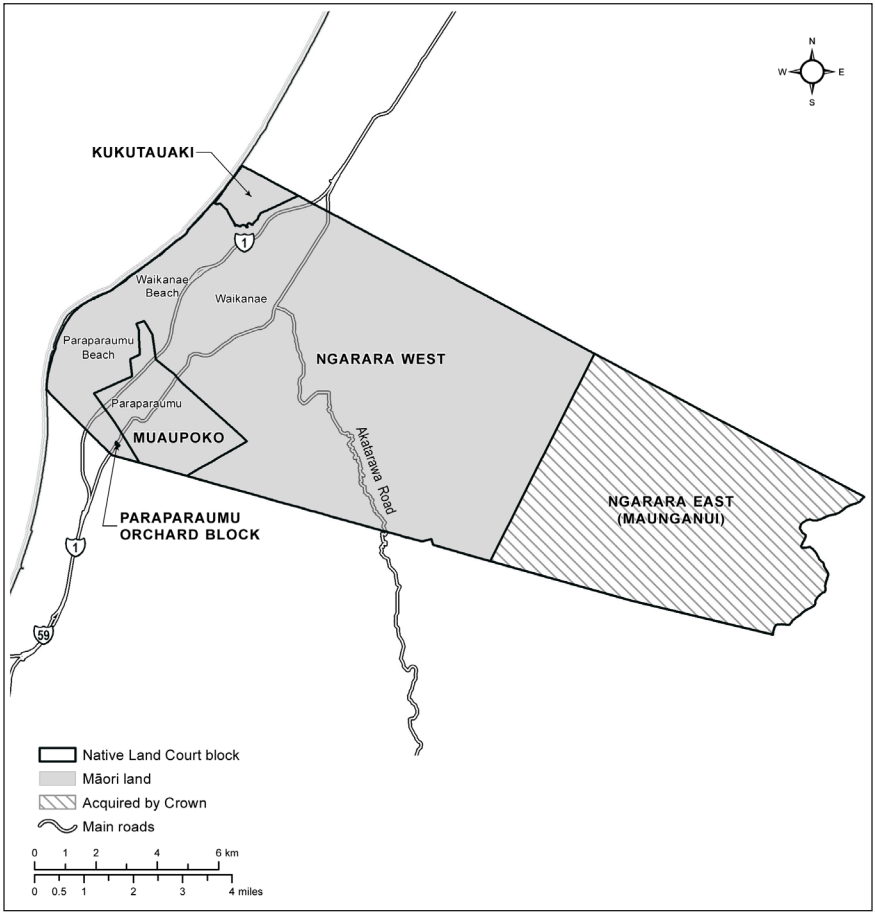
We have already discussed the broad situation at the time in *Horowhenua*, including the secondment of interpreter James Grindell to the Wellington provincial government.[70] The Native Department directed Grindell to 'endeavour to make arrangements (as desired by the Minister for Public Works[71]) with the various hapus and tribes for sending applications to the Native Lands Court to have their title to all lands, of which they are desirous of disposing to the Government, investigated'.[72] One of the main reasons given at the time for the establishment of the Native Land Court was that there should be direct dealing between Māori and settlers so that Māori could obtain a fair, market price for their lands, and not the artificially low prices that the Crown had paid under pre-emption.[73] But the Crown soon resumed large-scale purchasing in the late 1860s and 1870s.[74] The Wellington superintendent, William Fitzherbert, had succeeded Isaac Featherston as 'Agent of the General Government for the Purchase of Native Land'.[75]

The pressure from the Crown to put land through the court was a relatively new development for the Waikanae district. The previous superintendent, Isaac Featherston, had focused his attention on the vast Rangitikei–Manawatu block (see map 5). Te Ātiawa/Ngāti Awa ki Kāpiti played a role in that purchase. Featherston classified them as 'remote' claimants, which he defined as those who had a 'distant tribal connection' with the Ngāti Raukawa vendors, and whom he said participated on 'sufferance'. Featherston advised the Government that 'remote' claimants were only entitled to payment in the form of 'a present from the tribes by whom they were invited' to participate rather than a formal payment as owners of the block.[76]

Dr Hearn summarised the participation of Te Ātiawa/Ngāti Awa in the Rangitikei-Manawatu purchase as:

> Te Ati Awa's involvement in the Rangitikei–Manawatu transaction appears to have been minor and to have been at Ngati Raukawa's invitation. Members of the iwi were thus present at the Parewanui hui of December 1866 called to agree upon a scheme for the distribution of the purchase monies. During those proceedings, the hui appointed

68. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 46
69. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 46
70. Waitangi Tribunal, *Horowhenua*, p 167
71. At the time, the Minister of Public Works was responsible for Crown purchases of Māori land.
72. Grindell to Cooper, 25 March 1872 (Hearn, 'One past, many histories' (doc A152), p 578
73. Hearn, 'One past, many histories' (doc A152), pp 215, 221–222
74. Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues, c 1819–1900', 2017 (doc A194), p 411
75. Waitangi Tribunal, *Horowhenua*, p 167
76. Featherston to Richmond, 23 March 1867 (Hearn, 'One past, many histories' (doc A152), p 386)



Map 5: The Ngarara, Kukutauaki, and Muaupoko blocks as at 1874, including the Crown's purchase of Ngarara East (Maunganui).

an inter-tribal group of 47 to consider the matter: Te Ati Awa furnished two members of that group, as did Ngati Toa. That hui finally agreed that Ngati Apa should receive £15,000 of the total price of £25,000, and that it should settle with Rangitane, Whanganui and affiliated iwi; and that Ngati Raukawa should receive £10,000 and settle with Ngati Toa and Te Ati Awa and with those few of Ngati Apa whose claims it admitted. The Deed of Cession contained 1,647 names: of those 58 were of Te Ati Awa, Ngati Kahungunu 'and others.' Ngati Toa and Te Ati Awa appear to have received between them £1,000.[77]

77. T J Hearn, answers to questions in writing, 12 November 2018 (doc A152(h)), pp 1–2

Tony Walzl suggested that some Te Ātiawa/Ngāti Awa chiefs may have signed the deed when offered payment 'even though they did not see themselves as having rights', while 'some Ngatiawa clearly considered they had rights in this area.'[78]

We will address the Rangitikei-Manawatu purchase in detail in a later phase of this inquiry. Here we note that:

- the Crown purchase agent decided who to deal with, the jurisdiction of the Native Land Court having been deliberately excluded by legislation to facilitate this purchase; and
- some Te Ātiawa/Ngāti Awa chiefs participated, classified by the purchaser as 'remote claimants' without a formal investigation.

The exemption of land from the court's jurisdiction was removed in the Native Lands Act 1867, which also allowed non-signatories of the Rangitikei-Manawatu purchase to file claims.[79] The result was the Hīmatangi case in 1868, which may have been Te Ātiawa/Ngāti Awa's first experience with the court. Wi Parata and Wi Tamihana Te Neke both gave evidence and took opposite views. Wi Parata told the court about how Walter Buller, Featherston's assistant purchase agent, visited Waikanae during the negotiations:

> I said to Mr Buller it will not be right for us to sign that deed, that land belongs to Ngati Apa and Ngati Raukawa. It is not ours. And Wi Tako said Ngati Awa has no claim to that land and no reason why we should sign. Mr Buller replied 'No, but sign.' We said 'No, but give us £1,000 and we will sign.' Mr Buller said 'Yes; you go to Parewanui and divide the money between all the hapus.' We then signed, Mr Buller having consented to our having £1,000 because we understood that he agreed. We wrote our names having no claim. . . . Wi Tako, Tamati te Hawa, Heremia, Heta Potete and others Their names were signed, but Heremia I am not sure of. Heta. Mr Buller urged on them to sign although they objected.[80]

Wi Tamihana Te Neke, however, gave evidence that Te Ātiawa/Ngāti Awa had continuing rights as a result of their role in the conquest of the district, and that those rights meant that they had to be consulted about the sale.[81] There were varied points of view among the Ngāti Raukawa and Ngāti Toa witnesses in 1868 as to whether rights were conferred by an initial conquest without recent occupation. This continued to be debated in later cases. On the other side, Ngāti Apa maintained that they had retained exclusive rights to the land.[82]

Following a second hearing for Rangitikei-Manawatu in 1869, and the long, drawn-out completion of that purchase, the Crown's attention turned to the lands south of the Manawatū River. Superintendent Fitzherbert wanted to buy a long

78. Walzl, 'Ngatiawa' (doc A194), p 334
79. Robyn Anderson and Keith Pickens, *Wellington District: Port Nicholson, Hutt Valley, Porirua, Rangitikei, and Manawatu*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996) (doc A165), p 113; Native Lands Act 1867, ss 40–41
80. Otaki Native Land Court, minute book 1C, pp 220–221 (Walzl, 'Ngatiawa' (doc A194), p 337)
81. Walzl, 'Ngatiawa' (doc A194), pp 338–339
82. Walzl, 'Ngatiawa' (doc A194), pp 334–341

swathe of inland territory, amounting to about 250,000 acres. He wrote to Grindell that he was 'very anxious' to get this land, 'extending from the top of the Tararua Ranges to a roadway marked on the tracing with which you will be furnished.'[83] This would have included some 'flat land between the [proposed] road and the beginning of the foothills.'[84] This was the genesis of the Maunganui purchase in 1874 (see section 4.5.5.2). Grindell was sent to 'encourage and persuade the tribes to make applications to the Native Land Court' and to manage surveys, which were an essential prerequisite for a claim to be heard.[85] He did so in an atmosphere of insecurity and competition, as the various iwi became concerned that others would get title to land unless they put in a claim of their own. In 1870, Te Ātiawa/Ngāti Awa participated in two inter-tribal rūnanga to resolve disputes between Ngāti Raukawa and Muaūpoko.[86] As noted above, this was their preferred vehicle for resolving title matters when the Native Councils Bill was introduced in 1872.

Nonetheless, Te Ātiawa/Ngāti Awa lodged a claim for the whole of their lands in 1872. According to Tony Walzl:

> In just two weeks Grindell secured permission from Maori to bring to Court the large untitled areas stretching from Raumati to the Manawatu. The need to register claims in the face of a Muaupoko challenge to the rights of the heke groups is shown when Grindell reported in July 1872 that it was the intention of Muaupoko to place pou and arrange surveys as far south as the Wainui Crown purchase boundary. Although this did not eventuate as far as the Ngatiawa lands around Waikanae are concerned, such a belief reflects the context in which the applications for all remaining Maori land were made.[87]

The immediate trigger, however, was a claim from Ngāti Toa rather than Muaūpoko. In April 1872, Grindell found a dispute over surveys. Tamihana Te Rauparaha told him that Wi Parata would resist the survey of the Kukutauaki area, which was 'the southernmost point claimed by Ngatitoa and Ngati Raukawa [of Ōtaki]', whereas 'Te Ngatiawa' claimed 'to a point on the coast further north.'[88] As discussed in chapter 3, there had been a dispute about the boundary when Wiremu Kingi Te Rangitake departed from Waikanae in 1848 (see section 3.5.4). Grindell found the whole Waikanae community assembled to meet with him when he arrived, and Wi Parata assured Grindell that he would not dispute the survey – although he claimed that 'something unpleasant would arise' if the two parties were to meet on the ground. Due to Grindell's persuasion, the solution adopted was for 'the whole of their land extending from Tamihana's boundary in the north

83. Fitzherbert to Grindell and Wardell, 4 November 1872 (Anderson and Pickens, *Wellington District* (doc A165), p 203)
84. Walzl, 'Ngatiawa' (doc A194), p 412
85. Anderson and Pickens, *Wellington District* (doc A165), p 203
86. Waitangi Tribunal, *Horowhenua*, pp 159–162
87. Walzl, 'Ngatiawa' (doc A194), p 412
88. Grindell to Fitzherbert, 29 April 1872 (Walzl, 'Ngatiawa' (doc A194), p 422

to Wharemauku on the south of Waikanae should be surveyed and passed through the Lands Court'. Grindell 'filled up an application which they signed'.[89]

Wi Parata's account in the Native Land Court suggested that they were reluctant to use the court, and that the boundary had been disputed for a long time (without any trouble):

> We were a good many years contending about these boundaries up to the time the N Land court sat. Then the dispute changed. Tamihana [Te Rauparaha] said let the court decide ab[ou]t the land but I would not consent. Tamihana went to survey the land. I sent my sister[90] to remove Tamihana's survey chain, Raiha Puaha. When Tamihana saw that his survey chain was removed he came to say not to disturb the survey, let it go on & the court decide. I said it is your own idea, go on with it. Tamihana never went to dispute about this with any other N Awa never, he came to me. After he had surveyed it we went to lay down the boundary but we didn't survey in the first instance.[91]

What followed next, according to Wi Parata's account, was that Ngāti Raukawa got agreement from the superintendent to survey all the land they claimed between the Manawatū River and Kukutauaki, after which Te Ātiawa/Ngāti Awa got their own boundary line surveyed and 'then we put an application for the land to be heard in the court'.[92]

The issue of leasing may also have been relevant to the filing of a claim. A former whaling captain, Tom Wilson, had leased land for sheep farming. Part of his rent was paid in money and part in sheep and wool, with various chiefs and whānau running sheep in the 1860s and early 1870s. This lease was not legal and would not have been enforceable in the courts, but there do not seem to have been any significant disputes about it that might have precipitated a Native Land Court hearing.[93]

In sum, Grindell persuaded Te Ātiawa/Ngāti Awa to file a claim as part of a Crown initiative to get land titled so that it could be purchased. The main pressure came from a survey by other iwi who had filed a claim to part of their land, a disputed boundary zone. Once someone filed a claim, all others had to participate as well or risk losing their land. This was a well-known feature of the native land laws which has been the subject of comment in previous Tribunal reports.[94] The Crown conceded that the native land laws could 'compel those who otherwise did not want to participate in title determination to participate', although Crown

89. Grindell to Fitzherbert, 29 April 1872 (Walzl, 'Ngatiawa' (doc A194), p 422
90. Wi Parata explained in 1888 that she was not his sister in the 'European sense' but rather a second cousin: Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 817)
91. Napier Native Land Court, minute book 15, p 172 (Walzl, 'Ngatiawa' (doc A194), p 421)
92. Napier Native Land Court, minute book 15, p 172 (Walzl, 'Ngatiawa' (doc A194), p 421)
93. Walzl, 'Ngatiawa' (doc A194), pp 396–399
94. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 417; Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 3, pp 1049, 1058, 1059–1061, 1062, 1084–1088

counsel also argued that applications were generally made by representative persons.[95] It was clearly not the preference of Te Ātiawa/Ngāti Awa to use the court, as was shown by their initial reluctance to lodge a claim and Wi Parata's support of the Native Councils Bill. The passage of that Bill would have meant the hearing of their claim by a local Māori council prior to the court, although the same form of title was available either way (as discussed in the next section). The decision to go ahead and lodge a claim was made by the community in a public hui and not by an unrepresentative individual or individuals, as sometimes happened in other instances.

4.5 Were there Flaws in the Title Investigation and the Form of Title Available in 1873?

4.5.1 Introduction

In 1872–74, the Waikanae lands were divided into three blocks:

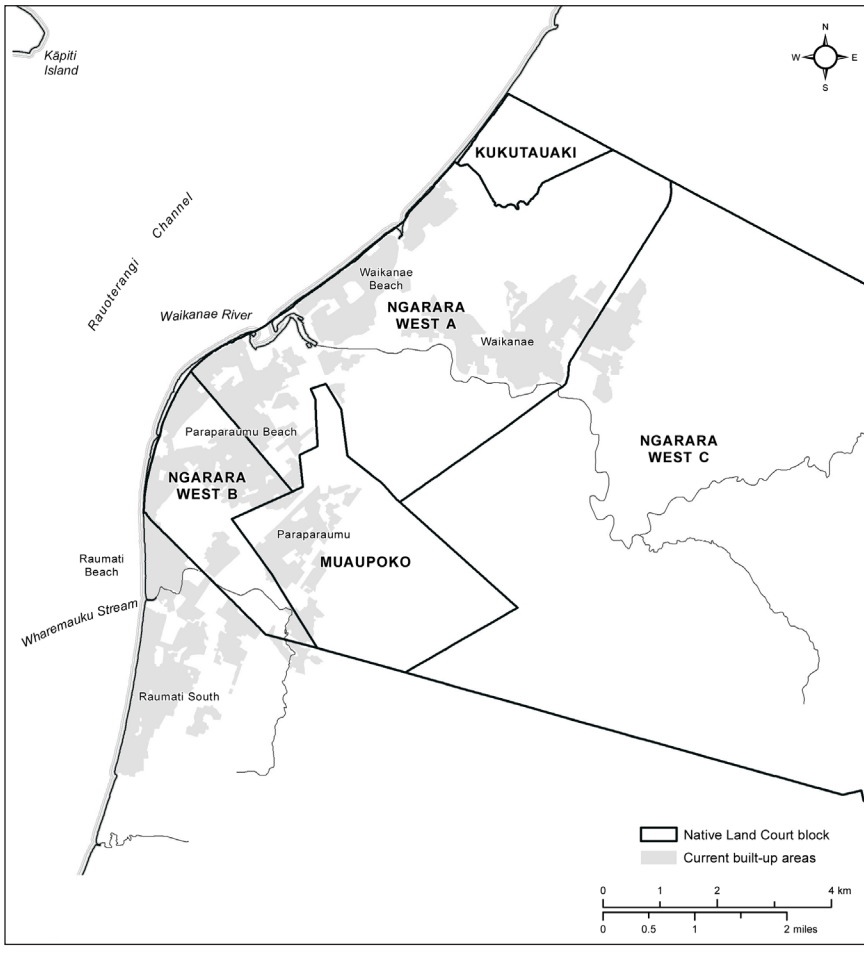
- the Ngarara block, which encompassed most of the land;
- the Muaupoko block, which was a section of land claimed for a separate award by the Otaraua hapū; and
- the Kukutauaki block, which was claimed by Tamihana Te Rauparaha for Ngāti Toa and Ngāti Raukawa, with Te Ātiawa/Ngāti Awa as counter-claimants (see map 6).

In this section of our chapter, we address the following issue: were there flaws in the title investigation for the Ngarara, Muaupoko, and Kukutauaki blocks and in the form of title available for those blocks in 1873?

The relevant legislation was the Native Lands Act 1865, the Native Lands Act 1867, and the Native Land Act 1873. We briefly discuss the title available under these Acts. All three of the Acts are relevant because the Waikanae lands passed through the court in 1873 on the cusp of a major shift in policy and legislation from the 1865 regime to a new one designed by Native Minister Donald McLean. In the 1880s, when the Ngarara block was partitioned, the Native Land Court Act 1886 had amended aspects of the 1873 regime but left most of it intact.

The claimants argued that the individualisation of title imposed by the Crown in its native land laws was fundamentally incompatible with customary title and the continuation of tribal authority over lands. In respect of the title hearings for Ngarara and Kukutauaki, the claimants submitted that many right-holders were left out of the lists of owners. In their view, the Crown bore responsibility because of the kind of court used to inquire into ownership, the Crown's actions in Taranaki (which caused the absence of legitimate right-holders at the time of hearing), and the Crown's failure to provide an adequate remedy. The claimants also argued that the form of title provided in 1873 led to the highly damaging partition and disputes of the late 1880s and early 1890s, because it gave no legal power to tribal leaders to manage lands and resolve disputes. According to the claimants, the court system caused or exacerbated divisions rather than providing a means to

95. Crown counsel, closing submissions (paper 3.3.60), p 30



Map 6: Ngarara West A, B, and C, 1892.

resolve them properly. In terms of the partitioning itself, the claimants argued that all those involved presented hapū cases and did not want the further individualisation of title on the ground that followed the partition hearings.[96]

The Crown has conceded that individualisation of title under the native land laws undermined tribal structures and made land more 'susceptible' to fragmentation, partition, and alienation. The Crown also conceded that it failed to include any form of corporate title before 1894, which undermined attempts to maintain

96. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 41–53; claimant counsel (Jones), closing submissions (paper 3.3.49), pp 16–20; claimant counsel (Hope), 21 October 2019 (paper 3.3.53), pp 15–17; claimant counsel (J Mason), closing submissions (paper 3.3.55), pp 20–23

tribal authority over lands that had passed through the court.[97] But the Crown argued that it was not responsible for an independent court's actions, including the Native Land Court's acceptance of owner lists prepared by Māori without any involvement from the Crown. This point included the Crown's submission that it was not responsible for the choice of 'Ngarara' instead of 'Waikanae' for the block's name (this was later complained of as a reason for non-attendance at the hearing). The Crown accepted that it was responsible for correcting injustices where those were brought to its attention, but argued that the claimants could not show that an injustice had actually occurred in the lists for Ngarara and Kukutauaki. In particular, the Crown relied on Wi Parata's evidence to the Ngarara commission for this point.[98]

We consider the issue of what remedy the Crown provided in the next section of this chapter. In this section we explore the migration of Waikanae people to Taranaki around the time of the hearings, the title investigations in 1873–74, the preparation and hearing of the lists of owners, the form of title granted in 1873, and the partitioning of the Ngarara block in the late 1880s.

4.5.2 Forms of title under the native land laws, 1865–67

As discussed above, the Native Lands Act 1865 entrenched a new form of court, which differed substantially from that intended in 1862 (see section 4.4.2). It also developed a new form of title for which it became infamous in the nineteenth century: the '10 owner rule', by which tribal lands were granted in individual title to a maximum of 10 chiefs, who at the time were intended to be representatives or trustees for their people. In fact, the law had made them absolute owners and disinherited all others with customary rights in the tribal estate. The Native Lands Act 1867 provided a partial remedy. Rather than repealing the 10-owner provisions, this Act provided another option: under section 17, a maximum of 10 owners could be recorded on the front of a certificate of title. These owners would act in a representative capacity and have powers to lease but not to sell land. The names of all other customary right-holders were recorded on the back of the certificate as owners. The use of this 1867 alternative was not compulsory and indeed it was seldom used by the court in practice, with no further remedial action taken about the 10-owner rule until 1873.[99] Wi Parata later told Parliament in 1893 that the 1867 Act was the best that had ever been enacted, and that Māori 'consider[ed] they had less reason for complaint under that Act than under any other enactment dealing with Native land'. 'This Act', he said, 'appeared to be far more satisfactory to the Natives; but it was afterwards amended' (referring to the Native Land Act 1873).[100]

97. This concession was made in the Muaūpoko phase but we consider it relevant here: Crown counsel, closing submissions for expedited Muaūpoko hearings, 31 March 2016 (paper 3.3.24), p 24.

98. Crown counsel, closing submissions (paper 3.3.60), pp 27–38

99. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 163, 195, 204, 206–208; Waitangi Tribunal, *Hauraki Report*, vol 2, pp 685–686, 697–701, 711; Ward, *National Overview*, vol 2, pp 220–221, 228–234

100. Wi Parata, evidence to Native Affairs Committee, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 9)

Claimant counsel submitted that reforms to the native land laws were always going to be minimal because the fundamental purpose of the legislation was to part Māori from their lands:

> as is well known, by 1867, after only two years, modifications were having to be made with the Native Land Act of that year to check the effects of the ten-owner rule and shortly afterwards Chief Judge Fenton contemplated with equanimity that Maori society was rapidly becoming divided into a landed gentry and a landless working proletariat. What then can the intention be said to have been? The social destruction of Maori as Premier and Attorney-General Henry Sewell said, by deliberately devastating the 'beastly communism' of Maori society?[101]

The fundamental purpose of the native land laws will be considered later in this inquiry after hearing the evidence and submissions of all parties. Here, we note that the Waikanae lands were one of the rare exceptions to the non-implementation of the Native Lands Act 1867. The Ngarara block went through the court in 1873, before the enactment of the Native Land Act 1873, and was vested under section 17 of the 1867 Act. The court's orders, however, for the two smaller blocks, Muaupoko and Kukutauaki 1, were made under the original 10-owner provisions of the 1865 Act.[102]

4.5.3 Title investigations under the 1865 and 1867 Acts

4.5.3.1 *Manawatu–Kukutauaki*

The Manawatu–Kukutauaki block passed through the court in November 1872 before the hearing of the Waikanae blocks. We discussed this massive 250,000-acre block in *Horowhenua* and will report on it more fully after hearing from Ngāti Raukawa and affiliated groups. Here we note that some Te Ātiawa/Ngāti Awa chiefs participated in the hearings. Ngāti Toa and Te Ātiawa/Ngāti Awa acted as co-claimants with Ngāti Raukawa but there were differences of opinion as to their respective rights.[103] Ultimately, the court awarded the land to 'sections of the Ngatiraukawa tribe . . . together with Ngatitoa and Ngatiawa whose joint interest therein is admitted by the [Ngāti Raukawa] claimants'.[104] The court order for the block stated that the 'resident hapus' of Ngāti Raukawa were the owners 'subject to such rights and interests therein as the Ngatiawa and Ngatitoa Tribes may hereafter establish'.[105] Wi Tamihana Te Neke, who had given evidence in the case, told the court that he represented Te Ātiawa/Ngāti Awa and agreed to this outcome.[106]

101. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 6
102. See the court orders for Kukutauaki 1, 16 April 1874, and Muaupoko, 3 June 1873 (Crown Forestry Rental Trust, MLC document bank (doc A70(b), vol 10, p 597; doc A70(c), vol 14, p 914)
103. Walzl, 'Ngatiawa' (doc A194), pp 414–417
104. Otaki Native Land Court, minute book 1, 12 March 1873, p 193 (Walzl, 'Ngatiawa' (doc A194), p 417)
105. Otaki Native Land Court, minute book 1, 12 March 1873, p 193 (Walzl, 'Ngatiawa' (doc A194), pp 417–418)
106. Walzl, 'Ngatiawa' (doc A194), p 417

According to Tony Walzl's evidence, however, Te Ātiawa/Ngāti Awa took no further action and did not attempt to obtain any of the land, despite the terms of the court's decision and order.[107]

4.5.3.2 *Ngarara*

The Ngarara block was heard by Judge Rogan in May 1873. There were three assessors, which was unusual: Hemi Tautari, Hare Waikaki, and Mitai Pene Taui.[108] The hearing was mostly held at Waikanae and was relatively brief. There were no counter-claims from Ngāti Toa and Ngāti Raukawa or from Muaūpoko. The court therefore accepted the uncontested claim of Te Ātiawa/Ngāti Awa without the need for extensive evidence. This was partly because Tamihana Te Rauparaha's claim to the northern part of the block was heard separately a year later, due to his illness. As a result, the most controversial part of the Ngarara hearing became the southern boundary, which was contested by the Crown.[109] As discussed in chapter 3, the claim to the court included large parts of the Whareroa and Wainui blocks, which the Crown had purchased primarily from Ngāti Toa in the 1850s (see section 3.6.4).[110] Ultimately, the boundary issue was settled out of court by Wi Parata and the Crown agent, H S Wardell, with the result that a triangular piece of land claimed by the Crown was included in the Ngarara block (see map).[111]

The list of individual owners was also arranged out of court. It is important to note that Te Ātiawa/Ngāti Awa were not involved in putting together lists of owners for either Himatangi or Manawatu–Kukutauaki. They had no experience in this task, which involved selecting the appropriate individuals and deciding the principles on which such a selection would occur. They were novices in the Native Land Court when the Ngarara block went through in 1873. Tony Walzl referred to a 'lack of experience' in court processes and in 'understanding the ramifications of the title that was being brought into place'.[112] As Wi Parata later put it: 'At that time we were ignorant how to conduct matters in the court.'[113]

It was the usual practice of Judge Rogan that such matters as lists of owners should be resolved by Māori out of court.[114] As the Turanga Tribunal commented, this meant that 'Maori controlled the decision-making process themselves as much as possible through negotiation and cooperation out of court'.[115] Crown counsel emphasised that the criteria for inclusion in the Ngarara list were determined by the community without any involvement from the Crown.[116] The Waikanae com-

107. Transcript 4.1.16, pp [270]–[272]
108. Otaki Native Land Court, minute book 2, 29 May 1873, p 203 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, p [12])
109. Walzl, 'Ngatiawa' (doc A194), pp 419, 422–423, 432–434
110. Walzl, 'Ngatiawa' (doc A194), pp 432–433
111. Walzl, 'Ngatiawa' (doc A194), pp 432–434
112. Tony Walzl, summary of 'Ngatiawa' (doc A194(b)), p 15
113. Evidence of the Native Affairs Committee, 24 August 1888 (Tony Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 829)
114. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 424
115. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 2, p 424
116. Crown counsel, closing submissions (paper 3.3.60), p 33

munity faced a tricky dilemma: how to deal with the high degree of mobility that had been a feature of their district since the 1840s, including recent departures to defend interests in the Compensation Court (as a result of the Crown's Taranaki confiscation) and most recently to join the peaceful resistance at Parihaka.[117]

The list of owners was worked out at the end of the court sitting at Waikanae in May 1873. The process was led by two chiefs, Wi Parata and Wi Tamihana Te Neke. The latter chief, the son of Kawana Hiangarere, was a prominent Waikanae leader at this time. He represented Te Ātiawa/Ngāti Awa in the Manawatu–Kukutauaki hearing and also gave evidence in the Ngarara hearing. The list was compiled at a hui in Pukumahi Tamariki, the house that had been built for the Kīngitanga (see chapter 3). According to Wi Parata's evidence to the Ngarara commission in 1888, there was some disagreement about the names on the list at the hui but there is no indication of how much; the majority were satisfied.[118]

The court had adjourned to Wellington for the Crown's boundary evidence so the hui appointed Wi Parata, Wi Tamihana Te Neke, and Poihipi Hikairo (a chief from the Whareroa district) to put the list to the court there when it resumed sitting. These chiefs were accompanied by Unaiki, Wi Parata's wife, the Puketapu chief Ihakara Te Ngarara, Rihi Kaupata, and an unknown number of others. The court approved the list of 55 names, after which the party returned to Waikanae. When they arrived, Wi Parata read out the list at a second hui, in response to which only one person was said to have expressed dissent.[119]

Everything seemed fine on the surface, especially since there was no change to occupation or titles until the late 1880s, but this concealed the real problems with the list and the individualised title granted in 1873. Tony Walzl suggested that the list had significant errors and the court was not equipped to interrogate the list so as to identify those errors:

> In the main Ngarara case, a finding that the land belonged to Ngatiawa as an iwi was transmuted into the creation of an ownership list supposedly based on residency. This was done, presumably, to provide some certainty at a time of demographic turmoil. Aside from the inherent difficulty of coming up with consistent criteria to define residency, the result was the selection by those conducting the case of a somewhat random group being placed on the title of Ngarara through the use of eclectic criteria for entitlement riven with inconsistencies and errors. It appears that having gained an iwi-based title, those Ngatiawa who were running the case struggled to actualise this into an ownership list as required by Court procedure. Put on the spot, an attempt was made to create an ownership cohort. In doing so, the tenets of customary rights and even the norms of the Land Court were departed from to create an ownership group that bore little relevancy to wider understandings of who the Ngarara owners actually were. There is even some evidence to suggest that the list when handed in was unfinished.

117. Walzl, summary of 'Ngatiawa' (doc A194(b)), p 15
118. Walzl, 'Ngatiawa' (doc A194), pp 436–438
119. Walzl, 'Ngatiawa' (doc A194), pp 435, 437–439

> None of these difficulties were revealed in 1873 and 1874. When Ngatiawa titles were first brought forward, the Court reacted to what was brought before it – groups of owners that apparently were in accord and apparently seeking the same result. In situations such as these, the Court was not structured to interrogate or investigate beyond the cases put before it. The Court therefore effectively rubber-stamped the apparently unified requests put before it by Ngatiawa claimants. The complexity of Ngatiawa's customary rights were not evident at this time nor was the inexperience of Ngatiawa in Land Court processes taken into account. Therefore, a tenure was brought into place that later events showed did not reflect the true nature of ownership at Waikanae. A limited ownership group was identified that the Court, because of its rules, subsequently could not move beyond when proceeding in the future.[120]

After reviewing the hundreds of pages of evidence to the Native Affairs Committee inquiry in 1888, the Ngarara commission in 1888, and the Ngarara rehearing in 1890, Mr Walzl indicated why he considered the list to be 'somewhat random', identifying the following points about how the list was compiled in 1873:

- inclusion firstly depended on a name being put forward. Those forgotten or not supported missed out regardless of the merit of their situation.
- those not located in Waikanae at the very time of the Court sitting were not regarded as resident and missed out. Previous (or subsequent) occupation or exercising of rights were not considered.
- a small group were included 'out of love and affection' – ie not based on rights.
- another group included on the title were those who had no claims (and were therefore probably not Ngatiawa) but who were included due to their residency.
- residency was not a full guarantee, however, for those who were Ngatiawa. You had to have what was termed at one place a 'right' and at another place a 'claim.'
- Th[is] 'right' had to be not just a person's physical location at Waikanae but real occupancy such as a cultivation. The 'claim' part of it was not really explained but given the later arguments used against the Tuhata whanau it related to things such as having a 'take' to the land and being there as at 1840.[121]

We agree with Crown counsel that the evidence shows a community policy or decision in 1873 to limit the list to residents (with some exceptions). We also agree that the Crown was not involved in the community's decision about who should be included on the list. Sometimes Crown agents or private purchasers were working behind the scenes to limit the numbers of owners in a list, so as to facilitate purchase, but there is no evidence of that for Ngarara. Although some Waikanae residents dissented from the decision, as Wi Parata admitted, it is clear that the community as a whole agreed in their hui to adopt the list. The criteria were so strict that residence was largely limited to those actually present as at the

120. Walzl, summary of 'Ngatiawa' (doc A194(b)), pp 15–16
121. Walzl, 'Ngatiawa' (doc A194), pp 444–445, 638

time of the hearing. Someone who went to Taranaki two weeks before the hearing, for example, was excluded from the list.[122]

Custom at Waikanae had been exceptionally fluid in the decades preceding the hearing, with frequent migrations to and from Taranaki and the South Island, with individuals and groups returning and taking up occupation as of right. In 1874 there was a further significant departure from Waikanae to Taranaki but those individuals remained legal owners because the court had cut through the fluid custom the year before at a single point in time. In our view, the community's decision about the list in 1873 was clearly based on tikanga, limiting the names to the ahi kā or those in actual occupation at the time who in custom were keeping the fires burning for the wider group. The evidence is clear that many who had been left off the list later considered they ought to be able to return and resume occupation, and that Wi Parata's intention had been that they would be able to do so (see section 4.6.3). He told the Ngarara commission in 1888, for example, that he had resisted selling any part of the Ngarara block after 1873: 'I was thinking of the tribe at Taranaki so that they might not find themselves without land. That they might have land here to come and live upon.'[123]

As noted above, those who made the decision in 1873 had no experience in compiling lists of owners under the native land laws, and they could not have anticipated the outcome under those laws of limiting the list in this way. In addition, people who *were* in residence at the time were sometimes overlooked or deliberately excluded from the list (see section 4.6.6), while others had no claim but were included out of aroha (such as Wi Hau Te Pane, who was included because he was working for Wi Parata at the time).[124] The inclusion of names due to aroha was common all around the country and was often later regretted when individual interests were partitioned out and tribal communities had less and less land to live upon.

As a result of all these factors, the 1873 list of owners was problematic and led to many later complaints from individuals that their names had been wrongly omitted.

In our inquiry, Crown counsel conceded that the native land laws did not 'provide for the legal recognition of the full range of complex and overlapping traditional land rights previously held by Māori.'[125] This was a particularly apt concession for the situation at Waikanae in 1873. But the Crown did not accept that problems with the 1873 list could be proven, pointing to the community 'policy' at the time, Wi Parata's defence of the list in the Ngarara commission, and the commission's findings on the matter.[126] We therefore postpone fuller consideration of this matter to later in the chapter when the issue of the Ngarara commission and of

122. Walzl, 'Ngatiawa' (doc A194), pp 441–442
123. Wi Parata, 19–21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 229)
124. Otaki Native Land Court, minute book 21A, pp 212, 246–247 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14) pp [120], [154]–[155]); Walzl, 'Ngatiawa' (doc A194), p 444
125. Crown counsel, closing submissions (paper 3.3.60), p 29
126. Crown counsel, closing submissions (paper 3.3.60), pp 33–34

the Crown's remedy in response to the commission is assessed. In this section, we focus on the issue of safeguards in the native land laws as at the time the Ngarara block passed the court in 1873.

Some who claimed to have been left out of the title in 1873 blamed the court. Henry Howarth, lawyer for the descendants of Wi Kingi Te Rangitake and others, complained in 1891 that the list of owners was 'confined to those who were residing on the land'. 'The Court', he argued, 'committed an error in accepting the list so restricted and inaccurate, without proper verification, and without requiring notice to be given to those who were not residing on the land'.[127] The court, however, accepted the list because there were no challengers, without any inquiry at all, including as to the basis on which it was compiled. Judge Rogan likely had no knowledge that those living in Taranaki by 1873 had been left out. It is by no means certain how the court would have judged their 25-year absence from Waikanae in terms of customary rights but the issue was never considered at all.

In our view, the problem of omitted names was inevitable when converting communal title to a list of individuals at a particular time. If the Crown had provided for some form of community title, it would have enabled the membership and their land entitlements to be adjusted over time as necessary by tribal rūnanga. Tribal leaders, therefore, could have decided whether or not to readmit those who had departed for Taranaki if or when they wanted to return.

According to Tony Walzl:

> The only protective mechanism in the Court process against error in the lists is the reading of the names in Court, but even this has problems. People might be away at the very time the list was read; listening to a reading of a list of names in Court does not give time to reflect on who is included and who is not; again, a number of possible problems could arise.[128]

The dangers inherent in this situation were noted and reported on by Justice Richmond in the Hawke's Bay Native Lands Alienation Commission of 1872, the year before the Ngarara block passed through the court:

> The supposed analogy of proceedings in ordinary Courts of Law or Equity is quite a mistaken one. The judgments and decrees of such Courts commonly bind only the litigant parties, and those who claim through them; whereas the judgments of the Native Lands Court are what are technically termed judgments *in rem*, which conclusively ascertain title not merely as between the parties in Court, but as against all the world. A Court with such a formidable power needs to be furnished with means of investigating, independently of the parties in Court, the validity of claims made before it. Some power is wanted of investigating the native title out of Court. The Court needs *tentacula* wherewith to seek out, and grasp for itself, all the facts of the

127. Henry Howarth to Native Land Court, Wellington, 19 March 1891 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 345–346)

128. Walzl, 'Ngatiawa' (doc A194), p 599

> case. It would not be well to throw upon the Judges of the Court the duty of investigations which, to be effective, should be made on the spot. This is rather an administrative than a judicial function, and might be committed to some officer of the Native Department in each district appointed for this duty by the Governor's warrant. A Report of this officer on every application for a certificate of native ownership, or of cession, should be presented to the Court. This Report should be open to exception by the parties interested, and should be confirmed, over-ruled, or remitted for amendment to the reporting officer, as the Court might think fit. But there should be no jurisdiction to proceed without such a Report.[129]

The Turanga Tribunal found that the court had to be 'armed with safeguards both to prevent mistakes from happening and to correct them if they were made'. This was because (as Chief Judge Fenton conceded) it was 'impossible to notify all owners of hearings', and 'pre-agreed lists were not without risks' of omissions. People might be missed out because they were absent or because of 'inter-family or inter-hapu politics'. The Turanga Tribunal concluded that the 'problems of communication and the fact that lists were being drawn up out of court meant that the Crown had to ensure that there was a proper and accessible system of checks' in its native land laws.[130]

One such system would have been provided if the Native Councils Bill, which Wi Parata and many other chiefs supported, had been accepted by Parliament in 1872 (see section 4.4.2). As will be recalled, this Bill provided for district councils composed of elected Māori leaders to examine and report on cases before they came to the Native Land Court, to endorse applications they approved of, and to investigate and resolve disputes about claims.[131]

The system suggested by Justice Richmond in 1872 was adopted by the Crown in the legislation it introduced in 1873, which became the Native Land Act of that year. This introduced district officers tasked with working with Māori communities to prepare 'a sort of *Domesday Book*' that would record whānau and their interests and whakapapa. The district officer was supposed to appear at every hearing and assist the court so as to 'provide a kind of objective reality check to help the court avoid errors'.[132] The lack of this kind of 'independent officer with local knowledge meant that ownership lists prepared by agreement between claimants could not be verified'.[133] This system had not been introduced at the time the Ngarara block passed through the court, and it failed anyway for lack of funding – district officers were not appointed for these purposes in most areas.[134]

The only real safeguard against errors in the native land laws at the time, therefore, was the right to apply for a rehearing. The exercise of such a right was subject

129. 'Hawke's Bay Native Lands Alienation Commission: General Report of the Chairman', 31 July 1873, pp 8–9, AJHR, 1873, G-7, pp [28]–[29]
130. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 449, 451
131. Native Councils Bill 1872, cls 6, 19–21
132. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 449
133. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 450
134. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 449

to a time limit. This was necessary because one of the supposed benefits of bringing land before the court was to obtain security of title so that it could be used effectively for leasing in the colonial economy. That benefit would not accrue if there was no finality in the titles issued by the court. Under the Native Lands Act 1865, which was the operative statute in this case, no order for a rehearing could be made 'after six months shall have elapsed from the date of the original decision'.[135] This meant that any aggrieved person had to get their application in and have it decided by the Government within six months. According to the findings of the Turanga Tribunal, the right to apply for a rehearing was not a sufficient safeguard on its own, especially since rehearings were not guaranteed but rather at the discretion of the Government (and later the chief judge).[136] In the case of Ngarara, it was later said that use of the name 'Ngarara' for the block in notification (instead of 'Waikanae') meant that many people were unaware of the court hearing or of the need to file an application for rehearing within the statutory time limit. We address the issue of the block name later in the chapter.

Here, we note our agreement with the Turanga Tribunal that the legislation lacked enough safeguards to prevent or correct mistakes in the lists of owners. Errors were inevitable in those circumstances, especially without a robust notification system and a guaranteed appeal right.[137] An opportunity arose later in 1889 to correct errors retrospectively through a new jurisdiction for the chief judge. We discuss that issue in section 4.6.6.

4.5.3.3 *Paraparaumu orchard block*

While the Crown searched for documentation on the boundary between the Ngarara block and the Whareroa purchase, a small, 2½ acre block called 'Paraparaumu' was put through the court on 22 May 1873. This area comprised an orchard claimed by one of the Paraparaumu whānau. Pakewa, also known as Ihipera (Isabella) Nukiahu, was a prominent Puketapu leader and she had signed the Treaty of Waitangi in 1840. She was living with her grandchildren at Te Uruhi Pā at the time the court sat but was elderly and too unwell to attend. Her granddaughter, Mary Cameron, attended the court while the Ngarara case was adjourned and obtained a title to the orchard in her own name (with no co-owners). Wi Parata supported the claim. Ihakara Te Ngarara, the Puketapu rangatira, confirmed the surveyor's evidence that the survey had not been disrupted. It was later discovered that Ihakara had opposed this piece of land being separated from the tribal claim and, as a consequence, he excluded the names of all seven whānau members from the Ngarara list of owners, even though they continued to live there and to run sheep on land outside the orchard. When they later tried to take part in the partitioning of Puketapu lands out of Ngarara in 1887, they discovered

135. Native Lands Act 1865, s 81
136. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 450–452
137. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 450–452

that their names had been left out and that Judge Puckey could not insert them in the title. This resulted in the filing of claims to the chief judge (see section 4.6.6).[138]

The title to this small block was thus granted to one person, thereby excluding all the other whānau members with rights in that piece of land. The whānau was also excluded from the title to the Ngarara block due to their 'quarrel' with Ihakara Te Ngarara. These kinds of omissions highlight the flaws in both the court's pro forma acceptance of lists and the freezing of custom in a finite list of individuals.

4.5.3.4 *Muaupoko*

The Muaupoko block was located inside the Ngarara block towards the southern end (see map 5). It consisted of 2,634 acres and was set aside for the Otaraua hapū. Eruini Te Tupe claimed the block unopposed in the court in May 1873 but Mr Walzl suggested that the claim had in fact been controversial at the time it was surveyed. He argued that 'the odd shape of the block, (which consists of strangely drawn angles) suggests that its creation may have been a more difficult process than the subsequent Court case suggests'. Mere Pomare,[139] the daughter of local whaler John Nicol and the famous Kahe Te Rauoterangi (see chapter 3), recalled quarrels over the boundaries.[140] Ihakara Te Ngarara gave evidence at a later inquiry that he had been 'struggling' with Eruini Te Tupe for 'two whole days' over the land at the same time as the Paraparaumu orchard block was being surveyed.[141]

In any case, Wi Parata supported Eruini Te Tupe's case. He told the court: 'Otaraua hapu have the rights to this land. It belongs to them. Tupe wishes this land to be granted to him and his descendants.'[142]

Blocks were sometimes granted under the 1865 10-owner rule (discussed above) without the Māori claimants to the block understanding the real effect of that form of title. The court did not vest the Muaupoko block under section 17 of the Native Lands Act 1867, as it did with the Ngarara block, where all the owners were to be listed on the back of the certificate. Rather, the Muaupoko block was vested in just 10 owners under the 1865 Act: Eruini Te Tupe, Tamati Mukaka, Karaitiana Te Tupe, Eruini Tiri Te Tupe, Te Nehu Motutere, Hona Whareararauru, Te Watene Harawira, Manahi Maniapoto, Wirihana Te Awaawa, and Hannah Erskine.[143] The rest of the hapū were left out of the title as a result, yet Wi Parata clearly explained to the court that the hapū had the 'rights to this land' and that it belonged to the

138. Otaki Native Land Court, minute book 2, 22 May 1873, p196; Mere Pairoke, Ihakara Te Ngarara, and others, evidence on application, no date (Walzl, answers to questions in writing (doc A194(d)), pp102–112)

139. So named for her second marriage to the Chatham Islands chief Wi Naera Pomare. Mere's first marriage was to Inia Tuhata the elder.

140. Walzl, 'Ngatiawa' (doc A194), p430

141. Ihakara Te Ngarara, evidence on application, no date (Walzl, answers to questions in writing (doc A194(d)), p105)

142. Otaki Native Land Court, minute book 2, 22 May 1873, p198 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 10–11)

143. Muaupoko court order, 3 June 1873 (Crown Forestry Rental Trust, MLC document bank (doc A70(c)), vol 14, p914); Walghan Partners, 'Block Research Narratives: Ngatiawa Edition', June 2018 (doc A203), p64

hapū. It would not be surprising, therefore, if the Otaraua hapū understood at the time that Muaupoko had been vested in 10 grantees, including their rangatira Eruini Te Tupe, as trustees for the wider hapū. If this was the case, then they were later disillusioned when the 10 legal owners began to sell the block, but we have no definite evidence on this point.

Otaraua interests in Ngarara, however, were not confined to the Muaupoko block; some hapū members had other cultivations in areas of the larger block shared with other hapū.[144] Eleven members of the Otaraua hapū were included in the 55 names for Ngarara block, and only six of these were also included on the list of names for Muaupoko.[145] Following the partition of Ngarara in the late 1880s (discussed below), Enoka Hohepa Te Taitea and others applied for a rehearing. One of the alleged grounds for rehearing was that some members of Otaraua were

> cut out of the Muaupoko [block] by agreement by Eruini Te Tupe on the special understanding that they were to have a large portion of the land adjoining the Muaupoko block and that they have not and never had any share in the Muaupoko since the forming of the Block by Eruini Te Tupe and as to the others, their share in the Muaupoko is small and was never intended to deprive them of their share in the Ngarara[.][146]

This suggests that the difficulty in surveying the boundaries of Muaupoko had resulted in some hapū members being left out deliberately. If so, this was not explained in court in 1873, and it is likely that there were other Otaraua members who were wrongly left out of the title to Muaupoko as a result of the Native Lands Act 1865 and the 10-owner rule. The Otaraua applicants for the Ngarara rehearing, who were restricted to the names in the 1873 title for that block, stated that those in the title were 'few in number' but they were 'the representatives of a very large hapu.'[147]

4.5.3.5 *Kukutauaki 1*

The Kukutauaki 1 block consisted of 654 acres, located at the north-west end of Ngarara (see map 5).[148] This area was the part of the Ngarara block that had been claimed by Tamihana Te Rauparaha of Ngāti Toa (discussed above in section 4.4.3). According to Wi Parata's later evidence in 1890, it was also separated out of

144. Walzl, 'Ngatiawa' (doc A194), pp 465–466, 468

145. Native Land Court Judges W G Mair and D Scannell, questions stated to the Supreme Court, 1 May 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp [269]–[270])

146. Wi Perahama Putiki, Ematini, Merekai Putiki, Enoka Te Taitea, Watene Te Nehu, and Eruini Te Marau, Otaraua section of application for rehearing, 29 June 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 180); Walzl, 'Ngatiawa' (doc A194), pp 474–475

147. Wi Perahama Putiki, Ematini, Merekai Putiki, Enoka Te Taitea, Watene Te Nehu, and Eruini Te Marau, Otaraua section of application for rehearing, 29 June 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 181)

148. Walghan Partners, 'Block Research Narratives', November 2018 (doc A212(a)), p 252. Kukutauaki 2 was an alternative name for the Ngakaroro block: Otaki Native Land Court, minute book 2, p 250 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9).

the Ngarara block because it belonged to him alone, unlike the rest of the Ngarara block.[149]

Tamihana Te Rauparaha had been the first to file a claim to Kukutauaki, which he said was on behalf of himself and Matene Te Whiwhi. This made him the claimant and Te Ātiawa/Ngāti Awa the counter-claimants at the court hearing in 1874. Penehira claimed for Ngāti Huia, a hapū of Ngāti Raukawa, but did not give evidence or pursue the claim in court. In addition to Wi Parata, the Te Ātiawa/Ngāti Awa objectors were Wi Tamihana Te Neke and Eruini Te Marau. Hiria Te Aratangata of Ngāti Toa supported them. Wi Parata told the court that 'all these objectors are one' with the exception of Penehira.[150]

Tamihana Te Rauparaha was very specific that his claim was an individual one and not on behalf of any group; he claimed Kukutauaki for himself and Matene on the grounds that it had belonged to his father Te Rauparaha and Te Rangihaeata (Matene Te Whiwhi's source of rights).[151] Wi Tamihana Te Neke and Eruini Te Marau, on the other hand, were claiming Kukutauaki for the iwi. Te Marau later stated in 1890 that Wi Parata had been chosen to conduct the case because he was their member of Parliament (and presumably was considered to have the appropriate skills to navigate a foreign environment like the court). Wi Parata, on the other hand, said in 1890 that the others had been witnesses supporting his case, which was a claim for the land over which his mother had exercised authority, which she had gained from her uncle Te Pehi Kupe.[152]

Wi Parata's opening statement to the court in 1874 seemed to support both positions: 'I claim this land together with those whose names are already given as objectors – they have seen me occupy the land'.[153] He stated that Ngāti Toa had conquered the land but the Te Ātiawa/Ngāti Awa hapū Ngāti Rahiri 'occupied and lived on this particular boundary'. Ngāti Toa had then departed for Kāpiti: 'this land was left by Ngatitoa to their relatives of Ngatiawa'. Following the battle of Kuititanga, Wi Parata said that after he 'arrived at manhood' he cultivated at Kukutauaki, controlling who could catch eels there – and did so exclusively until Tamihana Te Rauparaha and Matene Te Whiwhi tried to survey their boundary there. The only person who had 'objected to [his] being there' in the early days was Eruini Te Tupe. Following the surveys, which Wi Parata talked about in detail, he said that he had 'continued to use it for getting food, from its eels etc, [and] nobody has interfered with me'. He also referred to the exercise of authority by his

149. Walzl, 'Ngatiawa' (doc A194), p 427
150. Walzl, 'Ngatiawa' (doc A194), pp 422–423; Otaki Native Land Court, minute book 2, p 236 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)
151. Otaki Native Land Court, minute book 2, p 236 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)
152. Walzl, 'Ngatiawa' (doc A194), pp 425–429, 602–605
153. Otaki Native Land Court, minute book 2, p 237 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)

mother, Metapere Waipunahau, in setting the boundary, leaving that evidence to be explained more fully by Tamihana Te Neke.[154]

Tamihana Te Neke explained the events involving Metapere Waipunahau and the boundary-settling in 1848 when Wi Kingi Te Rangitake departed for Taranaki (his evidence is summarised in section 3.5.4). Tamihana Te Neke did not stress the sole authority of Wi Parata's mother, unlike later accounts in 1890. He recounted that the Ngāti Toa chiefs Mohi Te Hua and Hohepa Tamaihengia told his party, which had been to see Governor Eyre, to see Metapere Waipunahau about the boundary on their way back to Waikanae. They also said should that the boundary should be at Te Hapua, which was north of the Kukutauaki block. Tamihana told the court:

> The old men of Ngatiawa assembled in a house in the evening. Matene arose to make a speech at that time. Matene then questioned Metapere. Matene said – which is the boundary you approve of? She replied – Te Hapua. Matene asked a second time and she replied in the same way. Matene said a great deal on that occasion which I am unable to narrate. Tamihana Rauparaha then got up and made a speech. An old man called Tuainane's [a Te Ātiawa/Ngāti Awa chief] mind grew dark on this occasion and gave expression to his thoughts at that time to Tamihana and Matene. My grandfather Te Heke [a Te Ātiawa/Ngāti Awa chief] replied – and brought the boundary back to Te Maire . . . (Te Maire pointed out on the present boundary.) All the old men of Ngatiawa also William King [Wiremu Kingi Te Rangitake] agreed to this.[155]

Tamihana Te Neke then told the court that the boundary set by 'the old men of Ngatiawa' was later challenged again by Tamihana Te Rauparaha and Matene Te Whiwhi in 1870, explaining his own role in contesting Matene Te Whiwhi's claims – each having threatened to destroy pā tuna (eel weirs) on the other's side of the disputed boundary at that time.[156] In terms of occupation, Tamihana Te Neke stated that Ngāti Tama and Ngāti Rahiri had both occupied Kukutauaki, with Ngāti Rahiri in continuous occupation until the battle of Kūititanga in 1839. The Ngāti Rahiri chief Huriwhenua, he said, had passed his authority there to Paora Matuawaka when he left to live at Arapaoa. After Kūititanga, the area was only used for cultivation when people were there to catch eels. 'Ngatiawa have a right to these places' at Kukutauaki, he said, 'because they have cultivated there'.[157]

Eruini Te Marau stated that he claimed the land: 'my claim is the same as Wi Parata and my statement will be the same as his'. According to Eruini Te Marau, his parents had a pā tuna and caught eels at Kukutauaki; Wi Parata also had an 'eel

154. Otaki Native Land Court, minute book 2, pp 237–240 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)

155. Otaki Native Land Court, minute book 2, pp 240–241 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)

156. Otaki Native Land Court, minute book 2, pp 241–242 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)

157. Otaki Native Land Court, minute book 2, p 242 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)

pa' belonging to him alone. He added: 'I have never seen any person interfering with our occupation of this land or the waters for our eel catching'.[158]

The final witness for the counter-claimants was Te Hira Aratangata of Ngāti Toa. She told the court: 'These lands are Wi Parata's, he inherits them from Te Pehi', referring to the senior Ngāti Toa chief Te Pehi Kupe.[159] Te Pehi Kupe was Wi Parata's great-uncle. Te Hiria's evidence was the first mention of this basis for the claim, which was later Wi Parata's main argument for why the land was vested in his whānau alone and not Ngāti Rahiri or the wider iwi.

The court's decision in 1874 was very brief. It was given in favour of 'Wi Parata and his people' and was based on the evidence of occupation:

> The Court has thought over the evidence given and in giving judgment will not say much. The previous occupation of the claimants [Tamihana Te Rauparaha and Matene Te Whiwhi] is clear but they ceased to occupy and went to live at another place.
>
> We consider that Wi Parata and his co counter-claimants have made out their case and that they have proved continuous occupation for a long time (since 1840).
>
> We admit the occupation of claimants up to a certain time but they went away and ceased to occupy for a long period.
>
> The judgment of the Court is in favour of counter-claimants viz Wi Parata and his people.[160]

The court's order for Kukutauaki 1 was made under the 10-owner rule provisions of the Native Lands Act 1865. The court had not named any particular tribal group in its decision, merely stating 'Wi Parata and his people'. It vested title in six individuals: Wi Parata, Hemi Matenga, Winara Parata, Kereihi Parata, Raiha Puaha, and Hanikamu Te Hiko.[161] These individuals were 'part of the Parata whanau as well as other descendants of Te Pehi [Kupe]'.[162]

As with the Ngarara block, the Kukutauaki title was later disputed in the 1880s, once other members of the tribe discovered that they had been left out of the title.[163] Tony Walzl commented: 'The complaint made thereafter about this block – that it was deceptively misappropriated by one family – is a significant issue to consider.'[164] The claimants in this inquiry attributed the problem to the Native Land Court, its processes, and the Crown's failure to provide an appropriate rem-

158. Otaki Native Land Court, minute book 2, p 243 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)
159. Otaki Native Land Court, minute book 2, p 243 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)
160. Otaki Native Land Court, minute book 2, p 256 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 8–9)
161. Kukutauaki court order, 16 April 1874 (Crown Forestry Rental Trust, MLC document bank (doc A70(b)), vol 10, p 597)
162. Walzl, 'Ngatiawa' (doc A194), p 425
163. Walzl, 'Ngatiawa' (doc A194), pp 425–429, 602–605
164. Walzl, 'Ngatiawa' (doc A194), p 602

edy when the omission of tribal members from the Kukutauaki title was raised.[165] Crown counsel defined the core issue as Wi Parata's preparation of a list of owners and the court's acceptance of it, matters for which the Crown denied any responsibility. In the Crown's view, the real grievance related more to the 'ultimate alienation of the land and the consequences that has had on Te Ātiawa/Ngāti Awa ki Kāpiti.'[166]

We discuss the grievances that arose in respect of Kukutauaki in the 1880s later in sections 4.6.3 and 4.6.4. Here, we note that Wi Parata claimed to have read out his list of six names in court to a full meeting house, the Raukawa wharenui in Ōtaki, although he accepted that Eruini Te Marau may not have been in court when that was done. From the available evidence, the court did not query the absence of Eruini Te Marau and Wi Tamihana Te Neke from the list, despite their evidence in court, their status as counter-claimants, and the terms of the court's award. According to Wi Parata, the six named owners had *not* been intended as trustees for the wider iwi on this occasion but rather as absolute owners. Others in the tribe disagreed with this later, including Eruini Te Marau, although by then it was too late.[167]

We turn next to consider in more detail the form of title provided by the Crown in its native land laws at the time the Ngarara, Muaupoko, and Kukutauaki blocks passed through the court.

4.5.4 The form of title imposed by the Native Land Act 1873

We have already discussed the 10-owner rule of 1865 and the alternative provided in 1867 (see section 4.5.2). The 1867 title was perhaps the best accommodated to the exercise of tino rangatiratanga of all the nineteenth-century forms of title. It offered a kind of halfway position between tribal authority and individualised title, with a fixed list of individual owners but some continued tribal controls over the management and alienation of the land. Section 17 provided for rangatira to act essentially as trustees by including up to 10 names on the front of the certificate of title. Those named on the front could lease the land on behalf of the other owners but could not sell it; the land was inalienable other than by lease for up to 21 years. The named owners on the front of the certificate for Ngarara were: Wi Parata, Wi Tamihana Te Neke, Hemi Matenga, Hoani Ngapaki, Tutere Matau, Tamihana Te Karu, Rihi Kapoata, and Ihakara Te Ngarara. The court ordered that all the other names in the list be registered in the court under section 17 of the Native Lands Act 1867 (an alternative to listing them on the back of the certificate of title). A grant would be issued for the land once a 'proper survey' had been completed.[168]

Perhaps the most important flaw in the form of title awarded under the 1867 Act was its short lifespan; by the time title to Ngarara had been awarded in June 1873,

165. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 18; claimant counsel (Gilling, Dawes, and Brown), closing submissions (paper 3.3.51), pp 45–46, 52; 51–53

166. Crown counsel, closing submissions (paper 3.3.60), pp 36–38

167. Walzl, 'Ngatiawa' (doc A194), pp 425–429

168. Ngarara court order, 3 June 1873, Otaki Native Land Court, minute book 2, p 213 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12)

Donald McLean was already preparing a new Native Land Act for passage through Parliament. As we explained in *Horowhenua*, the Native Land Act 1873 altered the nature of the title awarded under section 17 of the Native Lands Act 1867. It made all the names on the front and back of the certificate equal individual owners, with no trustee role for those named on the front or any other kind of community controls on the land.[169] The removal of that role and those community controls had severe consequences in the 1880s and 1890s, as discussed in the next section.

4.5.5 Land sales and the partitioning of Ngarara West in the 1880s

4.5.5.1 *Tribal leaders attempt to keep the tribal estate intact, 1874–86*

The defects in the form of title were most evident during the 1880s, when it became clear that tribal leaders could not hold the lands undivided and that the process of individualisation could not be stopped. The key challenges at that time were: the absence of many owners at Taranaki; the new opportunities provided by the railway (which led to crucial divisions); and the breakdown of community controls over leasing and land use. We deal with each of these challenges in this section.

Wi Parata's main goal in the 1870s and 1880s was to retain the tribal estate intact for the people while still using the land in the colonial economy.[170] The mechanism for this was alienation of some parts by leasing but without any sales, partitions, or further involvement of the Native Land Court. At the same time, the owners sought to farm parts of their land by running sheep, some of which were obtained from lessees in lieu of rent. The smooth management of land matters from 1874 to the early 1880s was partly due to a further migration from Waikanae to Taranaki in 1874, leaving very few people on the land. According to Wi Parata, most of the registered owners were in Taranaki at the time of the partitioning in 1887.[171] Many were there because they supported Parihaka (the history of which is related in the *Taranaki Report*).[172] Wi Parata was also a leading supporter of the Parihaka community.[173] As the rangatira at Waikanae, he administered the leases on behalf of those who had left for Parihaka or Waitara and distributed the rents.[174]

Wi Parata's intention to keep the Ngarara West block 'undivided and as a sort of tribal estate' was well known in the 1880s.[175] Parata shared that intention with most of the tribe. As he stated at a hui with the railway company: 'the tribe had resolved to hold their lands in tribal interest and allow no subdivision', and '[w]hatever boon the railway brought was for the benefit of all'.[176] When he referred to 'the

169. Native Land Act 1873, ss 97–98; Waitangi Tribunal, *Horowhenua*, pp 189–190; Native Land Court Act 1886, s 40

170. For example, see Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 93.

171. Walzl, 'Ngatiawa' (doc A194), pp 447–453, 458–460, 462–463

172. See Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: Legislation Direct, 1996), ch 8.

173. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 81–90

174. Walzl, 'Ngatiawa' (doc A194), pp 452–453

175. Walzl, 'Ngatiawa' (doc A194), p 462

176. 'The Manawatu Railway and the Natives', *Evening Post*, 30 June 1884, p 2 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 93)

tribe', Parata included not just the registered owners but those who had returned to Taranaki over the years, even as far back as Wi Kingi Te Rangitake's migration in 1848. As a rangatira he was inclusive, not exclusive, despite the community decision in 1873 to only include those in the title who were resident at the time of the hearing. He told the Ngarara commission that he was keeping the land for 'the hapu of William King' and others who had been there in 1840 but not in 1873, and so that the Waikanae people would not be impoverished.[177] In doing so, he was also carrying on the work of his mother, Waipunahau, who had sought to keep the land for the tribe and opposed its sale in the early 1850s (see also chapter 3).[178] Tony Walzl quoted the following exchange between Wi Parata and his solicitor at the commission's hearings in 1888:

> You have been trying for some time to keep this block from being sold?
>
> Yes I have been trying to save it for some time.
>
> Why did you take upon yourself to keep this land from being sold?
>
> I was thinking of the tribe at Taranaki so that they might not find themselves without land. That they might have land here to come and live upon.
>
> The Ngatiawa & the Taranaki people are losing or have lost all their land have they not?
>
> Yes they have lost their land it has been confiscated.[179]

Trouble and division came about in the 1880s over two matters: first, the removal of part of the tribe from Tuku Rakau village to the site of the future Waikanae township in 1884; and, secondly, internal disputes over leasing and the allocation of land for sheep runs.

As discussed in chapter 3, Tuku Rakau had been established as a 'model village' in the 1840s, to which most people in the Waikanae district had relocated at that time. Ben Ngaia explained that the move from Tuku Rakau in the 1880s occurred as part of Wi Parata's strategy for economic development, which included taking full advantage of the opportunities created by the construction of a railway line. By 1884, the Wellington and Manawatu Railway Company was ready to begin the next stage of construction, which had to pass through the Ngarara block:

> In 1884, a meeting took place between Wi Parata and the Wellington and Manawatu Railway Company which confirmed Wi Parata's intention of shifting the house, Pukumahi Tamariki, to be situated closer to the [proposed] railway. When the line was open for traffic, Pukumahi Tamariki was already established in anticipation of the opening of the railway, having been brought via bullock to its present site in which it

177. Walzl, 'Ngatiawa' (doc A194), pp 462–463
178. Wi Parata, evidence to Ngarara commission, 20 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 229–231)
179. Wi Parata, evidence to Ngarara commission, 20 November 1888 (Walzl, 'Ngatiawa' (doc A194), p 462)

still stands today. This is at Marae Lane in Waikanae, and is the meeting house now known as 'Whakarongotai'.[180]

Ben Ngaia stated that '[t]his event signalled a division within the Te Āti Awa'. The 'Otaraua and Manukorihi inhabitants who remained at Tuku Rakau' were opposed to the move and to the removal of the meeting house. 'Otaraua hapū', he said, 'and certain family groupings of Ngāti Kaitangata hapū, who were two of the larger hapū remaining around the north-western side of the Waikanae River, mourned the "loss" of the house Pukumahi Tamariki.' The church at Tuku Rakau was moved as well in 1895.[181]

Mr Ngaia told us that the ramifications of this split were still felt at the time of our hearing in 2018: 'It is an issue where we have described ourselves as Te Ātiawa-ki-Uta and Te Ātiawa-ki-Tai, or more loosely Te Ātiawa-ki-Uta being the top crowd or the townies and Te Ātiawa-ki-Tai being the beach crowd or the poor Māoris, but that is a reflection of that historical impact that occurred during that time.'[182] This split and its impacts were also a result of the partitioning that was about to occur in 1887–91, which Wi Parata had worked very hard to prevent:

> the allocations of land through the Native Land Court; that was a major impact for Te Ātiawa as a community, and it is possibly felt for those Te Ātiawa hapū that remained at Tuku Rākau that those hapū that travelled with the whare [to the Waikanae township] were primarily those that benefitted from that Native Land Court allocation and the terms were phrased Te Ātiawa-ki-Uta and Te Ātiawa-ki-Tai. In some of our maps, just our own maps, personal maps at home you will see drawn on them areas for Uta and areas for Tai to distinguish the difference. The impact that it did have for our peoples was the way that they engaged with one another, okay. It was an issue which was very much between the peoples. The view was that the Te Ātiawa-ki-Uta, the townies, the top crowd, were ones that were very affluent and well-off economically, whereas the Te Ātiawa-ki-Tai, the beach crowd, the poor Māoris as has been described, we described it like that ourselves you know, is that they were ones that were not so affluent or you know had benefited to the same extent. The ongoing impact of that was that there wasn't the engagement that I would have hoped upon our marae [Whakarongotai, located since 1884 in Waikanae]. . . . There have been retellings of . . . whānau kōrero, when mate have been on the marae that . . . whānau of Te Ātiawa-ki-Tai have stood on the outskirts of the fence line to watch over the fence but not necessarily gone into the marae.[183]

180. Benjamin Rameka Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A, prepared for purposes associated with legal proceedings taken by Mrs Patricia Grace', 8 November 2013 (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), pp [66]–[67])

181. Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A' (Ngaia, papers in support of brief of evidence (doc E3(a)), p [67]

182. Transcript 4.1.16, p [523]

183. Transcript 4.1.16, pp [595]–[596]

When Wi Parata and others moved from Tuku Rakau in 1884, it was not intended that they alone should benefit from the new opportunities created by the railway. The 1884 meeting with the railway company (mentioned above by Ben Ngaia) was held to arrange the terms for allowing the railway line to run through the Ngarara block.[184] The meeting house had been renamed 'Whakarongotai' at this time, which was reported in the newspapers as meaning 'Listen to the voice of tides'. Wi Parata expressed the 'desire of the tribe to facilitate the making of the railway, and welcomed it because it would bring great good to his people'. But this was dependent on the retention of the land: he said that the tribe had resolved to keep all of their land 'in tribal interest', there would be *no* partitions, and '[w]hatever boon the railway brought was for the benefit of all'.[185]

Ben Ngaia described the move to beside the railway as 'future-focused',[186] and this was certainly the perspective reported at the time. The article in the *Evening Post* stated:

> There is a good deal of significance in the name [Whakarongotai] 'Listen to the voices of tides' which Wi Parata has given to his runanga house. The name is an exhortation to the tribe to listen not only to what the 'wild waves are saying,' but to the tides of progress and advancement, social and physical, observable around them. The lesson inculcated is just as Shakespeare has it – 'There is a tide in the affairs of men which taken at the flood leads on to fortune.' Evidently Wi Parata has been studying our celebrated poet, and means to be equally philosophical and practical in his efforts to elevate his people.[187]

The tribal aspiration to keep the land intact and to benefit from leasing and the railway was defeated, however, by the legal rights conferred on individual owners under the Native Land Act 1873. As noted above, there were some disputes about leasing in the early 1880s. These arose after the return of Inia Tuhata from Taranaki around 1878. Inia Tuhata was either the grandson or great-grandson of the chief Hone Tuhata (who had signed the Treaty), and the son of Inia Tuhata senior and Mere Pomare.[188] As noted above, Mere Pomare was the daughter of John Nicol and Kahe Te Rauoterangi. Inia Tuhata (the younger) farmed in common with various Otaraua people but wanted to change the leasing arrangements so that more land could be used as sheep runs. He also quarrelled with the chief Tamihana Te Neke over a timber lease. Inia Tuhata cut down the trees when Tamihana Te Neke

184. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 92–93

185. 'The Manawatu Railway and the Natives', *Evening Post*, 30 June 1884, p 2 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 93)

186. Transcript 4.1.16, p [523]

187. *Evening Post*, 30 June 1884; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 92–93

188. Although some evidence suggests that Hone Tuhata was the father of Inia Tuhata senior and grandfather of Inia Tuhata the younger, evidence to the Ngarara commission in November 1888 suggests that this was not the case: see Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 108, 514–515, 667).

denied him a share in the lease. Inia Tuhata's decision to build a new house was opposed in turn, with timber for the house thrown into a swamp, a fence pulled down, and even some planks dragged off the walls of the house.[189] Tamihana Te Karu was prosecuted for forcible entry into Tuhata's house.[190]

Decisions about the leases and the allocation of land for sheep runs were made by the community at hui, and the usual processes for collective decision-making and the adjustment of disputes worked for the Ngarara West block until the early to mid-1880s.[191] At law, every individual owner had the power to apply for a partition whenever they wanted.[192] In October 1886, Inia Tuhata and Hema Tini (of Otaraua) went to Wellington to seek the advice of the Native Minister as to what they should do about their disagreement with a recent decision to lease land to W H Field – this decision had been made by the community at a hui. According to Inia Tuhata, the Minister advised them to apply for a partition, which they accordingly did.[193]

After Tuhata made his application in late 1886, those who disagreed tried to stop him building a house on the disputed land (as discussed above). The opposition of Wi Parata and others, however, could not prevent the partition hearing from going ahead. 'If all the people', Wi Parata stated, 'had been willing & desirable of the subdivisions going on that would have been right but as it was, those three people alone were anxious for the subdivision'.[194] By the time of the partition hearing in 1887, applications had been lodged by more owners, but still representing a minority.[195]

4.5.5.2 *Land sales and the consequences of individualised title*

Once the Ngarara and Muaupoko blocks passed through the court in 1873, Crown purchasing followed almost immediately. As will be recalled from chapter 3, the Crown had attempted to purchase the whole of the Waikanae lands in the 1850s and had succeeded in buying the Wainui and Whareroa blocks to the south of what became the Ngarara block. The Crown's purchase agent, James Grindell, had then played a significant part in persuading Wi Parata and other Kāpiti coast chiefs to apply to the court for title (see section 4.4.3). The Wellington Superintendent at the time, William Fitzherbert, wanted to buy a stretch of inland territory through the lower North Island, amounting to about 250,000 acres. Fitzherbert was acting as 'Agent of the General Government for the Purchase of Native Land',[196] while Grindell had been instructed by the Native Department to get land put through

189. Walzl, 'Ngatiawa' (doc A194), pp 458–462
190. Anderson and Pickens, *Wellington District* (doc A165), p 296
191. Walzl, 'Ngatiawa' (doc A194), pp 458–462
192. Native Land Court Act 1886, s 23
193. Walzl, 'Ngatiawa' (doc A194), p 461
194. Wi Parata, evidence to the Native Affairs Committee, 1888 (Walzl, 'Ngatiawa' (doc A194), p 462)
195. Walzl, 'Ngatiawa' (doc A194), pp 463, 464
196. Grindell to superintendent, 29 April 1872 (Waitangi Tribunal, *Horowhenua*, p 167)

the court so that it could be purchased.[197] Fitzherbert was 'very anxious' to get the land 'extending from the top of the Tararua Ranges' down to the base of the foothills.[198] The Crown therefore purchased the eastern-most portion of the Ngarara block in January 1874.

Almost all of the owners participated in the sale of 1874 in terms of signing the deed, although little evidence exists about how or why the sale was negotiated. On the Crown's side, it wanted the inland territory but hoped to get much of the rest as well. On the owners' side, they had to pay for the survey of the block and the costs of putting it through the court, although the court's first sitting at Waikanae relieved them of one of the usual sources of expense. Also, many owners were about to leave for Waitara and Parihaka at the beginning of 1874. They must have wanted money to assist with their removal and resettlement. The purchase deed was signed on 14 January 1874 and it contained a list of 54 names with marks or signatures next to 52 of those names. The block was called 'Maunganui', presumably because the block included the part of the Tararua ranges running along the inland boundary of the Ngarara block. Effectively this was 'Ngarara East' and the residue became 'Ngarara West'. The purchase was estimated at 19,600 acres with a price of £600.[199] When the land was surveyed, however, it only consisted of 15,750 acres, comprising about 35 per cent of the Ngarara block, leaving the owners with an undivided estate of 29,500 acres.[200]

Apart from the cumulative impact of Crown purchasing on Te Ātiawa/Ngāti Awa ki Kāpiti, the most controversial part of the sale proved to be the payment of an additional £200 to Wi Parata.[201] The chief explained at the Ngarara commission in 1888 that he did not keep any part of the original £600 purchase money: '[T]he money was given to the tribe, I left the tribe to divide it out to the Hapus according to their right, that is the custom amongst us Natives'. In the presence of the assembled tribe, he placed the money 'on a table, and I said, "there is the money, be careful that you divide it equally according to each one's right', after which Tamihana Te Neke and Tamihana Te Karu took the money and were responsible for dividing it among the hapū.[202] Wi Parata added that he did not ask for a payment but the land purchase commissioners had 'told the Government that I had had none of the £600 and therefore I was given this sum of £200', which he took as payment for his work as the tribe's agent in the sale.[203] The £600 was used to assist those of the tribe who were moving from Waikanae to Taranaki in 1874 – there was some-

197. Hearn, 'One past, many histories' (doc A152), p 578

198. Fitzherbert to Grindell and Wardell, 4 November 1872 (Anderson and Pickens, *Wellington District* (doc A165), p 203); Walzl, 'Ngatiawa' (doc A194), p 412

199. Walzl, 'Ngatiawa' (doc A194), p 446; Maunganui deed, 14 January 1874 (H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 2 vols (Wellington: Government Printer, 1877), vol 2, pp 134–135)

200. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 23

201. Walzl, 'Ngatiawa' (doc A194), pp 446–447

202. Wi Parata, evidence to the Ngarara commission, 20 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 191, 192); Walzl, 'Ngatiawa' (doc A194), p 447

203. Wi Parata, evidence to the Ngarara commission, 20 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 185)

thing of an exodus in that year and the money was to assist their departure and establishment costs.[204]

At first glance it might seem unlikely for the Crown's purchase agents to have pressed for this extra payment but this was the time of the 'repudiation movement' which had started in Hawke's Bay and was gathering support, including from the political opponents of the Native Minister, Donald McLean. The repudiation movement, Te Hunga Whakakorekore o te Matau-a-Māui, sought to repudiate the disastrous sales that had occurred through the new title system, especially the 10-owner rule, and to abolish the court.[205] With the movement gaining significant momentum, the Native Department would certainly be worried about a transaction in which the principal chief and agent had received no payment.

In terms of how the money was spent, Wi Parata told the Ngarara commission that his £200 was spent on legal costs connected with Parihaka.[206] The prophets Te Whiti o Rongomai and Tohu Kakahi began peaceful protests in the 1870s. These included the protest of the ploughmen, in which unarmed men went out in 1879 to plough the confiscated lands in the hands of settlers. The Crown deployed the armed constabulary to arrest the ploughmen, with hundreds arrested throughout 1879 and imprisoned in Dunedin; 420 were arrested in all.[207] Wi Parata told the commission that, at the time of this protest, the prisoners were taken to Otago. He stated: 'I heard there was a trial to be gone into by the Government & I wished to engage a solicitor for their defence, & that money was expended in that way.'[208]

Wi Parata's son, Winara, and Tamihana Te Karu (who is mentioned frequently in this chapter) were among the prisoners. Hemi Sundgren told us that '[c]onditions were harsh and included hard labour'. Neither Winara Parata nor Wiremu Kingi Te Matakatea, however, would agree to leave the other prisoners when Wi Parata paid their bail.[209] Wi Parata engaged Walter Buller as their lawyer. He also joined a committee of the Māori members of both Houses, acting as its secretary, which sought to test the legality of confiscation. Parata continued employing Buller during the West Coast commission that followed in 1880. No trial for the ploughmen was ever held and the purchase money had been expended without any solid return.[210]

The Crown also purchased land in the Muaupoko block in 1874–75. As will be recalled, the 2619-acre Muaupoko block had been awarded under the 10-owner rule to 10 Otaraua individuals. The Crown purchase agents had sought to buy most of Ngarara in 1874 but had faced resistance,[211] but they did succeed in obtain-

204. Walzl, 'Ngatiawa' (doc A194), p 600
205. Ward, *National Overview*, vol 2, pp 234, 242–243; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p 506
206. Walzl, 'Ngatiawa' (doc A194), p 601
207. Hemi Sundgren, brief of evidence, 29 January 2019 (doc F19), pp 19–20; Waitangi Tribunal, *The Taranaki Report*, pp 224–226
208. Wi Parata, 20 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 218)
209. Sundgren, brief of evidence (doc F19), p 20
210. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 82–87
211. Walzl, 'Ngatiawa' (doc A194), p 446

ing a large part of the Muaupoko block. The principal Otaraua chief, Eruini Te Tupe, died in September 1874, after which the purchase agents pursued a 25-year-old debt to secure land from his co-owners. The Crown had paid £50 to Eruini Te Tupe during its unsuccessful attempts to buy the whole of the Waikanae lands back in the 1850s (see chapter 3). Rather than writing off this sum when the purchase did not go ahead, the Crown now sought repayment of it in land from the Muaupoko block. Karaitiana Te Tupe, Eruini Te Tupe's son, agreed to sell 1,000 acres in 1875. He later told the Native Land Court that none of the other owners had objected to the sale.[212] The deed was dated 3 June 1875 and it stated that the purchase price was £250. Because the purchase was intended to satisfy Eruini Te Tupe's debt, Karaitiana placed his mark on the deed twice – once as an owner in his own right and once on behalf of his deceased father. Hannah Erskine's husband, James Erskine, signed the deed alongside his wife although he was not an owner, and two of the registered owners did not sign.[213]

As discussed above in section 4.5.3, there were members of Otaraua who had been omitted from the block due to the 10-owner rule, and there is no evidence that their view or consent was sought, nor was it legally necessary for the Crown to have done so. The legal owners did not receive the full £250 price. Karaitiana Te Tupe told the court that they received £200 from the purchase agent, James Booth. The Crown had deducted the £50 owed by his father. Wi Parata was involved in making the payment, presumably acting to assist the owners.[214]

On survey the part acquired by the Crown amounted to 983 acres, representing an alienation of 37.5 per cent of the block. This particular sale seems to have been conducted similarly to that of Maunganui, with the chiefs acting as agents for the tribe and most or all owners involved. The sales that followed, however, showed the dangers of individualised title. Within a decade, private purchasers had bought up interests piecemeal behind the scenes, acquiring about 1,308 acres when their interests were finally partitioned out in 1887. The remaining owners only retained 12.5 per cent of the block.[215] Some of the purchases were carried out by one of the owners, Hannah Field (also known as Hana Field).[216] Her husband Henry Field was leasing land in Ngarara West. This marked the beginning of the Field family's attempt to buy up as much of the Waikanae lands as possible (see section 4.7.3).

The plight of the owners of Muaupoko by 1887 showed the danger of individualised title. It also left the Otaraua owners virtually landless and desperate to obtain significant awards in Ngarara West, either through partition (for those who had been included in the 1873 list) or through getting back into the title if they could do so. Some owners of Muaupoko, such as Karaitiana Te Tupe, had been omitted

212. Walzl, 'Ngatiawa' (doc A194), pp 430–431
213. Muaupoko deed, 3 June 1875 (H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, vol 2, pp 200–201)
214. Walzl, 'Ngatiawa' (doc A194), p 431
215. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 44
216. She was Hannah Wilson, the son of ex-whaler Tom Wilson and his Otaraua wife. She was also known as Hannah Erskine due to her earlier marriage to James Erskine.

in 1873. The situation of Otaraua had flow-on effects for Ngarara West, as will be clear in the following sections.

The 983 acres purchased by the Crown were given to the Wellington and Manawatu Railway Company as an endowment. The company used the land to establish the township of Paraparaumu in 1888, auctioning off the land as a series of town or suburban lots which were all 'soon snapped up'.[217] The real value of the land therefore went to the company and not the Māori owners. The construction of the railway in 1886 and the establishment of Paraparaumu in 1888 also had significant consequences for Ngarara West because it brought an influx of settlers interested in acquiring further land in the area. The effects of this were seen when the title to subdivided sections was finally completed in 1891, resulting in rapid alienation to both the Crown and private purchasers (see below).

4.5.5.3 *The Ngarara West partition hearings, 1887*

The partition hearings for Ngarara West took place before Judge E W Puckey at Ōtaki in May 1887, following a dispute that led to an adjournment of the sitting at Waikanae. Ōtaki was considered a more neutral venue but less expensive than an adjournment to Wellington.[218] Chief Judge Macdonald explained how the court usually dealt with partition cases in his evidence to the Native Affairs Committee in 1888. He emphasised that a block would not necessarily be divided into equal parts for each registered owner:

> Upon what grounds does the Court decide in regard to subdivision?
>
> Various grounds. The main ground is the value of the relative interests; then the locality on the block which the people occupied. Some would occupy, say, the Southern end and some the Northern. In division you generally follow geographical occupation.
>
> Not always divided into equal divisions?
>
> Not as a rule. Owners are not normally entitled equally – some are entitled to a larger value than others.
>
> Then on what ground would you divide their rights?
>
> Anything that is adduced [in evidence] in every case to show what shares should be smaller or larger – in default of any such evidence it would be presumed that they were equal.[219]

The cases for the partition applicants were mostly presented on a hapū basis, broadly coalescing around Puketapu, Otaraua, Ngāti Mitiwai (a hapū of Kaitangata),[220] and Ngāti Tuaho. There was some overlap between these hapū claims. According to Tony Walzl, 44 of the 55 registered owners had not applied

217. Walzl, 'Ngatiawa' (doc A194), p 508
218. Walzl, 'Ngatiawa' (doc A194), pp 464–465
219. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 798–799)
220. Lou Chase, 'Ngātiawa/Te Āti Awa: Oral and Traditional History Report', February 2018 (doc A195), p 84

for a partition and supported the case led by Tamihana Te Karu (Kaitangata) and Wi Parata.[221] Their objective was to keep Ngarara West as intact as possible for a tribal estate, and their case was 'effectively a counter-claim to the evidence put forward by the applicants for partition.'[222]

In brief:

- Puketapu, led by Ihakara Te Ngarara, sought the partitioning out of their land at the southern end of Ngarara. Their case was uncontroversial and the award of Ngarara West B to Puketapu (see map 6) was not challenged then or later.[223]
- The Mitiwai case presented the claim of Inia Tuhata and his sister Rangihanu. Their claim was based on the occupation and authority of their great-grandfather, Hone Tuhata. Inia's mother, Mere Pomare, was a key witness for this case. It was closely linked to the Otaraua and Ngāti Tuaho cases. The claim for Mitiwai encompassed all the land south of the Waikanae River, save for the Puketapu part. Mere Pomare's evidence was that Mitiwai and Otaraua shared this area.[224]
- The Otaraua and Ngāti Tuaho cases were presented jointly, with 'several witnesses' for Ngāti Tuaho 'noting either that they shared the lands of Otaraua or were the same as Otaraua.'[225] This case was led by Enoka Hohepa Taitea and Ema Tini (also known as Hema Tini). There was significant disagreement among the witnesses for this case as to whether Otaraua had a defined area with boundaries in the Ngarara block.[226]
- Eruini Te Marau of Otaraua and Ngāti Rahiri presented an individual claim in order to cut out his cultivations.[227]

Once these witnesses had closed their case, the position for the majority of owners was put by Wi Parata, Tamihana Te Karu, Hira Maeke, Pirihira Tamihana Te Neke, and Tutere Te Matau. The main points of their evidence were that Hone Tuhata had no rights because he had left the district before 1840, and that the land north of the Muaupoko block and the Puketapu claim had been given to the Kaitangata chief Haukione by Te Pehi of Ngāti Toa. All the hapū had originally lived and cultivated there in common, it was said, but the other hapū had gradually left the district. Tutere Te Matau told the court that those Kaitangata who spread south of the Waikanae River had indeed done so under the name of Mitiwai, including Hone Tuhata as the chief of Mitiwai, but they had all since left. Wi Parata acknowledged that Otaraua did have some cultivations outside their main claim in their hapū block, Muaupoko, but argued that these were limited. He

221. Walzl, 'Ngatiawa' (doc A194), pp 465–470
222. Walzl, 'Ngatiawa' (doc A194), p 606
223. Walzl, 'Ngatiawa' (doc A194), pp 465–470
224. Walzl, 'Ngatiawa' (doc A194), pp 466–467
225. Walzl, 'Ngatiawa' (doc A194), p 465
226. Walzl, 'Ngatiawa' (doc A194), pp 465–466, 606
227. Walzl, 'Ngatiawa' (doc A194), p 467

also acknowledged that Inia Tuhata had a claim because he had built a house on the land and had not been opposed in doing so.[228]

Having heard all of the evidence, Judge Puckey then prepared to announce his decision. What happened next was later one of the main justifications for granting a rehearing.[229] Judge Puckey told the Ngarara commission that an application to present rebuttal evidence was made

> just as the Court was going to deliver its Judgment. I think the case for Wi Parata closed on Friday night & the next morning at 10 o'clock when the Court was about delivering Judgment Mrs Pomare asked for an extension of time to bring more evidence. . . . The Court did not see any reason at the eleventh hour to grant the request. Had it been made before it would have been granted.[230]

The key issue was the evidence given by Wi Parata and others about Hone Tuhata's 'abandonment' of rights due to his departure prior to 1840. According to Judge Puckey, this was not a 'surprise case' to the applicants, and he thought they had 'some knowledge' of it beforehand.[231] The commissioners asked Puckey whether he had raised the matter with them:

> You had put the position before them in regard to the Treaty of Waitangi and as to where [Hone] Tuhata was at that time?'
>
> Yes.
>
> What was their answer?
>
> I don't think any of them knew anything at all about him.
>
> Was Mere Pomare there at the time?
>
> Yes. She was there some days before the Court opened.[232]

The commissioners also asked Puckey as to whether Mere Pomare had visited him on Friday night to ask for the opportunity to call rebuttal evidence, and that he had told her to apply formally in court the next morning. Puckey replied: I do not think so but I would not be positive about it.'[233]

228. Walzl, 'Ngatiawa' (doc A194), pp 466–469
229. Judge Puckey, evidence to the Ngarara commission, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 294–297)
230. Judge Puckey, evidence to the Ngarara commission, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 294)
231. Judge Puckey, evidence to the Ngarara commission, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 295, 296
232. Judge Puckey, evidence to the Ngārara commission, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 294–295)
233. Judge Puckey, evidence to the Ngārara commission, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 296)

4.5.5.4 *The outcome of the 1887 partition hearings*

The court awarded the land claimed by Puketapu. This was cut out as Ngarara West B (1,534¾ acres) with the residue named Ngarara West A. Judge Puckey did not, however, grant the areas claimed by the Mitiwai and Otaraua applicants. They were restricted to the area of land that they had cultivated. The Mitiwai case was rejected utterly due to the evidence that Hone Tuhata had left for the South Island before 1840, but – because Inia Tuhata and his sister were on the 1873 title – they were allotted their cultivations. Similarly, the court found that Otaraua's claim was limited to the Muaupoko block with the exception of land outside that block that they had cultivated. Ema Tini's husband, Enoka Hohepa, was found to have no rights at all but 'as he too was on the register of owners he could not be struck off so he was to be joined with his wife in one interest'. The bulk of Ngarara West was allotted as a single partition to the 44 owners who had opposed the division of the block.[234] According to a later court calculation, the partition applicants only received an estimated 50 acres in total (not counting the award of Ngarara West B to Puketapu).[235] This obviously caused them great alarm, hence the subsequent petitions and litigation.

Following Judge Puckey's oral delivery of the decision, the surveyor Henry Field (rather than the applicants themselves) gave evidence about where the various cultivations were located. Field's role was later grounds for objection to the court's decision. Field estimated that Inia Tuhata had about three or four acres, Eruini Te Marau had about 10–15 acres, and Enoka Hohepa Te Taitea and Ema Tini had about seven acres. The small size of these acreages were also later grounds for objection.[236] Inia Tuhata pointed out in a petition that the land was also 'fished and shot over [for birding]';[237] restriction to land for cultivation alone would never be sufficient.

In sum, once Inia Tuhata and Ema Tini were advised by the Native Minister to seek a partition, the native land laws allowed them to do so as individual owners without the consent of the majority. Tribal authority, which had been exercised in the 1870s in the form of hui to decide questions about leasing and occupation, could not be enforced under the Native Land Act 1873. This Act had empowered individuals rather than the tribe. Once the dam was broken and an application for partition had been made in 1886, the Otaraua and Puketapu owners on the list decided to partition out the areas occupied by their respective hapū. They succeeded up to a point but Wi Parata, Tamihana Te Karu, and the majority of owners also succeeded in their attempt to keep most of Ngarara West as an undivided whole. One of the great defects of the eventual rehearing in 1890 was that the Crown insisted on the whole of Ngarara West being broken up into individual pieces. We discuss that development later.

234. Walzl, 'Ngatiawa' (doc A194), pp 469–470, 544

235. Otaki Native Land Court, minute book 21A, p 250 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p 158)

236. Walzl, 'Ngatiawa' (doc A194), p 470

237. Inia Tuhata and others, petition, June 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 892)

In the next section, we turn to the remedies provided by the Crown for those who objected to the court's 1887 decision and those who, on the other hand, objected to any further partitioning of the tribal estate. We also address a new development in the late 1880s: the petitions of those who were left out of the title in 1873 (because they were not in residence at that time), and their attempts to obtain a remedy from the Crown.

4.6 Did the Crown Provide Appropriate Remedies when Made Aware of Grievances?

4.6.1 Introduction

In this section, we address a key question for the claim issues covered in this chapter: did the Crown provide appropriate remedies when it was made aware of the two major grievances of Te Ātiawa/Ngāti Awa: the omission of right-holders from the list of owners in 1873; and the outcomes of the 1887 partition (including the fact that there had been a partition at all, which was a grievance for the majority who wished to continue holding their lands undivided). Their broader grievances about the native land laws in general and loss of land were raised with the Crown as part of the Kotahitanga movement in the 1890s and are discussed in section 4.8.

The potential remedies addressed in this section are:

- the right under the native land laws to apply for a rehearing within three months of a court decision – Inia Tuhata and the Otaraua partition applicants exercised this right in 1887;
- petitioning Parliament – this was the main remedy available outside of the native land laws and there were multiple petitions from various Te Ātiawa/Ngāti Awa groups or individuals in 1888, 1889, and 1891, often accompanied by appeals to the Native Minister;
- a commission of inquiry – commissions of inquiry or Native Land Court inquiries were another remedy that the Crown provided, especially when a select committee recommended further investigation, and in this case the Crown appointed a commission in 1888 to inquire into the need for a rehearing in Ngarara and three other blocks;
- legislative action to order a rehearing – this was a remedy that Parliament sometimes provided in the 1880s, and in this case the Crown proposed it twice, first in 1888 (a clause in the Native Land Court Act 1886 Amendment Bill 1888) and secondly in a special Act (the Ngarara and Waipiro Further Investigation Act 1889); and
- the jurisdiction of the court to correct errors – section 13 of the Native Land Court Acts Amendment Act 1889 conferred new powers on the chief judge to correct errors, which were considered broader than any previous powers, and those who claimed to have been omitted from the list of owners in 1873 tried to use section 13 to get back into the title.

The claimants were highly critical of the Crown's approach to remedies in 1888–1891, especially the Ngarara commission and the Ngarara and Waipiro Further Investigation Act. Crown counsel, on the other hand, argued that the Crown

provided appropriate remedies, and that it was entitled to carry out the recommendations of the Ngarara commission in the special Act. We explore the substance of their arguments further below. After analysing the potential remedies, we also explore the question of whether the rehearing granted under the special Act provided a remedy in practice. In particular we examine one key aspect of the Act: the power it conferred on the court to identify and separate all individual interests on the block plan – essentially a power to subdivide in advance of surveys – and the outcome of this process for the majority of owners who had sought to retain their land in common in an undivided block.

4.6.2 Potential remedy: the right to apply for a rehearing

4.6.2.1 *Applications for rehearing*

The native land laws provided a potential remedy for Māori who were aggrieved with a court decision: the right to apply for a rehearing within three months of a decision.[238] This remedy was available to those who were unhappy with the outcome of the partition hearing but not for those who discovered that they had been left out of the title back in 1873.

The official application for rehearing was filed on 27 June 1887, supported by letters from Mere Pomare and others who objected to the decision. Puketapu were part of the application at first but later withdrew from it. The reason for their withdrawal is presumably, as Judge Puckey pointed out, that the court had in fact granted what Puketapu wanted at the partition hearing. Their part of the application had been confined to two 'minor administrative points.'[239] The Otaraua part of the application was in the names of Wi Perahama Putiki, Ematini, Merekai Putiki, Enoka Te Taitea, Watene Te Nehu, and Eruini Te Marau. They sought a rehearing on a number of grounds. Their allegations included:

- the court took 'other and hostile evidence as to their cultivations' (a reference to Field's part in defining the nature and extent of their cultivations), and also Field was a newcomer and an agent of Wi Parata;
- they were not allowed to present additional evidence in response to what they considered the 'false and fictitious' evidence of Wi Parata;
- the court was wrong in its findings about Merekai Putiki, Watene Te Nehu, and Enoka Te Taitea;
- the court was wrong in finding that the Otaraua claim to land in the Ngarara block had no boundaries; and
- the Otaraua claim was not confined to the Muaupoko block but (by agreement in 1873) many were in fact left out of Muaupoko and were supposed to have a 'large portion' of Ngarara land adjoining the Muaupoko block instead.[240]

238. Native Land Court Act 1886, s 75
239. Walzl, 'Ngatiawa' (doc A194), pp 472–476, 478
240. Walzl, 'Ngatiawa' (doc A194), pp 474–475; Wi Perahama Putiki, Ematini, Merekai Putiki, Enoka Te Taita, Watene Te Nehu, and Eruini Te Marau, Otaraua section of application for rehearing, 29 June 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 179–181)

The Mitiwai part of the application was in the names of siblings Inia and Rangihanu Tuhata. They argued that:

- Mitiwai had exclusive occupation rights south of the Waikanae River, which they said had been demonstrated in evidence to the partition court;
- they were the only members of Mitiwai in the 1873 title but 'there were others out of the Certificate whom Inia and his sister by consent represent[ed]';
- the court did not allow them to rebut Wi Parata's evidence that Hone Tuhata left Waikanae before 1840, whereas they could have brought 'independent' evidence on this point (this was probably a reference to Bishop Octavius Hadfield); and
- Wi Parata had failed in his trustee duties to Inia Tuhata (who had been a minor in 1873).[241]

The applications for rehearing drew immediate protest from Wi Parata and seven others, who represented the majority of owners. They objected to the cost of another hearing, noting that they had already been put to great expense by the partition hearing.[242]

In the meantime, the uncertainty as to whether a rehearing would be granted left matters in limbo. Some claimed that they could not use their cultivations for fear of reprisals. Others were ploughing and fencing outside their awards and had been threatened with legal action. The new form of title under the native land laws had undermined tribal control, and the chiefs were not able to resolve these issues through the usual customary means.[243]

4.6.2.2 *The issue of the 1873 list of owners and the block name 'Ngarara' is raised*

In addition to their dissatisfaction with the partition result, the applicants argued that a number of right holders had been left out of the 1873 titles (both Ngarara and Muaupoko). Eruini Te Marau's application to the chief judge underlined this point, alleging that names had been left out in 1873 and that the block name 'Ngarara' had been used instead of 'Waikanae' to deceive people.[244] As far as we are aware, this was the first time that this allegation about the name 'Ngarara' was made.

Was deception intended? In answering this question, it is important to note that the earliest correspondence on file in respect of Ngarara – a letter from Wi Tamihana Te Neke to Chief Judge Fenton in June 1872 – stated that 'your consent has arrived to adjudicate upon Te Ngarara and Waikanae' (a translation of 'te Ngarara o Waikanae').[245] The gazette advertisement for the 1873 hearing also referred to the block as 'Te Ngarara and Waikanae', and advertised that the hearing

241. Inia Tuhata and Rangianu Tuhata, Mitiwai section of application for rehearing, 29 June 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 182–183)

242. Walzl, 'Ngatiawa' (doc A194), p 472

243. Walzl, 'Ngatiawa' (doc A194), pp 472, 478–479

244. Eruini Te Marau to Chief Judge, 21 July 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 174–175)

245. Wi Tamihana Te Neke to Chief Judge, 29 June 1872 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 236–237)

would take place at Waikanae.[246] The issue of the block name 'Ngarara' was raised frequently later in petitions and in evidence before the Ngarara commission so will be discussed more in later sections. The commission's interpreter, Lieutenant-Colonel McDonnell, understood the *Kahiti* notice to mean 'Ngarara at Waikanae', similar to 'Lambton Quay in Wellington'.[247]

Since both names, 'Ngarara' and 'Waikanae' were used in the advertisement, and since the court hearing was advertised for and held at Waikanae in the house Te Pukumahi Tamariki, it is highly unlikely that any of the local people were unaware of the 1873 hearing. Wi Parata recalled in 1890 that 'Ngarara was advertised and talked about for a year before the hearing', and 'everybody about there knew that Ngarara was before the Court'.[248] We see no reason to doubt that this was the case. Mr Walzl was unable to confirm, however, whether the relevant *Kahiti* was distributed at Taranaki. He commented: 'The impression from the evidence is that many persons in Taranaki did not know that the title for Ngarara had been passed until 1887 when the protest over the partition was taken to Taranaki to gain support for calls for rehearing'.[249] It is possible that those who had left Waikanae for Taranaki since the big migration in 1848 were either unaware of the hearing or unaware until it was too late to file an application for rehearing within the three-month deadline. Since most of the Ngarara owners moved to Parihaka in 1874, however, the news of the 1873 title hearing must have reached Taranaki well before 1887.

4.6.2.3 *Chief Judge MacDonald denies the applications*

In 1887, the chief judge had sole power to decide whether a rehearing should be granted. No Māori assessors were involved in the decision until the law was changed later in 1888.[250] The usual practice at the time was for the presiding judge to give the chief judge a report on the applications. In this case, Judge Puckey denied that there were any grounds for a rehearing. Importantly, Puckey considered that Otaraua had already had their share of the Ngarara lands in the Muaupoko block, and he had awarded the Otaraua applicants the amount of land actually shown to be 'in their bona fide occupation'. He considered the applicants' claim that the Otaraua 'appearing in the partition case either had no or little interest in Muaupoko' as novel and 'manufactured for the occasion'.[251] Judge Puckey also commented that Wi Parata's statements were not false, having been 'made on oath and supported by the evidence of Major Kemp' (Te Keepa Te Rangihiwinui of the Muaūpoko iwi). The key point for Puckey was that 'of course,

246. Anderson and Pickens, *Wellington District* (doc A165), p 283
247. T McDonnell, answers to commissioner's questions, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 83)
248. Wi Parata, evidence in section 13 application hearing, 2 May 1890 (Walzl, answers to questions in writing (doc A194(d)), p 93)
249. Tony Walzl, answers to questions in writing, November 2018 (doc A194(d)), p 32
250. Native Land Court Act 1886 Amendment Act 1888, s 24
251. Walzl, 'Ngatiawa' (doc A194), p 475; Judge Puckey, memorandum, 9 July 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 209–210)

having closed their case they were not allowed to call rebutting evidence.'[252] The only point on which a rehearing might be justified, he said, was the arrangement for land to be conveyed to the Wellington and Manawatu Railway Company for the railway line.[253] Tony Walzl noted that Te Keepa's evidence at the partition hearing was very brief: 'I live at Horowhenua. I know this land. It belonged to me long ago. It was taken from my people by yours. [Wi Parata's] N'Toa are the people who conquered this land.'[254]

Chief Judge J E MacDonald held a two-day hearing of the rehearing applications at Ōtaki in November 1887, declining all the applications in March 1888.[255] No record has been found of this inquiry. The chief judge told the Native Affairs Committee in August 1888 that the parties had been represented by counsel, that he had considered Puckey's report, and that he had 'refused an order for rehearing, not being satisfied that there was sufficient ground for disturbing the decision complained of' by the applicants.[256] MacDonald also noted that the applicants for rehearing had attacked the original court decision of 1873 as well as the partition decision but it had been 'out of [his] power to deal with that.'[257]

4.6.3 Potential remedy: petitioning Parliament

4.6.3.1 *Inia Tuhata's petition*

Once the option of a rehearing was denied, Inia Tuhata turned to Parliament for a remedy. His was the only party to petition;[258] the aggrieved members of Otaraua did not file a petition or join him as co-petitioners. Nonetheless, Tuhata's petition was filed partly on behalf of all those who had been omitted from the title back in 1873, either by mistake or because they did not reside at Waikanae at the time the list of owners was compiled for the court. His main argument in that respect was that 'Ngarara' was the name for only the part of the block around the Ngārara Stream, and that the use of that name for the whole of the Waikanae lands misled the people: 'many of the owners did not know that the Block being adjudicated upon [was] in reality Waikanae until long after'.[259] In addition, Tuhata argued that the names of many owners had been left off the list, which again 'was not known

252. Judge Puckey, memorandum, 9 July 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 210)

253. Judge Puckey, memorandum, 9 July 1887 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 211)

254. Otaki Native Land Court, minute book 7, p 249 (Tony Walzl, answers to questions in writing, November 2018 (doc A194(d)), p 26)

255. Walzl, 'Ngatiawa' (doc A194), p 479

256. Chief Judge MacDonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 785–786)

257. Chief Judge MacDonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 787)

258. Four others signed the petition. Their names are not on the Record but they likely included Inia Tuhata's aunt, Heni Te Rau (who wrote a covering letter for his petition), his sister Rangihanu, and his mother Mere Pomare.

259. Inia Tuhata and others, petition, June 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 893); Walzl, 'Ngatiawa' (doc A194), p 480

till long after'. He blamed Wi Parata for this, and also claimed that the Kukutauaki block had been wrongly awarded to Wi Parata and his close relations.[260]

The petition's other main allegation was that the chief judge refused to accept 'fresh evidence' of Hone Tuhata's long residence at Waikanae, and had wrongly refused the application for rehearing, even though his whānau had been granted only four acres. The petitioner sought two remedies: a new inquiry into the ownership of the whole Waikanae block; and a rehearing of the partitions.[261]

Inia Tuhata's petition brought these grievances to the attention of the Crown for the first time, in particular the complaints that many had been left out of the title in 1873, the Kukutauaki block had been wrongly awarded, and the partition hearing had resulted in injustice. The concerns of Otaraua, including issues about the title of the Muaupoko block, had not yet been put directly to the Crown.

The Native Affairs Committees of the House of Representatives and Legislative Council both inquired into the petition. We have the minutes of the council's committee on our record but not those of the House. These inquiries raised two general issues, in addition to the complaints outlined above:

- systemic problems in the Native Land Court system, particularly the large number of petitions about court decisions and the chief judge's denial of rehearings; and
- the responsibility of the Crown and Parliament to remedy injustices vis-à-vis the independence of the courts and the finality of court decisions.

The first of these general issues was the subject of the House committee's report in June 1888:

> That this being another petition for rehearing after the decision of the Chief Judge of the Native Land Court to the contrary, the Committee, without expressing any opinion as to the alleged grievances of the petitioners, consider that some general legislation should be introduced this session by the Government dealing with appeals from decisions in respect of rehearings.[262]

The committee also recommended 'the Government to make careful inquiry into the allegations of the petition'.[263]

The second issue was debated in the committee and the House, with the result that Parliament decided it could and should upset titles where the Crown decided that a case of injustice had occurred. We discuss these issues further below.

4.6.3.2 *The Native Minister's decision and Wi Parata's petition*

As well as petitioning Parliament, both sides appealed directly to the Native Minister, Edwin Mitchelson. He received letters from Wi Parata's lawyers, from

260. Inia Tuhata and others, petition, June 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 894)
261. Inia Tuhata and others, petition, June 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 895–897); Walzl, 'Ngatiawa' (doc A194), pp 480–482
262. AJHR, 1888, I-3, p 14
263. AJHR, 1888, I-3, p 14

a group of residents at Waikanae in support of Wi Parata, from Inia Tuhata's lawyers, and from Heni Te Rau, Inia Tuhata's aunt. The Minister referred some of these letters to the chief judge for inquiry. Judge Puckey was once again consulted and again denied the Tuhata party's allegations, this time as put forward by Heni Te Rau. Nonetheless, the Crown decided that a remedy was necessary. Mitchelson introduced an amendment to the Native Land Court Bill, which was already before the House. This amendment would annul the chief judge's decision to refuse a rehearing. The Crown thus proposed to take a middle course between granting and declining a rehearing, while also providing for the inquiry recommended by the select committee. There was no guarantee that a rehearing would result; it simply required the chief judge to consider the applications a second time.[264]

Wi Parata and the majority of owners filed a petition with Parliament, asking that Tuhata's petition not be granted and that 'a certain clause in the Native Land Court Act Amendment Bill authorising the rehearing be struck out'. The Native Affairs Committee made no recommendations on this counter-petition because 'the subject-matter of this petition is now before Parliament'.[265] Despite a number of letters and protests on Wi Parata's side,[266] on 14 August 1888 the House voted in favour of the Bill containing Mitchelson's clause. This stated: 'The decision of the Chief Judge upon an application for a rehearing in respect of a decision of the Court upon partition of land known as Ngarara is hereby annulled, and such application shall be deemed to be still undealt with'.[267]

4.6.3.3 *The Legislative Council's consideration of the petitions*

The Native Affairs Committee of the Legislative Council heard evidence about both petitions in August 1888, soon after the House passed the Native Land Court Act 1886 Amendment Bill. The inquiry focused mainly on six issues:

- The use of the name 'Ngarara' for the 1873 title investigation – the chief surveyor and commissioner of Crown lands, J W Marchant, argued that the 1873 hearing was held locally (at Waikanae) and the people of the district would have known about it, regardless of what name was used. Bishop Hadfield, on the other hand, claimed that the name 'Ngarara' must have been used 'for the purpose of deceiving those interested in the land'. Wi Parata's evidence was that 'Ngarara' was the name of the area contested in the boundary dispute with Tamihana Te Rauparaha (see section 4.4.3 for details). This dispute had led to the survey of the whole of the Waikanae lands as a single block. Tamihana Te Rauparaha was ill when the case was called in 1873, however, which prevented the disputed part of this block being heard that year (that part of the block was later heard separately as 'Kukutauaki'). The name 'Ngarara' continued to be used for the remainder,

264. Buckley, Stafford & Treadwell to Native Minister, 6 August 1888; Judge Puckey, memorandum to the Chief Judge, 21 July 1888; T W Lewis, minute to Native Minister, 9 July 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 870, 880–883, 886)

265. AJHR, 1888, I-3, p 32

266. Walzl, 'Ngatiawa' (doc A194), pp 482–483

267. Native Land Court Act 1886 Amendment Bill 1888, no 51–5, cl 28

for which the hearing went ahead in 1873.[268] The Ngārara Stream was the boundary between the Kukutauaki 1 and Ngarara blocks.[269] Wi Parata specified that all the boundaries were set out in the Gazette notice, adding: 'The Ngarara was the cause of this dispute . . . I did not adopt the name of Te Ngarara with the object of deceiving them, but on account of the dispute between Tamihana and myself, and which resulted in all the land being dealt with [by the court].'[270]

- The completeness of the original list of owners – this issue was closely related to the allegations about the use of the name 'Ngarara' in 1873. Heni Te Rau, Inia Tuhata's aunt, gave evidence that a large number of people had been left out of the original list.[271] The chief judge stated that the rehearing applicants in 1887 had 'attack[ed] the original decision of the Court but it was out of my power to deal with that'. Asked if the court could now go behind the 1873 certificate, Macdonald said that only legislation could allow it to do so but the current clause in the Bill did not go that far. An example of where a title had in fact been upset after 15 years was Little Barrier Island, which, he said, had been heard four times so far and a fifth rehearing was sought. Asked about the costs of rehearings, the chief judge replied that they were considerable, especially 'the expense of living where the Court is held and the neglect of their business'.[272]

  Wi Parata's evidence explained the community decisions in 1873 as to how the list of owners should be selected and who should compile it. The list was not drawn up by Parata on his own (he was a relatively young chief at the time) but by 'two old tattooed men of the Ngatiawa tribe and myself'.[273] These three chiefs – Wi Parata, Tamihana Te Neke, and Poihipi Hikairo – were appointed to bring the list to the court in Wellington. The names of 'all the owners of Ngatiawa living on the land were put in'. Importantly, only some had actual 'interests' in the land, some had no interests, because 'at that time we were ignorant how to conduct matters in the Court'. The committee then asked Wi Parata why he and the other chiefs had included names of people with no interests, to which his response was: 'Owing to our

268. J W A Marchant, evidence to Native Affairs Committee, 20 August; Bishop Hadfield, evidence to Native Affairs Committee, 17 August 1888; Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 765–766, 782, 816–818)

269. Anderson and Pickens, *Wellington District* (doc A165), p 287

270. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 817–818)

271. Heni Te Rau, evidence to Native Affairs Committee, no date (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 769, 772)

272. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 787, 788, 790)

273. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 822)

ignorance of the law we said: "Oh well, all the people living at Waikanae will be allowed to go into the Certificate."'[274]

- Hone Tuhata's presence at (or absence from) Waikanae after 1840 – this was one of the most hotly contested issues. Inia Tuhata did not give evidence himself but Heni Te Rau, Bishop Hadfield, Wi Hape Pakau, and Pirihira Te Tia (Hone Tuhata's niece)[275] all testified to the presence of Hone Tuhata at Waikanae after he signed the Treaty in 1840.[276] Bishop Hadfield testified that Hone Tuhata had been wounded at Kuititanga in 1839 but otherwise his evidence was limited, since he could only speak to having seen Hone Tuhata in 1841. After a disagreement that year, Hadfield was 'shunned' by the chief, and Hadfield himself moved away from Waikanae in 1844.[277] Wi Parata continued to deny that Hone Tuhata resided and cultivated at Waikanae with his whānau. According to Parata, Hone Tuhata left Waikanae with Huriwhenua and the majority of the people after the battle of Haowhenua. Although he had other witnesses in support of this position, none were called, possibly because the session was almost over.[278]
- The very small amount of land awarded to Inia Tuhata and his sister – this was an issue that particularly concerned the select committee. Heni Te Rau explained that the court had only awarded her nephew and niece four acres. She also testified that Eruini Te Marau only received 15 acres. Ema Tini and her husband got about six or seven acres. Puketapu were awarded their share, which was 'swamp and sandhills principally'. All the rest went to 'Parata's people' (which is how Heni Te Rau described the majority of owners).[279]

  The committee asked Wi Parata to explain why the petitioners' share was limited to the land they were cultivating, especially in light of the fact that he had been their court-appointed trustee. Inia Tuhata and Rangihanu were minors in 1873. Parata's response was: 'I was not able to give them more, because they got the exact portion occupied by their father [Inia Tuhata senior] when he came back from Arapaoa. When he came back and built his house.' Parata also explained that the majority of owners had not been limited to their cultivated land in the same way because they customarily 'went

274. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 828–829)

275. Pirihira Te Tia, evidence to Ngarara commission, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 90). Pirihira Te Tia stated that her mother was Hone Tuhata's sister.

276. Walzl, 'Ngatiawa' (doc A194), p 483

277. Bishop Hadfield, evidence to Native Affairs Committee, 17 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 780–781)

278. Wi Parata, evidence to Native Affairs Committee, 24 August 1888; Wi Parata, evidence to Ngarara commission, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 183–184, 824, 838–839). The committee completed its inquiry four days before the end of the session.

279. Heni Te Rau, evidence to Native Affairs Committee, no date (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 769–770)

up to the mountains and procured food. Caught birds and so on.' The relative shares were not equal, he argued – despite the committee's expectation to the contrary – and the partition court awarded the share of land to which each owner had a right.[280] The chief judge observed that 'owners are not usually entitled equally. Some are entitled to a larger value than others.'[281]

- The award of Kukutauaki 1 to Wi Parata and his immediate relations – this was a minor issue in the inquiry but the committee heard briefly the complaint of Heni Te Rau that Wi Parata had wrongly obtained Kukutauaki 1 for his own family. In doing so, she said, he had excluded other Te Ātiawa/Ngāti Awa right-holders from the ownership. She added: 'They believed he was acting fair with them according to Maori custom and usage. They did not therefore look into the thing until about three years ago.'[282] Wi Parata recited the history of how his mother, Waipunahau, had mana over this area to decide the boundary, and discussed the dispute with Tamihana Te Rauparaha in 1872 that had resulted in the land being surveyed and brought before the court.[283] But this particular allegation was not put squarely to Wi Parata and he did not respond to it as a result, presumably because the committee considered it a side issue.
- The question of whether the final decision of a court should be disturbed if injustice had occurred – this issue was debated between the committee and Chief Judge Macdonald, and later discussed in Parliament during the debate on Mitchelson's Ngarara clause (clause 28 of the Native Land Court Act 1886 Amendment Bill 1888). In response to questions from the committee, Macdonald expressed concern that Parliament's frequent granting of rehearings was an interference with the judicial independence of the court and damaging to its prestige. He pointed out that there was no similar interference with the decisions of the ordinary courts. The finality of Native Land Court decisions would never be accepted if it was known that Parliament would regularly upset them. In the particular case of Ngarara, the chief judge argued that concern about the small size of acreages was not the issue; ownership rights and relative interests were the proper business of the Native Land Court. It would be equally unjust to reopen settled cases and to give 'the wrong people too much'. Matters of 'abstract justice' had to be measured against such considerations.[284]

280. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 834–836)

281. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 798–799)

282. Heni Te Rau, evidence to Native Affairs Committee, no date (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 775–776)

283. Wi Parata, evidence to Native Affairs Committee, 24 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 815–817)

284. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 790–792, 795–796, 799)

The minutes include the following exchange between committee member William Swanson and Chief Judge Macdonald:

> [If it could be shown that Hone Tuhata was a chief equal to Wi Parata and who had in fact still been in residence in the 1840s], would you not consider that sufficient cause for dissatisfaction on the part of these two petitioners?
>
> The question would still be whether even in an extreme case it would be advisable to reopen it after being settled for so long.
>
> That would not weigh with me, if an injustice had been done there is no length of time that will make it anything else but a wrong?
>
> It is not so serious as a hanging case where there is no remedy.
>
> But it looks very much like a case of starvation if these things are true [referring to the four acres and the denial of wider interests]?
>
> If they are true, then it is quite clear injustice was done.
>
> Then you should do justice to these people?
>
> I am not so clear about that. There is another kind of injustice in giving the wrong people too much.[285]

The Native Affairs Committee report was delivered to the Legislative Council on 27 August 1888.[286] Its contents showed that the committee had misunderstood some matters, due no doubt to the brief time available for the inquiry, insufficient evidence, and the fact that most of the witnesses were in support of the petitioners. Only Wi Parata was heard on the other side despite the presence of others waiting to speak in his support. The committee found that the evidence pointed 'very distinctly to a serious miscarriage of justice' in the 1887 subdivision. This subdivision, it reported, 'awards a very insignificant portion to the immediate descendants of the full-blood members of the tribe', who had occupied the land 'continuously' since Hone Tuhata signed the Treaty in 1840. The subdivision 'practically sets aside the general award of 1873 to Ngatiawa, awarding by far the greater part of the land to persons collaterally connected with Ngatiawa but with comparatively a large amount of Ngatitoa blood; and in one case to a half-caste American by the father's side, and of mixed Ngatiawa and Ngatitoa bloods on the mother's side'.[287] These statements reveal that the committee had uncritically accepted one side's evidence and, even worse, had completely misunderstood the tribal affiliations of Wi Parata and the great majority of Te Ātiawa/Ngāti Awa owners.

The committee went on to recommend the matter to the 'prompt attention of the Executive Government', otherwise 'the expulsion of the present occupants, some of whom have been in continuous occupation since 1840, from all but the four acres awarded, will probably be quickly effected'. The committee also warned

285. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 795–796)

286. Walzl, 'Ngatiawa' (doc A194), pp 484–485

287. 'Petition of Inia Tuhata', report, 27 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 763)

that 'the alienation of the greater part of the block is likely to be effected at an early date, and defeat all further efforts for reconsideration'.[288] The first of these statements reflected the very exaggerated case before the committee – only two of the 56 registered owners had been confined to four acres, and they were a small minority of the residents. The second statement reflected the committee's clear understanding of how individualised title worked under the native land laws – partition and full individualisation was usually followed by rapid alienation.

The committee's report was misinformed and incorrect on a number of points, but the question of Hone Tuhata's occupation at Waikanae and the justice of the partition in respect of those with very small awards was a valid concern on which further evidence was required. It is notable that the select committee made no mention of the issues surrounding the use of the block name 'Ngarara' in 1873 or the lists of owners for Ngarara and Kukutauaki 1.

As noted above, the Native Minister had already included a remedial clause in the Native Land Court Act 1886 Amendment Bill as it passed the House. This clause (28) was considered by the Council on 24 August 1888, before it received the select committee's report. The Council struck out clause 28 by a large majority (14–4). This meant that the Crown's remedy for Ngarara and three other blocks – Porangahau, Mangamaire, and Waipiro – had been removed from the Bill.[289] The question then arose: what would the Crown do in response to the Council's amendment?

4.6.3.4 *The Crown devises an alternative remedy*

As Crown counsel submitted, it is important to consider the Crown's attempts to remedy injustices once those had been drawn to its attention. The Crown also submitted that the alternative remedies available to governments at the time must be taken into account.[290]

As a result of Inia Tuhata's petition, the two select committee inquiries, and letters to the Native Minister, the Crown was by now well aware of grievances about the 1873 list of owners for Ngarara, the 1874 list of owners for Kukutauaki 1, and the 1887 partition. The Crown's preference in August 1888 was to retain the original clause 28 as a remedy, even though it only dealt with the partition. The House considered the Council's amendments to the Native Land Court Act 1886 Amendment Bill on 27 August. The premier, Sir Harry Atkinson, moved that the House disagree with the deletion of clause 28. James Carroll, the member for Eastern Māori, argued that there was a systemic problem and that a general clause should be inserted to allow numerous rehearings to be held rather than singling out 'four special blocks' for redress. Other members raised the kinds of arguments the chief judge had put to the select committee: the native land laws provided for courts to

288. 'Petition of Inia Tuhata', report, 27 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 763)

289. 'Native Land Court Bill', 24 August 1888, NZPD, vol 63, p 363; Walzl, 'Ngatiawa' (doc A194), pp 486–487

290. Crown counsel, closing submissions (paper 3.3.60), pp 14–17, 26–27

make final decisions. If those decisions were to be reopened by Parliament, then the House was

> bringing the administration of the Native Land Court into contempt – passing a vote of censure upon the Native Land Courts and the present system which we ourselves created in 1886 [the Native Land Court Act 1886]. The natural and logical conclusion is that the system should be amended . . .[291]

The member for Southern Māori, Tame Parata, disagreed, pointing out that even Ngāi Tahu had received 12 acres per head from Walter Mantell rather than the 'two or four acres' allotted to some Ngarara owners. This was highly unjust, he said, and the Native Affairs Committee's 'full and exhaustive inquiry' showed that 'the petitioners have suffered great wrong and are entitled to a rehearing'.[292]

The House agreed to reject the Council's amendment (among others).[293] The Legislative Council, however, insisted on its deletion of clause 28, arguing that 'unless full inquiry was held and evidence laid before Parliament in some fair and satisfactory way, they [Parliament] should not order these rehearings as a matter of course'.[294] The Government therefore decided on a royal commission as a compromise, with a new amendment to make the land inalienable until the end of the next session so as to prevent any sales before a remedy could be implemented. At a conference of both Houses, the Council agreed to accept this amendment.[295] Although this was presented as a compromise with the Council, there was clearly disagreement in the House as to whether a full case for rehearing had been made out thus far, and the House select committee had recommended further inquiry.

The actual remedy chosen in 1888, therefore, was for a royal commission to investigate the issues while the land was kept inalienable in the meantime. As we shall see in the next section, the claimants were highly critical of the Ngarara commission, its composition, its recommendations, and the Crown's eventual remedy in response to the commission's findings.

4.6.4 Potential remedy: the Ngarara commission

4.6.4.1 *Introduction*

A royal commission was appointed to consider all four blocks covered by clause 28: Porangahau, Mangamaire, Waipiro, and Ngarara. In this report, we refer to it as the 'Ngarara commission' because it reported separately on Ngarara. According to the claimants, the Ngarara commission did not result in an adequate remedy, due to acts and omissions of the Crown:

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291. 'Native Land Court Bill', 27 August 1888, NZPD, vol 63, pp 458–459
292. Tame Parata, 27 August 1888, NZPD, vol 63, p 458. For Walter Mantell and the Ngāi Tahu reserves, see Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: GP Publications, 1991), vol 3, pp 828–829.
293. 'Native Land Court Bill', 27 August 1888, NZPD, vol 63, p 459
294. 'Native Land Court Bill', 29 August 1888, NZPD, vol 63, p 523
295. 'Native Land Court Bill', 29 August 1888, NZPD, vol 63, p 523; Native Land Court Act 1886 Amendment Act 1888, s 27

The Commission was described by Tony Walzl as the Crown's 'small window of opportunity' to 'make things right' yet his research also shows how the establishment of the commission: its membership, terms of reference and administrative support was such as to prevent an effective inquiry from taking place.

The Commission recommended that the 1887 decision be set aside and a rehearing ordered, it failed to recommend that the re-hearing be undertaken on a *de novo* basis, instead recommending that the re-hearing be restricted in scope by the initial list of owners which had been provided to the Court in 1873, thereby perpetuating the initial injustice and adding delay in the finalising of titles to that injustice.[296]

The Crown denied all of these allegations. In the Crown's submission, the commission was an appropriate response to Inia Tuhata's petition:

The Crown is not responsible for the conduct and recommendation of Commissions of Inquiry (sometimes established in response to petitions following decisions of the Native Land Court, as occurred in relation to the Ngārara block here). While Commissions of Inquiry may be established by the Executive or Parliament, once in train the Government cannot interfere in the direction taken by an Inquiry or influence the findings.

Further, once a Commission has reported to the Government, the Government is free to either accept or reject any recommendations made by the Commission. The Crown's responsibility for Commissions, in a Treaty context, lies with:

- the statutory framework within which Commissions of Inquiry (generally) operated and with ensuring that that framework was consistent with Treaty principles and
- responding to any recommendations made by a Commission of Inquiry in a Treaty-consistent manner.[297]

In the specific case of the Ngarara commission, Crown counsel argued that it was Treaty-consistent for the Crown to accept the commission's main recommendation, which was to confine a rehearing to the 1887 partitions. The commission had exonerated Wi Parata of any wrongdoing in 1873 and, in the Crown's submission, accepted his evidence that the 1873 list of owners was compiled according to the community's wishes at the time.[298] The Crown submitted that the allegations against it were groundless:

Despite the evidence that the criteria for inclusion reflected community policy at the time, the Crown is being criticised in this inquiry (some 120 years later) for adopting the principal recommendation of the Ngārara Commission in 1888 of ordering a rehearing of the 1887 title investigation, rather than a hearing *de novo*.[299]

296. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 18–19
297. Crown counsel, closing submissions (paper 3.3.60), pp 27–28
298. Crown counsel, closing submissions (paper 3.3.60), pp 32–34
299. Crown counsel, closing submissions (paper 3.3.60), p 33

4.6.4.2 *The commission's scope and composition*

According to the claimants, the commission failed partly because of its terms of reference and membership.[300] The Ngarara commission was not constituted by statute, as in the case of some royal commissions. Rather, the establishment of the commission, its terms of reference, and its members were all chosen by the Crown without any input from Te Ātiawa/Ngāti Awa ki Kāpiti.

The commission described the scope of its inquiry as, in particular, 'whether the decisions of the Native Land Court in relation, among others, to the land known as Ngarara West ought to be given full effect to, or whether sufficient doubt exists as to the correctness of such decisions as to render further inquiry proper'.[301] By using the block name 'Ngarara West', the Crown limited the commission's inquiry to the 1887 partitions, since the Ngarara West block was constituted in 1874 following the Crown's purchase of the eastern part of the original Ngarara block. Crown counsel agreed with Mr Walzl's evidence that the commission had been 'directed to take evidence to review the correctness of the 1887 decision'.[302] This did limit the inquiry in substantial ways (see below) but the commission nonetheless made some brief findings about the use of the name 'Ngarara' in 1873 and Wi Parata's actions in respect of Ngarara in that year.[303] Clearly, the commission did not see itself as precluded from inquiring and reporting on those matters, although it noted that the 'evidence that has been brought before us has been confined to the claim of Inia Tuhata and his sister Rangihanu, to whom the Native Land Court, presided over by Judge Puckey in 1887, on a subdivision, awarded a small area of about four acres'.[304]

The commission heard the evidence of 32 witnesses (the minutes amount to 736 pages) but the vast majority of evidence was focused on:

- whether Hone Tuhata lived at Waikanae or the South Island after the battle of Haowhenua;
- whether Hone Tuhata was involved as a rangatira in various key events such as the battle of Kuititanga, Octavius Hadfield's first welcome in 1839, the construction of the church at Waikanae in 1844, the departure of Wi Kingi's people to Waitara in 1848, and the gifting of land to Wi Tako in 1860;
- the relationship of Tuhata's hapū Mitiwai to Kaitangata;
- whether Mitiwai and the Tuhata whānau had valid rights south of the Waikanae River, and the source of customary rights in that area, including discussion of a gift of land from Te Pehi and Te Rangihiroa to Kaitangata chief Haukaione; and
- the disputes over Inia Tuhata the younger's sheep in the period leading up to the partition hearing (see section 4.5.5.1 on these disputes).[305]

300. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 18–19
301. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1
302. Crown counsel, closing submissions (paper 3.3.60), p 32; Walzl, 'Ngatiawa' (doc A194), p 488
303. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1
304. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1
305. See the evidence to the Ngarara commission (Walzl, papers in support of 'Ngatiawa' (doc A194(a)). See also Walzl, 'Ngatiawa' (doc A194), pp 489–495.

This reflected the commission's almost sole focus on the claims of Inia Tuhata and his sister and their award of about four acres at the 1887 partition hearing. It also reflected the inquiry format. Witnesses were asked a series of questions about these matters by their counsel and then cross-examined by the opposing counsel. No evidence was given about Otaraua or the claims of others who only received small awards from the partition court in 1887. The witnesses' explanations of how Mitiwai related to Kaitangata were varied. Most agreed that the name 'Mitiwai' was adopted after the migration from Taranaki but there was no agreement as to why that happened. Wi Hapi Pakau told the commission: 'Mitiwai is a new name for those people. They were known as Kaitangata. When they came from Taranaki they adopted the name of Mitiwai.' When asked why, Wi Hapi responded: 'It was on account of their being capsized & some drowned, licked up by the water'.[306]

Evidence about the use of the block name 'Ngarara' and the 1873 list of owners was very limited; the primary witness who was asked about these matters was Wi Parata himself, but Pirihira Te Tia and the commission interpreter also offered opinions.[307] It did emerge from the questioning of various witnesses on both sides, however, that they considered themselves to still have rights at Waikanae even though their names were not in the list of owners. The context of these questions was usually an attempt by opposing counsel to suggest that a reward had been offered for their evidence (that is, inclusion in the title), but this evidence still ought to have raised concerns for the commissioners.[308]

Evidence about the award of Kukutauaki 1 was mostly limited to two eyewitnesses: Wi Parata and Eruini Te Marau, who had both attended that court hearing in 1874.[309] The commission also had the relevant Native Land Court documents, Inia Tuhata's petition, and copies of the evidence presented to the Native Affairs Committee of the Legislative Council.[310] These would have supplemented the comparatively narrow range of the commission's inquiry.

In terms of membership, Tony Walzl noted that some newspapers were highly critical of the Crown's appointments. Hugh Garden Seth-Smith was a barrister and former Auckland magistrate. Robert Trimble was the member for Taranaki (and a supporter of Harry Atkinson) who had lost his seat in the 1887 general election. According to the *Evening Post*, Seth-Smith knew nothing of 'the Maori language or land laws or customs', while Trimble's qualifications were residence at Taranaki and a period of chairing the Native Affairs Committee. Both appointments were said

306. Wi Hapi Pakau, evidence to Ngarara commission, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 69)

307. Pirihira Te Tia, evidence to Ngarara commission, 16 November 1888; Colonel T McDonnell, answer to commissioner's questions, 16 November 1888; Wi Parata, evidence to Ngarara commission, 20 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 82–83, 223)

308. See, for example, Pirihira Te Tia, 16 November 1888; Riria Te Matata, 26 November 1888; Mita Te Rangikatatu, 1 December 1888; Rihari Tahuaroa, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 88–89, 385–386, 480–481, 617)

309. Wi Parata, evidence to Ngarara commission, 19–21 November 1888; Eruini Te Marau, evidence to Ngarara commission, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 172, 186–187, 204–207, 226, 227–228, 241. 258–265)

310. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1

to have been a result of political influence and the commission was their 'novitiate' for future appointments to the Native Land Court.[311] Some of these facts were incontestable: Seth-Smith especially was appointed for his knowledge of English law, not Māori; and both commissioners were appointed to the Native Land Court afterwards. Seth-Smith's appointment to replace J E Macdonald as chief judge was announced on 12 January 1889, just weeks after the commission reported, and Trimble became a judge in November 1889.[312]

It is important to note that the Crown did not appoint a Māori member or members to the commission. That is an important contrast with the two select committee inquiries earlier in the year, both of which had the benefit of expertise from their Māori members. It was also a contrast with the Edwards–Ormsby commission in 1890 and the Rees–Carroll commission in 1891, both of which had Māori members.[313] Clearly, given the inexperience of both Seth-Smith and Trimble, Māori knowledge and expertise was a crucial gap in the commission appointments. When asked the reason why no Māori member was appointed, Tony Walzl responded:

> Well, if the newspaper reports are to be believed, it is that this commission came up and they had a couple of political appointees that they – what would be the right word for it? That – well, the newspaper uses the phrase that if these guys did well on this, then they would go on to other things. And so there seems to be that element of political appointments being made by Government for people that they wanted to advance. So, that possibly suggested there wasn't great serious consideration being given to the issues themselves, but more to the, you know, Government's requirements in rewarding friends or people.[314]

The commission was, however, assisted by its interpreter, Lieutenant-Colonel Thomas McDonnell, who had earlier commanded both colonial and Māori forces in the Waikato war, the campaigns against Titokowaru in Taranaki, and campaigns against Te Kooti.[315]

In sum, the commission's mandate and composition made it a weaker tool for addressing the full range of issues that had been raised in Inia Tuhata's petition and in the evidence given to the Native Affairs Committee. From Mitchelson's clause 28 through to the terms of the commission's appointment, the Crown was focused on the 1887 partition and not the wider concerns raised about the Ngarara and Kukutauaki 1 titles.

311. *Evening Post*, 12 November 1888 (Walzl, 'Ngatiawa' (doc A194), pp 488–489
312. Walzl, 'Ngatiawa' (doc A194), pp 496–497
313. For the Edwards–Ormsby commission, see Ward, *National Overview*, vol 2, p 280. For the Rees–Carroll commission, see AJHR, 1891, G-1.
314. Transcript 4.1.16, pp [283]–[284]
315. Walzl, 'Ngatiawa' (doc A194), p 489; James Belich, 'Thomas McDonnell', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies

4.6.4.3 *The commission's findings: Kukutauaki 1 and Ngarara, 1873–74*

As noted above, the evidence was almost entirely focused on the ultimate reasons for the award of only four acres to Inia and Rangihanu Tuhata. The main exception was the evidence of Wi Parata (over 100 pages of transcribed evidence), which also covered the use of the block name 'Ngarara', the 1873 ownership list, the Kukutauaki 1 block, and the various allegations which had been made against him. The latter included allegations that he had sent Eruini Te Marau away from court in 1874 so that he could get Kukutauaki for himself without anyone knowing, that he had obtained an extra payment of £200 for himself during the Crown purchase of Ngarara East in 1874 (discussed in section 4.5.5.2), that he left people out of the Ngarara list of owners, and that he had been unfair to Inia and Rangihanu Tuhata in the partition hearing despite having been their trustee back in 1873.[316] One witness, Hone Taramena (John Drummond), even accused Parata of getting the Ngarara hearing moved to Wellington because he was a member of Parliament and could 'twist' the Native Land Court system.[317] As will be recalled, the hearing was moved to Wellington for the Crown's evidence on boundaries (see section 4.5.3).

The issue of the 640-acre Kukutauaki 1 was confined largely to the evidence of Wi Parata and Eruini Te Marau. According to Te Marau, Wi Parata had sent him away from court to show the surveyor the location of a trig station so that he could 'put in other names when [Eruini Te Marau's] back was turned'. Eruini Te Marau said that he did not discover until 1886 that his name and that of others of Te Ātiawa/Ngāti Awa had been left out. This was because he and 'other young people of the Ngatiawa' had been able to continue catching eels there without any interference, while the Parata whānau used it for sheep farming.[318]

Wi Parata told the commission that there had been no attempts at deceit. In respect of Kukutauaki 1, the disputed northern end of the Ngarara block, he said this land had been awarded to himself and other relatives of Te Pehi Kupe for valid reasons, and he had not sent Te Marau away from court at all.[319]

In terms of the use of 'Ngarara' as a block name, Wi Parata said that this disputed area (later renamed 'Kukutauaki') had given its name to the whole Waikanae block due to the way the lands had come before the court:

> Ngarara [was] the smaller portion & Waikanae the larger but because Ngarara was the first mentioned the name extended over the larger one. It was not done to disguise

316. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 150, 155–157, 172, 185, 186–187, 189–191, 197–199, 207, 218, 223–224, 227–228, 234, 236). See also report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, pp 1–2.

317. Hone Taramena, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 138–139)

318. Eruini Te Marau, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 258–264)

319. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 172, 186–187, 207, 226–228, 236)

> any facts from the Natives. It was said I tried to hide the fact but the whole trouble was between Tamihana [Te Rauparaha] and myself.[320]

Pirihira Te Tia, who had earlier appeared before the Native Affairs Committee, denied that the name 'Ngarara' would have been understood to mean the Waikanae lands.[321] During her evidence, the commissioners asked the interpreter, Lieutenant-Colonel McDonnell,[322] to translate the original *Kahiti* notice for the title investigation hearing:

> Colonel McDonnell was then asked what a native would understand on reading the words in the first column, Ngarara and Waikanae or Ngarara at Waikanae. He replied that it was ambiguous; it might be read either way. I should gather, said he, that Ngarara was the name of the Block and Waikanae the name of the District . . . just as you might say Lambton Quay in Wellington.[323]

From this evidence (there was hardly any other on the topic), the commission made a finding about the use of the name 'Ngarara':

> We find that the name by which the block of land in question is more generally known is Waikanae. Ngarara is properly the name of a portion of the block, which was extended to the whole in 1873. We do not find that this change of name has in any way deceived or misled any of the parties.[324]

The commission did not, however, make a finding about the ownership list for Kukutauaki 1.

In terms of the Ngarara list of owners, Wi Parata again referred to the community's decision in 1873 as to the criteria for entry to the list. He told the commission that the list of names was prepared by the 'elderly men', especially Wiremu Tamihana Te Neke and Poihipi, and read out to 'the whole of the people' at the house Pukumahi Tamariki ('Puku-o-te-mahi Tamariki') in Waikanae. Essentially, '[i]f the people were elsewhere they had no right to be in the Certificate'. But some people living there at the time were still left out because they were not cultivating, and some who were living there but had no claim were put in out of aroha – he listed five people under this latter category, including Inia and Rangihanu.[325]

320. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 223)
321. Pirihira Te Tia, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 82–83)
322. Walzl, 'Ngatiawa' (doc A194), p 489
323. Minutes of Ngarara commission, 16 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 83)
324. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1; Walzl, 'Ngatiawa' (doc A194(a)), p 493
325. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 150, 154–157, 224, 233–234)

In respect of the 1873 list of owners and other general allegations about Wi Parata's role in the Ngarara title investigation, the commission made a general finding that was focused on the significance of those issues for the 1887 partition. It stated that the 'allegations of improper conduct on the part of Wi Parata . . . when the title to the [Ngarara] block was being investigated by the Native Land Court in 1873 and 1874' did not disclose anything which would 'justify an interference with the judgment of the Court in 1887'.[326] The commission's inference is clear: nothing had been shown that would justify upsetting the title as it had existed in 1887 when the court partitioned Ngarara West, which meant that the commissioners saw no problem with the 1873 title.

Most evidence about the list was indirect and focused on whether Inia and Rangihanu had been put on it as of right, by tracing their tupuna's occupation and exercise of chiefly authority at Waikanae in the decades prior to the land court hearing. But some statements were made that ought to have raised doubts in the commissioners' minds as to the integrity of the 1873 title. Wi Parata's evidence, for example, was that – regardless of the names on the list – his intention as rangatira was to hold the land intact for all the people, including those who had gone to Taranaki in 1848 and whose land had been confiscated:

> Why did you take upon yourself to keep this land from being sold?
> I was thinking of the tribe at Taranaki so that they might not find themselves without land. That they might have land here to come and live upon.[327]

Under cross-examination by Morrison and questioning by Commissioner Trimble, Wi Parata continued to maintain that he was reserving land for those of 'the Hapu of William King' whose land had all been confiscated. They were not in the Ngarara certificate of title, he said, nor were they living on the block in 1873, but they were there in 1840 and 'had a claim'.[328] The fact was, of course, that Parata only owned an individual share alongside 55 others by this time. He no longer had any power under the native land laws to provide for these people in the way that a rangatira could have done under the customary system. This kind of conflict between rangatiratanga and the native land laws was very common in the late nineteenth century as chiefs and people tried to work around the new, fixed court titles which overlaid their more fluid customary arrangements. As noted, Eruini Te Marau told the commission that he and others of Te Ātiawa/Ngāti Awa continued to go and fish on the Kukutauaki block without any opposition.[329] This customary arrangement persisted despite the award of the land to others back in 1874, but it was doubtful whether it could survive the next step of individualisation: partitioning the land on the ground into defined sections for each individual.

326. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1
327. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 229)
328. Wi Parata, 19, 21 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 243, 245, 246)
329. Eruini Te Marau, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 263)

The commissioners made no note of any of this evidence. Nor did they comment upon the several witnesses who stated that they still had rights at Waikanae despite having been left out of the certificate of title in 1873. These witnesses included Riria Te Matata (Reretawhangawhanga's niece),[330] Mita Te Rangikatatu,[331] and Rihari Tahuaroa.[332] One Waikanae resident, Tamihana Te Karu, argued that all the people who had returned from Waikanae to Taranaki by 1873 should have been put in the title.[333]

Riria Te Matata and Mita Te Rangikatatu believed that they should be able to return to Waikanae and live on the land despite the 1873 title. Mita Te Rangikatatu came to Waikanae on the Tamateuaua heke, moved back and forth between Waikanae and Ohariu, and later moved to Whanganui to live for a time with her mother's people (and hence was absent in 1873). Her view was that it did not matter whether her name was in the certificate so long as the rangatira knew who she was (and the nature of her interests). Wi Parata, she said, was 'looking after all our lands', and 'the land belongs to the whole of us, all the people'. So long as Wi Parata took care of the land, and the land was 'lying there & nothing being done with it', then it remained a tribal resource for the whole of the people.[334] Rihari Tahuaroa of Puketapu, son of the chief Toheroa, lived mostly at Arapaoa. He also expected to be included in the title for his interests at Te Uruhi but had been left out in 1873.[335] The sad fact was that the new form of individualised title created by the Native Land Act 1867 had created a completely different situation from that understood by these people, yet the commissioners did not observe the disparity between their expectations and the legal reality of the 1873 list of owners.

Balanced against this evidence was the issue of 'abandonment' and what constituted a relinquishment of rights at Waikanae. It is possible that a full rehearing of the original title would have shown that the hapū who returned to Waitara in 1848 did in fact intend to give up their customary rights at Waikanae.[336] A number of witnesses told the commission that, upon his departure with most of the people, Wiremu Kingi Te Rangitake gave the land to Waipunahau (some said it was because she was Haukaione's granddaughter).[337] Heni Te Rau claimed that

330. Riria Te Matata, 26 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 385–386)

331. Mita Te Rangikatatu, 1 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 480–481)

332. Rihari Tahuaroa, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 617)

333. Tamihana Te Karu, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 659)

334. Mita Te Rangikatatu, 29 November, 1 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 461–462, 467, 471, 480–481)

335. Rihari Tahuaroa, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 616–617, 623–624)

336. See, for example, Miria Pomare, brief of evidence, 22 April 2015 (doc A138), p 14.

337. See, for example, Raniera Erihana (Dan Ellison), 24 November 1888; Riria Te Matata, 26 November 1888; Pare Tawhera, 27 November 1888; Mita Te Rangikatatu, 1 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 312, 383, 414, 479)

Wi Kingi had actually left the land to her mother, Kahe Te Rauoterangi, although Enoka Tatairau denied that he had signed a paper acknowledging that this was the case.[338] Hone Tuhata and Mitiwai were also said to have 'left for good'.[339] These narratives showed the immense difficulty facing Waikanae leaders in 1873, when they had to convert a very mobile population into a finite set of names. The artificiality of the result was shown by the partitions in 1887.

Tony Walzl commented:

> For Parata, it [the 1887 partition] was the worst outcome. Wi Parata, in his role of representing those who were away in Taranaki and his leadership role amongst the community in Waikanae, intended to keep Ngarara 'intact'. This was to ensure generally that Ngatiawa did not become 'poor' and to act as a residual estate to provide refuge and resources should the time come that those from Taranaki returned. Parata's intention of providing for the whole tribe if necessary was completely incongruent with the title regime set up through the Court process where 55 people only had the right to take any action regarding the land. From this point onwards, the tensions between custom-based aspirations in relation to the land, and Court imposed realities came into a complete clash and matters quickly unravelled.[340]

In the event, the Ngarara commissioners did not recommend any further inquiry into the original title, which was to have significant and lasting impacts on those who had been left out and on the whole tribal community.

4.6.4.4 *The commission's findings: the Tuhata whānau and the 1887 partition*

In terms of the Tuhata whānau and the rights (occupation or otherwise) of Mitiwai, the evidence before the commission was polarised. Inia Tuhata's supporters included his aunt, Heni Te Rau, the Otaraua chief Eruini Te Marau, the Puketapu chief Ihakara Te Ngarara, and several others. Wi Parata was supported by Enoka Tatairau (Wi Kingi Te Rangitake's brother), Pare Tawhera (Tamihana Te Neke's widow), Hira Maeke, Tamihana Te Karu, and a number of other Waikanae and Taranaki residents. Due to the conflicting nature of their statements, the commission relied partly on the evidence of two Pākehā: the whaler William Jenkins and Bishop Hadfield. Jenkins was not disinterested, having quarrelled badly with Wi Parata, and Hadfield only lived at Waikanae until 1844. Nonetheless, the commission relied on them and on the fact that Inia and Rangihanu had been inserted

338. Most of Heni Te Rau's evidence was taken up with this issue. The paper was reproduced in the minutes during the evidence of Kauwae, 3 December 1888. It stated (in translation) that Wi Kingi 'returned this land to Te Kahe o te rangi', and that Enoka Tatairau also, on his return to Waikanae, 'again gave this land back to Kahe': Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 575–576. See also Inia Tuhata's story about this in January 1889: Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), app 1, pp 135–136.

339. See, for example, Mita Te Rangikatatu, 1 December 1888; Hemara Waiho, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 480, 630).

340. Tony Walzl, summary of 'Ngatiawa', 23 July 2018 (doc A194(b)), p 17

in the list of owners without challenge in 1873.[341] Hadfield testified that Hone Tuhata was wounded at Kuititanga, was one of the chiefs who greeted him on his first arrival in 1839, and was living at Waikanae in 1840–41.[342] These points were all denied by the other side but Hadfield was an impartial witness whose evidence carried weight with the commissioners.

From our reading of the evidence, it is clear that Hone Tuhata (like many others) lived in both Waikanae and the South Island, travelling backwards and forwards seasonally or at will, until he moved his whānau to Taranaki in about 1860 or 1861. After his death there in the early 1860s, the evidence was uncontested that Inia Tuhata and his son Inia the younger returned to Waikanae and lived there permanently, apart from some time spent away whaling.

The commissioners concluded: 'we are of [the] opinion that, in respect of the claim of Inia Tuhata, there is sufficient doubt as to the correctness of the decision of the Native Land Court in 1887 to render further inquiry proper'. The commission also concluded that Wi Parata's actions were not at fault in this matter. In respect of the 'allegations of improper conduct . . . when before the Court on the subdivision in 1887', they again concluded that 'nothing has been disclosed which would justify an interference with the judgment of the Court in 1887'.[343]

Why, then, had the court come to such a mistaken finding in 1887 and awarded only four acres to Inia and Rangihanu? On this issue, the commissioners accepted the evidence of Judge Puckey (although this was not stated in the commission's report). In brief, Puckey testified that:

- the applicants had plenty of time to bring sufficient evidence to prove their case;
- the applicants had 'some knowledge' of the objectors' abandonment case, and he did not think it was not a surprise to them;
- the applicants left it too late to apply to bring rebuttal evidence, even though they were represented by legal counsel; and
- he had put the question to the applicants as to 'where Tuhata was' at the time the Treaty was signed in 1840 but it appeared to him that none of them 'knew anything at all about him'.[344]

The commission therefore found:

> The fact of the Court having been misled, and having arrived at a decision which seems to us unsatisfactory, has arisen not from improper conduct on the part of Wi Parata, but from the fact that the petitioners were not prepared with sufficient evidence to meet the statements made on the other side – namely, that Hone Tuhata, the

341. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, pp 1–2
342. Octavius Hadfield, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 267–268)
343. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, pp 1, 2
344. EW Puckey, 23 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 293–296)

ancestor through whom Inia Tuhata and his sister claim an interest in the land, had abandoned his interest, whatever it may have been, before the year 1840.[345]

Also, the commission found that, 'in respect of the claim of Inia Tuhata, there is sufficient doubt as to the correctness of the decision of the Native Land Court in 1887 to render further inquiry proper'.[346] This was based on the evidence of Hadfield and Jenkins, admissions that Hone Tuhata had been at Waikanae three times after Hadfield last saw him in 1841, the residence of the Tuhata whānau at Waikanae after Hone Tuhata died in Taranaki, and the inclusion of Inia the younger and Rangihanu in the 1873 list. But, as noted above, the commission's inquiry had focused narrowly on this one claim. There was no evidence about the other partitions. Nonetheless, the commission recommended that the Native Land Court rehear all of the 1887 partition applications. No reason was given for this other than that the commissioners considered it 'desirable'.[347]

4.6.4.5 *The commission's findings on individualisation and costs*

In brief, the native land laws provided for three steps in the individualisation of title:

- the first step was to transform customary title into a court-ordered list of owners, any of whom could apply to partition out their individual interest, and each of whom could alienate their undivided interest in certain circumstances;
- the second or intermediate step was to define the relative interests of each owner on paper as a percentage share of the block (this step was sometimes bypassed); and
- the third step was to partition out individual interests into separate, surveyed titles – each partition could be multiply owned or in sole ownership, and each multiply owned partition could undergo subsequent rounds of partitioning.

During the commission's hearings, Wi Parata and others were questioned about the tribe's wish to keep the Waikanae block intact, which had been partly met by the result of the 1887 partition decisions. The great bulk of Ngarara West had been awarded as an undivided whole to the majority of owners, while the partitioning out of individual interests had been confined to those who applied for it. We have already cited Wi Parata's evidence on the need to keep the block as a tribal resource (see above). Other witnesses were also asked about this point, including Raniera Erihana:

> Why has he [Wi Parata] stopped them from selling their lands?

345. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 1
346. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 2
347. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, pp 2–3

> They have an interest in the lands together. Wi Parata & them did not wish to sell.[348]

Hone Taramena also confirmed under cross-examination that 'Wi Parata's desire is to keep the land intact for the tribe so that they should not become poor', although his view was that 'the tribe have been so squeezed that they now cry out'.[349] Many witnesses referred to Wi Parata's role as rangatira in holding the land intact for everyone.

Despite this evidence of the tribe's aspirations, and the fact that only a small part of the block had been separated out in the 1887 partitions, the commissioners recommended that the block's title be fully individualised:

> The proceedings in this case have brought forcibly before us the desirability of making some general provisions for individualising Native titles; and we are strongly impressed with the advantage that would accrue from such legislation in obviating future disputes. Although no such general provisions have yet been made, we think it would be well, in any Act that may be passed in pursuance of this report, to insert a clause providing for the individualisation of the interest of each of the owners of this block.[350]

In making these statements, the commissioners revealed their ignorance of the native land laws. As noted, the legislation already provided for individualised titles, including the identification of relative interests and the partitioning out of those interests, either upon the owners' application or at the discretion of the court.[351] The commissioners recommended taking any element of choice away from the owners, and individualising 'the interest of each of the owners', by which they meant compulsory subdivision.[352] This would have resulted in the division of Ngarara West into multiple individually owned sections, rendering each section vulnerable to sale (and saddling each section with the costs of survey and partition).

The commissioners also recommended the compulsory alienation of some land, again despite the tribe's wishes to hold the estate intact. The commission reported that 'the costs already incurred in connection with this case appear to have been considerable, and no doubt further costs will be necessarily incurred before a final decision can be arrived at'.[353] We note that the parties had been represented by counsel during:

348. Raniera Erihana, 26 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 307)
349. Hone Taramena, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 132)
350. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 3
351. Native Land Court Act 1886, ss 21, 23, 25, 42
352. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 3
353. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 3

- the lengthy partition hearings in 1887, which had mostly taken place at Ōtaki, away from their homes, and so adding the cost of accommodation to that of the hearing;
- the chief judge's hearing of the applications for rehearing;
- the filing of petitions and counter-petitions in 1888 (and more in 1889);
- correspondence with the Native Minister in 1888 (and more in 1889); and
- two select committee inquiries in 1888 (and more in 1889).

The owners were also put to the expense of attending the Ngarara commission in Wellington and, again, being represented by counsel throughout its hearings. To all these costs would now be added the expense of defending their respective positions in Parliament in 1889, the expenses of a lengthy rehearing and partition hearings, and the survey costs of multiple partitions.

Inevitably, this process would result in the alienation of land to pay these costs once titles had been finalised. The commissioners believed that the costs of the commission itself should be added to the owners' burdens. They commented:

> While we are of opinion that there has been a substantial failure of justice in the matter, we do not think that either side can be held entirely free from blame. It seems, therefore, most in accordance with the interests of justice that the estate as a whole should bear the costs of this Commission and of any subsequent proceedings that may be necessary to give effect to this report. The costs of and occasioned by the rehearing, if directed, should be in the discretion of the Court.[354]

A similar recommendation was made by the Horowhenua commission in 1896 (see *Horowhenua*, the Muaūpoko volume of our report).[355]

Why did the commission justify this recommendation by stating that neither side was 'entirely free from blame'? No reasons were given and, since the commission specifically absolved Wi Parata of any wrongdoing in 1873–74 and 1887, it is difficult to know what was blame-worthy from the arguments and findings presented in the report.

4.6.4.6 *Summary of the commission's recommendations*

In sum, the commission recommended that legislation be enacted to:

- direct the Native Land Court to rehear the 1887 partition applications;
- provide for determining 'the individual interest of each owner' as part of the rehearing (which would broaden the scope of the rehearing from just the applications made by Inia Tuhata, Ema Tini, and a handful of others); and
- make a 'reasonable proportion of the costs of . . . this Commission, and all subsequent costs reasonably incurred in and about obtaining the necessary legislation' a first charge against the land, while the costs of the rehearing itself would be at the discretion of the court.[356]

354. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 3
355. Report of the Horowhenua Commission, 25 May 1896, AJHR, 1896, G-2, p 21
356. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, p 3

4.6.5 Legislative remedy: the Crown and Parliament consider a number of remedy options and make a final choice

4.6.5.1 *Introduction*

The Ngarara commission reported to the Crown on 19 December 1888. The evidence presented in both the commission and the select committee inquiries was now available to the Crown as a basis for choosing an appropriate remedy. Ultimately, after a number of alternatives were raised and debated, the Crown decided to follow some (but not all) of the commission's recommendations. The Ngarara and Waipiro Further Investigation Act 1889 directed the Native Land Court to rehear the 1887 partition applications, which was the commission's primary recommendation.

As noted above, the Crown's position in our inquiry was that it was free to accept or decline a commission of inquiry's recommendations so long as it responded in 'a Treaty-consistent manner'.[357] Crown counsel also submitted that, in assessing past Crown actions for Treaty compliance, it is necessary for the Tribunal to consider 'what options were reasonably open to the Crown at the time'. The Crown, it was submitted, 'may decide from a number of possible policy options how to give effect to its Treaty obligations provided, in pursuing a particular course of action, it is acting reasonably and in good faith'. The Crown argued that choosing a particular policy option over others was not a Treaty breach simply because there were other options available at the time; it is necessary to consider what was reasonable in the prevailing circumstances, including the Crown's resources, the legitimate role of the Crown in society at the time, and the medium- or long-term consequences of particular options.[358]

In the claimants' view, this argument 'gives all interpretive authority and power to the Crown which, it is submitted, was clearly not the intention of Te Tiriti o Waitangi, and certainly [not] of the Maori signatories, the Crown's partners in Te Tiriti'. The claimants' position was that the Crown does not have an 'unfettered ability to choose the option which suits itself best, provided that option in some way, for better or worse, fully or meagrely, gives effect to its Te Tiriti o Waitangi obligations'. In the claimants' view, the Crown was not entitled under the Treaty to choose an option that provided 'only for the bare minimum of its obligations, again as defined by itself'.[359] In terms of the Crown's response at the time to the Ngarara commission's recommendations, the claimants argued that the Crown chose the wrong option and ought to have provided a *de novo* rehearing of the 1873 title instead.[360]

We explore these issues in this section, beginning with the Crown's initial choice of remedy. Officials drafted the Ngarara and Waipiro Further Investigation Bill in mid-1889, which would have given effect to all the recommendations of the commission. The other remedy options available to the Crown at the time included:

357. Crown counsel, closing submissions (paper 3.3.60), p 28
358. Crown counsel, closing submissions (paper 3.3.60), pp 10, 13
359. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 2
360. Claimant counsel (Beaumont), submissions by way of reply (paper 3.3.66), pp 2–3

- widening the rehearing recommended by the commissioners to include Waikanae residents who were left out of the Ngarara title in 1873;
- rehearing the 1873 Ngarara title *de novo* (instead of the 1887 partition applications);
- rehearing the 1887 partition applications but disregarding the commissioners' other recommendations for apportioning costs, compulsory subdivision, and compulsory sale of land to meet the costs;
- systemic reform to remedy the underlying causes of the grievances; and
- a rehearing of the Kukutauaki 1 title in addition to the recommended rehearing of the Ngarara West partitions.

We discuss each of these remedy options in terms of the way in which they were raised and discussed at the time.

4.6.5.2 *Remedy options available to the Crown at the time*

The Crown's initial decision was to carry out the commission's recommendations in full by introducing the Ngarara and Waipiro Further Investigation Bill 1889. Chief Judge Seth-Smith, who had chaired the Ngarara commission, was asked to comment on proposals to go beyond or to change the commission's recommendations in the Bill (which he rejected).[361] The preamble stated that it was 'just and expedient' that the commission's recommendations should be given effect. The part of the Bill relating to Ngarara West provided that:

- the Native Land Court was directed to rehear the applications for partition, with the exception of the 1887 award to Puketapu, the 1887 awards to the Wellington and Manawatu Railway Company, and the original award to Otaraua (the Muaupoko block) (clauses 2, 11) – these exceptions were not part of the commission's recommendations;
- the court would determine what 'reasonable proportions' of the costs of the commission, of obtaining the 1888 legislation, and of obtaining this new statutory remedy, would be made a 'charge upon the land' (clause 3);
- the court would define the portion of the Ngarara block to bear the costs and vest it in the registrar (clause 4);
- the court would partition the residue of Ngarara among the owners and 'determine what portion thereof shall be held by each of the said owners in severalty' (that is, in sole ownership) (clause 5);
- the registrar would sell the vested portion of Ngarara by public auction – if that failed to discharge the debt, then the remainder would be deducted from rents until the entire costs had been paid off (clause 6);
- the purchaser of the part sold by the registrar will receive a land transfer title (clause 7);
- the court may use evidence taken by the commission (clause 10); and
- the interests of settler lessees would not be disturbed (clause 11).[362]

361. Walzl 'Ngati Awa' (doc A194), pp 498–499

362. Draft Ngarara and Waipiro Further Investigation Bill 1889 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 852–853). This early draft predated its first introduction to Parliament.

Other remedy options were raised during the Crown's preparation of this Bill and there was further discussion of appropriate remedies once the Bill was before the House.

The first remedy option was to widen the rehearing so as to include individuals who were living at Waikanae but had been left out of the Ngarara title, for whatever reason – this option was raised with the Crown by Inia Tuhata and his supporters. The Crown consulted Tuhata's lawyer, C B Morison, about the contents of the draft Bill. Morison suggested that adding such a clause would provide for a small number of people who would otherwise lose their homes.[363] One such person was Hone Taramena (John Drummond), who was Wi Tako's stepson and had accompanied him to Waikanae in 1860 and had remained living there when Wi Tako returned to Wellington to take up his appointment to the Legislative Council. Taramena petitioned Parliament in August 1889, seeking to have his interests included in the rehearing.[364] Morison also suggested a clause requiring the court to investigate past benefits derived from the block, which would enable the court to 'compensate' certain owners (who had not received those benefits) with larger awards. This was aimed at what Morison called the 'governing party', who were in fact the large majority of registered owners.[365] The head of the Native Department, T W Lewis, supported the first of these changes and referred Morison's proposals to Chief Judge Seth-Smith, who minuted them as '[n]ot recommended'.[366]

The second remedy option was to rehear the 1873 title de novo – this option was raised with the Minister by T W Lewis, the Native Department Under-Secretary. Clearly, the Crown was aware by now of the issues in respect of the list of owners and the omission of everyone not living at Waikanae in 1873. Lewis was aware that some Taranaki Māori wanted this remedy, and advised the Minister: 'I should think this under the circumstances would be the fairest way of dealing with the question'.[367] Lewis also proposed that the Government consult Seth-Smith and ask him to draft something for the Bill that would meet the case. The Native Minister, Edwin Mitchelson, approved this proposal and the matter was put to the new chief judge. Tony Walzl could not find any specific comment from Seth-Smith but the chief judge recommended against any changes to the commission's recommendations.[368]

Mr Walzl argued that there was a clear conflict of interest in having the former chair of the commission vet all proposed amendments in his new role as chief judge, and that the outcome of doing so was predictable, but that the final decision about the contents of the Bill still rested with the Crown:

363. Morison to Native Minister, 12 July 1889 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 854–855)
364. Hone Taramena, petition, 15 August 1889 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 865–867)
365. Morison to Native Minister, 12 July 1889 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 855)
366. Walzl, 'Ngatiawa' (doc A194), pp 498–499
367. T W Lewis to Native Minister, 26 June 1889 (Walzl, 'Ngatiawa' (doc A194), p 498)
368. Walzl, 'Ngatiawa' (doc A194), pp 498–499

> The main failing of the Commission's findings over the Ngarara block is that these were out of step with the complaint that had been made and the evidence that had been heard. The Tuhata petition, which sparked the two inquiries in 1888, had complained about the result of the 1887 subdivision case. It also, however, broadly alluded to a deeper systemic problem with the narrowness of the 1873 Ngarara title and it claimed that a number of interestholders had missed out on being included in the title. When the Commission sat, the evidence presented on the 1873 title confirmed that this was the case. The Commissioners, however, did not report on this. Following the Commission's report, no Crown official or parliamentarian who ultimately had the responsibility of passing the enabling legislation for a rehearing acted to address the evident discrepancy between the evidence of injustice arising from the 1873 title and the limited findings of the Commission. The matter was directly brought up by the petitioners' legal counsel who provided a proposed clause to the legislation allowing anyone in residence at Waikanae to bring their claims before the rehearing even if they were not in the Certificate of Title. This suggestion was supported by the Under Secretary of Native Affairs who also expressed a further view that a hearing of the Ngarara title de novo would be a fair way of meeting the requests and petitions for inclusion that were coming out of Taranaki. The Native Minister had no problem with this either. They agreed the matter be referred to the Chief Judge. It was at this point that the conflict of interest, put in place by the Crown's appointment on a Commission of inquiry of a person who would be responsible for implementing the recommendations made by the inquiry, came into full effect. Former Ngarara Commissioner and now Chief Judge Seth Smith recommended against the proposed clause giving as the only reason that the issue was not part of the Commission's findings. Therefore, the Commission's findings, having failed once to address an issue of exclusion from title, [were] used as the basis to undermine a proposed solution to this failure. Nevertheless, the option remained for the Chief Judge's view to be ignored by officials who had acknowledged the fairness of rehearing the Ngarara case do novo. It was not taken and the rehearing of the 1887 partition case only went ahead.[369]

The option of rehearing the 1873 title was raised in the House by Hirini Taiwhanga, the member for Northern Māori. He reiterated the concerns about using 'Ngarara' for the name of the block in 1873. In his understanding, the true owners of the block were all supporters of Te Whiti and living in Taranaki. Taiwhanga proposed dropping the Crown's Bill altogether and 'mak[ing] provision for dealing with the claims of Wi Parata and of those on the other side fairly, and for investigating who were the proper owners of this twenty thousand acres at the place called Ngarara, but the proper name of which was Waikanae'.[370] Neither the Government nor the Opposition responded to this proposal.

Were there countervailing interests which might prevent reopening the 1873 title or create fresh injustices if it was done? The Bill already proposed to protect lessees (regardless of the underlying ownership) and the position of the Wellington

369. Walzl, summary of 'Ngatiawa' (doc A194(b)), pp 20–21
370. Hirini Taiwhanga, 3 September 1889, NZPD, vol 66, p 255

and Manawatu Railway Company. The select committee had considered the propriety of reopening a title after 15 years (see above) and Chief Judge Macdonald had pointed out that it had been done before. In the case of Ngarara, the main complication was the Crown's purchase of the eastern portion in 1874 (see section 4.5.5.2). No one raised this issue at the time but the Crown's position could have been protected by legislation, as was done for lessees and the Wellington and Manawatu Railway Company.

The third remedy option was to grant a rehearing but disregard the commission's recommendations about costs and compulsory subdivision – this option was raised by Wi Parata's lawyers, a petition from Te Ātiawa/Ngāti Awa, and by a number of members of Parliament. The Crown sent the draft Bill to the lawyers of both sides for comment. Morison's suggested amendments have been discussed already. Buckley, Stafford, and Treadwell, lawyers for Wi Parata and the majority of owners, asked that the clauses relating to costs and compulsory subdivision be removed from the Bill.[371] The Crown declined this request and the Bill was introduced to the Legislative Council by the Attorney-General, Sir Frederick Whitaker, without any of the changes that had been sought. Patrick Buckley presented a petition from Te Ātiawa/Ngāti Awa owners to the Council, asking for exemption from clause 5 (compulsory subdivision):

> They asked that the desire should be complied with of those persons . . . that the shares to which they were entitled should be cut off, leaving the other people, who at present were living in common, to continue as they were at present, or to make application to the Court to have their part partitioned off; but that these latter should not be compelled, whether they liked it or not, to have their shares partitioned, which might result in the portions allotted them being so small as not to be sufficient for the maintenance of each of them individually.[372]

Whitaker and Daniel Pollen, another Government supporter, opposed amending clause 5, even though Buckley pointed out that doing so would cause no 'injustice' to those owners who did want their interests partitioned out. Pollen criticised the court for not having properly individualised the title in the first place by identifying all relative shares back in 1873. He noted that the Native Affairs Committee had already heard counsel for both sides on the Bill and had refused to make any amendments, preferring to follow 'strictly the recommendations of the Commissioners'.[373]

The Ngarara and Waipiro Further Investigation Bill passed the Council and was transmitted to the House for its concurrence. Eight members raised the issue of costs and compulsory subdivision in the House, objecting to the clauses inserted on the commission's recommendation.[374] Some objected to the costs because it was

371. Walzl, 'Ngatiawa' (doc A194), p 499
372. Patrick Buckley, 23 August 1889, NZPD, vol 66, pp 41–42
373. Daniel Pollen, Sir Frederick Whitaker, 23 August 1889, NZPD, vol 66, p 42
374. NZPD, 1889, vol 66, pp 249–250, 253–254, 255–256, 259–260

the native land laws and the court, not the Ngarara owners, who were responsible for the injustice that now required a remedy. Hoani Taipua, member for Western Māori, stated:

> The mistake had been caused by the law passed by the House, and through the action of Government officers, and it was not right that the Native people should be called upon to pay for that mistake. The colony should be responsible for any errors that had been committed, and that had arisen through the contradictory law.[375]

Most of the members who spoke considered that the provision for costs was unjust, regardless of who was to blame, especially that the costs of a large commission of inquiry would be 'saddled on the block'.[376] It was also suggested that if the land was to bear the costs of 'all this expensive litigation', followed by the survey costs of compulsory partitioning, the value of the land might disappear altogether.[377]

The provision for compulsory partitioning of all individual interests was also widely condemned. James Wilson presented a petition from 22 of the owners (presumably the same petition referred to by Buckley) which sought the removal of clauses 3–7 from the Bill,[378] and a number of members suggested delaying the Bill until this petition could be the subject of inquiry by the Native Affairs Committee. In the event, this petition, under the name of Watene Te Nehu and others, was not reported on by the committee until it was too late in 1891.[379] Hoani Taipua told the House that it was 'altogether dishonest, harsh, and unjust that clauses should be inserted in this measure compelling them to partition the land against their wishes and interest'.[380] The member for Eastern Māori, James Carroll, suggested a compromise – the rehearing court could define all the individual interests but without surveys and leave it to the owners to partition out all those interests later:

> He would suggest the following as a medium course to be adopted: that, in the subdivision case of that block, the Court might proceed to define the interests of the owners in the block, and let it remain with each owner or body of owners, as they might choose afterwards, to obtain a proper subdivisional survey of their interests. He thought that was fair, and that it would meet the case on both sides.[381]

Major Jackson and Dr Newman both supported this compromise.[382]

375. Hoani Taipua, 3 September 1889, NZPD, vol 66, p 250
376. Andrew Stuart-Menteath, 3 September 1889, NZPD, vol 66, p 259
377. Richard Turnbull, Andrew Stuart-Monteath, Alfred Newman, 3 September 1889, NZPD, vol 66, pp 249, 259, 260
378. James Wilson, 3 September 1889, NZPD, vol 66, p 250
379. AJHR, 1891, I-3, p 9; Walzl, 'Ngatiawa' (doc A194), pp 499–500
380. Hoani Taipua, 3 September 1889, NZPD, vol 66, p 250
381. James Carroll, 3 September 1889, NZPD, vol 66, p 254
382. William Jackson, Alfred Newman, 3 September 1889, NZPD, vol 66, pp 256–257, 260

Some members, however, argued that the House was not an impartial tribunal and that the royal commission's recommendations should therefore be followed in full (since it *was* an impartial tribunal). Others argued in contrast that Parliament was the proper place of last resort for the remedying of grievances, and that it was not bound by the commission's findings.[383] This was an important difference of principle and the former Native Minister, John Ballance, pointed out that supporters of both Wi Parata and Inia Tuhata were in Wellington and constantly lobbying the members in favour of one side or the other.[384] The question of what would heal the divisions between them, which were caused ultimately by the individualised title of the native land laws, was not addressed. In fact, Richard Hobbs virtually accused his colleagues of hypocrisy in their protests against compulsory subdivision: 'As to the question of subdivision, that was a policy they had all been clamouring for for years – that the Native title should be individualised.'[385]

Following this debate, the Native Minister agreed that the Bill should go to the Native Affairs Committee where, he said, the chief judge would be able to explain the commission's reasons for the recommendations embodied in the Bill. Mitchelson clearly accepted that some amendments were required. He wanted the committee to deal particularly with the question of partition.[386] We discuss the outcome below.

The fourth remedy option was systemic reform of the native land laws to address underlying causes – this reform option was discussed by some members. As in the 1888 debate (see above), the question was raised as to whether the Ngarara case and others like it revealed a systemic problem with the Native Land Court. The Pākehā members in the general seats were clearly aware of systemic problems but were not prepared to consider systemic reform.

The first point to note is that, although several of these members referred to the way in which the high costs of prolonged litigation and surveys could swallow the value of a whole block, there was no consideration of wider reforms to address that well-known problem.

Secondly, although there was strong evidence that Te Ātiawa/Ngāti Awa wanted to continue living in common on the Ngarara block, there was no suggestion of a pause in – as Hobbs put it – 'the policy they had all been clamouring for for years', the individualisation of title. Compulsory subdivision, however, was a step too far for some.

Thirdly, while some Pākehā members blamed the Native Land Court for the problem with Ngarara, only one was prepared to suggest that the court system established by the native land laws might be in need of reform. Oliver Samuel, the member for New Plymouth, told the House that the example of Ngarara proved the 'unsatisfactory constitution of the Native Land Court':

383. George Hutchison, Oliver Samuel, Richard Monk, 3 September 1889, NZPD, vol 66, pp 249, 251, 252
384. John Ballance, 3 September 1889, NZPD, vol 66, p 250
385. Richard Hobbs, 3 September 1889, NZPD, vol 66, p 254
386. Edwin Mitchelson, 3 September 1889, NZPD, vol 66, p 261

> [H]e would like to draw pointed attention to the condition in which the Native Land Court was, and he would like to urge on the Government how absolutely necessary it was, without further delay than next recess, to endeavour to devise some better lines on which to establish that tribunal. Whether it was that the Native Land Court Judges, being appointed by the Government and holding their situations only at the will and pleasure of the Government for the time being, endeavoured to secure the good-will of those influential persons in the colony with whom they came in contact, or whether it was that they were incompetent to deal with the subjects intrusted to them, he did not know; but, whatever the cause might be, the House was perpetually, session after session, finding cases which, on careful investigation, were found to be cases of hardship and even injustice.[387]

Hirini Taiwhanga argued that the whole system of the Native Land Court, the administration of Māori lands, and land purchases was in need of extreme reform, a view that Māori leaders nationally had held for some time. He suggested that the owners of Ngarara were all at Parihaka and '[t]his Court stank in their noses – they smelt brimstone anyhow, and not only now but ever since the Native Land Court was established in 1865. No remedy had been provided ever since'.[388] He went on to say:

> The first law in New Zealand was the Treaty of Waitangi, and because the provisions of that Treaty were not carried out in a proper manner a war was created all over New Zealand. And in consequence of the wars with Hone Heke and Rangihaeata in 1845 the Europeans applied for a responsible Government, and England granted them 'The New Zealand Constitution Act, 1852' and in the 71st section of this Act it was provided that the Maoris were to have a Parliament of their own. And in 1858 the Maoris put up a Maori King for themselves for the same reason; for the Europeans had not only not carried out the provisions of the Treaty of Waitangi, but also they had ignored the provision of the 71st clause of 'The New Zealand Constitution Act, 1852;' and in consequence of this Maori-King movement the war broke out at Waitara in 1860 to 1863, although that movement was started according to the provision of the 71st section of the Constitution Act. And instead of carrying out the provision of the 71st section of 'The New Zealand Constitution Act, 1852,' this Legislature provided 'The Native Land Act, 1865,' and 'The Maori Representation Act, 1867,' which was contrary to the provisions of both the Treaty of Waitangi and the 71st section of the 'New Zealand Constitution Act, 1852'.[389]

Other members dismissed Taiwhanga's speech as irrelevant to the Ngarara and Waipiro Further Investigation Bill but, in a speech a fortnight later, he explained his proposed systemic remedies. According to Taiwhanga, special one-off remedies like the Ngarara and Waipiro Bill were useful in their own right but the

387. Oliver Samuel, 3 September 1889, NZPD, vol 66, p 251
388. Hirini Taiwhanga, 3 September 1889, NZPD, vol 66, p 255
389. Hirini Taiwhanga, 3 September 1889, NZPD, vol 66, p 255

underlying grievances of the Māori people required the Crown to consult with them nationwide. This consultation needed to focus on 'whether the Maoris desire that the Native lands should be administered by a Maori Council elected by the Maori people themselves', the Native Land Court should be abolished, and all sales of Māori land limited to the 'open market' (no more Crown purchases).[390]

These and similar proposals were circulating widely among Māori at the time, in the wake of large inter-tribal hui in 1888–89 which marked the beginnings of the Kotahitanga/Māori Parliament movement.[391] Dr Robyn Anderson, Dr Terence Green, and Louis Chase referred to one such hui at Pūtiki in May 1888, which was attended by the Premier and the Native Minister. Wi Parata was one of many rangatira who attended. His speech was recorded in the *Wanganui Chronicle*. The purpose of these hui, he said, was to 'consider the Acts which bore heavily on the Maori people, and to express their views on those Acts'. Their grievances included confiscation, massive land loss, and political powerlessness. Māori were

> formerly the possessors of the whole island, but now they had a small portion only. It was on account of their land that they suffered, as it was in the hands of the Government. The European suffered when his money ran short, and so the Maori suffered when his land ran short. They had only four members in the House, and the Europeans had a great number, therefore when their members made a proposal they were overruled by a great majority.[392]

The Crown was not willing to consider a systemic remedy in 1889. For Ngarara, it was prepared to authorise a rehearing of the 1887 partition applications but by the same court and within the same system of individualised titles. We discuss the issue of a systemic remedy further in section 4.6.10.

The fifth remedy option was to order a rehearing for Kukutauaki 1 as well as Ngarara – this remedy would have involved a rehearing of the title granted in 1874 under the 10-owner rule. The issues surrounding the award of Kukutauaki 1 were barely addressed in the Ngarara commission's inquiry, due mainly to the narrow focus of its terms of reference (see above). Only one member raised the grievances about Kukutauaki 1 in the House. Major Jackson, the member for Waipā,[393] argued that this block was awarded to a few individuals 'to the injury of the Ngatiawa Tribe as a whole, who say these six hundred and forty acres were stolen'.[394] The rest of the House dismissed this grievance without any discussion, as had the Crown when it prepared the Ngarara and Waipiro Bill, and it should be added that no further petitions or appeals were made to Parliament or the Crown about this block.

390. Hirini Taiwhanga, 16 September 1889, NZPD, vol 66, p 614
391. Robyn Anderson, Terence Green, and Louis Chase, 'Crown Action and Māori Response, Land and Politics, 1840–1900', 2018 (doc A201), pp 793–802
392. 'Native Meeting: Three Cabinet Ministers Present', *Wanganui Chronicle*, 2 May 1888, p 2 (Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), pp 794–798); Walzl, 'Ngatiawa' (doc A194), p 560
393. Major William Jackson commanded the Forest Rangers in the Waikato War.
394. Major Jackson, 3 September 1889, NZPD, vol 66, p 257

4.6.5.3 *The Crown's chosen remedy: the Ngarara and Waipiro Further Investigation Act 1889*

The Ngarara and Waipiro Bill came back from the Native Affairs Committee with major revisions. The Government was comfortable with these changes and the revised Bill passed the House without debate.[395] The committee excised all the clauses relating to the commission's costs, compulsory sale of land to meet those costs, and compulsory subdivision. Individualisation of title, however, was still a key objective but allowance was made for something called 'hapu holding[s]' to be marked out as well as individual interests.[396] This was unusual in the context of the principal Acts, the Native Land Act 1873 and the Native Land Court Act 1886, which were then in force. Perhaps Carroll influenced the outcome since the committee largely adopted his compromise (see above), which still held an element of compulsion. Section 4 of the Act stated:

> The Court may, if it deems fit, cause the position of every individual share or *hapu holding* in the Ngarara Block to be shown on a plan of the same; but no survey or actual subdivision of any share or hapu interest shall be made until the owner or owners thereof shall apply in writing to the Registrar of the Native Land Court at Wellington for his or their partition order, and then only of the portion of the owner or owners applying for the same: Provided that every owner whose share shall adjoin any other share in respect of which issue of a partition order has been applied for shall bear his proportion of the cost of the survey of the common boundary. [Emphasis added.][397]

Thus, whether the owners wanted it or not, the court was empowered to define every individual share on a plan of the block. Also, since the principal legislation did not provide for 'hapū holdings', the effect was to allow partitions of blocks with multiple owners rather than the partition of every individual interest in sole ownership, which the commission had recommended. The native land laws at this time had no provision for block committees or any other mechanism for the collective management of multiply owned blocks, despite the many requests of Māori leaders nationally in the 1880s.[398] Another punitive aspect of this section was that the Act empowered the rehearing court to define all individual interests. Normally this would be done on applications from the owners by a court of first instance, which would be subject to a right to apply for a rehearing. Under section 4, however, these decisions were not subject to any appeal right because the task was carried out by a rehearing court and not a court of first instance.

We note that when the court sat in 1891 to exercise the powers conferred on it by section 4, it was called a 'partition court', and it defined sections on the map as Ngarara West A2–A78 and Ngarara West C1–C41, with detailed descriptions

395. 'Third Readings', 9 September 1889, NZPD, vol 66, p 368
396. Ngarara and Waipiro Further Investigation Act 1889, s 4
397. Ngarara and Waipiro Further Investigation Act 1889, s 4
398. See Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 339–356.

of the boundaries and acreages of each section. Although none of these sections had been surveyed at that point, the court had nonetheless subdivided it on paper (including on the court's plan of the block), and had done so using the compulsory powers under section 4.[399] As we discuss below, the owners tried to stop the court from using its compulsory powers under this section of the Act by obtaining a writ of prohibition; this failed and the court continued against their wishes (see section 4.6.8).

In sum, section 4 was doubly unfair because it deprived owners of the right to choose to cut out their individual interests and of the right to appeal the rehearing court's decisions on that matter.

Section 4 also included one of Morison's requests (see above). When consulted about the draft Bill, Morison had asked that all 'pecuniary benefits' derived by owners from their interests in the undivided block should be taken into account by the court, so that the size of awards could compensate for any 'unequal distribution of these benefits'.[400] Chief Judge Seth-Smith had recommended against including this provision in the Bill,[401] but section 4 of the Act stated: 'In estimating the extent of any share the Court may take into consideration the amount or value of any rents or profits from the Ngarara Block which have been received by the owner of such share.'[402] This had the potential to significantly complicate the court's task and prolong the rehearing.

Although the costs of the commission were no longer to be imposed on the block, nor did the Crown undertake to pay a share of the forthcoming litigation costs. The native land laws, the court, and Judge Puckey had all been ascribed a share of the blame for the miscarriage of justice in 1887. In that sense, as Carroll put it, 'the Government should be responsible for the wrongdoing of the Native Land Court', although Carroll himself believed that the owners should pay all the costs of the rehearing.[403] The commission's report, however, specifically blamed Tuhata's party and then – without explanation as to why – said that neither side 'can be held entirely free from blame'.[404]

In sum, the rehearing ordered by the Act was confined to the 1887 partition applications, stipulating that nothing would disturb or prejudice the Puketapu subdivision (1887), the Wellington and Manawatu Railway Company's two sections (1887), the award of the Muaupoko block to Otaraua (1873), or any 'valid' lease.[405]

399. Otaki Native Land Court, minute book 21A, p 1, Napier minute book 22, pp 297–344 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [2], [554]–[600]); Otaki Native Land Court, minute book 12, p 36 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), p [902]

400. Morison to Native Minister, 12 July 1889 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 855)

401. Walzl, 'Ngatiawa' (doc A194), pp 498–499

402. Ngarara and Waipiro Further Investigation Act 1889, s 4

403. James Carroll, 3 September 1889, NZPD 1889, vol 66, p 253

404. Report of the Ngarara commission, 19 December 1888, AJHR, 1889, G-1, pp 1, 3

405. Ngarara and Waipiro Further Investigation Act 1889, ss 2, 7

4.6.6 Alternative potential remedy for those left out in 1873: section 13 applications

4.6.6.1 *Introduction*

Following the passage of the Ngarara and Waipiro Further Investigation Act 1889, the Native Land Court held the rehearing at Wellington from January to April 1890.[406] During this process, those who had wanted a *de novo* rehearing of the 1873 title tried a new potential remedy: the chief judge's power to correct errors under section 13 of the Native Land Court Acts Amendment Act 1889. This was a very important remedy in theory because it offered these people their only chance to put their case before a court, but the resultant inquiries were brief and not a single application was granted. Nonetheless, these applications give an important insight for the Tribunal as to the identity of the people who claimed to have been wrongly left out in 1873, the basis of their claims to have been included, and the reasons why section 13 did not provide the remedy for which they had hoped. This issue is particularly important for the claim of Andrea Moore and Robert Taylor, whose tupuna Wiremu Kingi Te Rangitake was one source of the rights claimed under section 13. In their submission, they were already landless in Taranaki and the failure of this potential remedy left them landless in Waikanae as well.[407]

4.6.6.2 *Section 13 (1889) and its interpretation*

Prior to the 1889 amendment Act, the 'Chief Judge and every Judge' (in 1873) and '[t]he Court or any Judge' (in 1886) had a discretion to amend defects or errors in a court proceeding.[408] Section 63 of the Native Land Court Act 1886 defined the scope of this power: 'All amendments necessary for the purpose of determining the real question in controversy between the parties, or for giving effect to and recording the intended decision of the Court in any proceeding may be made at any time by the Chief Judge or any Judge.'

The 1889 amendment Act created some new powers for the chief judge. First, when sitting to decide applications for rehearing, the chief judge could amend errors with the concurrence of an assessor.[409] Secondly, a seemingly wide-ranging power was conferred on the chief judge which could be exercised at any time, and which potentially applied to those who had been left out of the Ngarara title in 1873:

> It shall be lawful for any person entitled to or claiming an interest in any land, who shall allege that his interest therein has been prejudicially affected by any error or omission committed or made in any decision or order of the Court, to apply at any time after the title of such land has been or shall hereafter become ascertained to the Chief Judge to inquire into the matters alleged in such application.[410]

406. Walzl, 'Ngatiawa' (doc A194), p 511
407. Claimant counsel (J A Hope), closing submissions (paper 3.3.53), pp 5–8, 15–17
408. Native Land Act 1873, s 104; Native Land Court Act 1886, ss 62–63
409. Native Land Court Acts Amendment Act 1889, s 12
410. Native Land Court Acts Amendment Act 1889, s 13

Once a section 13 application was made, the chief judge could either dismiss it, hold an inquiry in open court with an assessor, or refer it to another judge 'sitting in open Court with an Assessor for his investigation and report'. No application could be granted, therefore, without a hearing in open court, whereas applications could be dismissed at the sole discretion of the chief judge. Further, although the matter could be delegated to a judge and assessor to investigate and report, the decision in that case still rested with the chief judge alone. If the chief judge held an inquiry in person, the concurrence of the assessor was not required. Section 13 of the amendment Act empowered the chief judge to make any order which remedied the 'error or omission'. The only express limit was that no order could affect the validity of a 'conveyance, transfer, mortgage, lease, contract, lien, or transaction' made before notice of the intention to hold an inquiry.[411] In the case of Ngarara, this would have protected the interests of lessees and the Crown (the latter had purchased about one-third of the block in 1874). Chief Judge Seth-Smith referred some of the section 13 applications to the rehearing court to investigate; others he dismissed without inquiry. None were granted.[412]

Henry Howarth was counsel for most of the section 13 applicants. He argued that the new section 13 jurisdiction was 'co-extensive' with the right to apply for a rehearing, conferred by section 75 of the Native Land Court Act 1886. Section 13, he said, 'operates as a virtual repeal of that part of Section 75 which limits the right to apply for a rehearing to a period of three months after the decision complained of'.[413] If the court were to accept this argument, then it would have effectively reopened the original Ngarara title for rehearing. It would also have reopened many other supposedly final titles if section 13 was applied to multiple blocks. Chief Judge Seth-Smith dismissed Howarth's argument: 'The answer to that is that if the Legislature had intended to effect such a repeal they would have done so in so many words and not have left their intention to be indirectly inferred from the construction of the Section [13]'.[414]

Stafford, acting for Wi Parata and the majority of owners, argued that section 13 could not be applied retrospectively; in other words, it could only be applied to errors that occurred after the 1889 amendment Act was passed. The chief judge rejected this argument as well, and Stafford made moves to challenge his decision in the Supreme Court.[415] It is unclear from the files whether a review went ahead but certainly the chief judge's view prevailed and section 13 was applied to court decisions regardless of when they were made.

The chief judge explained that the earlier power to correct errors in section 63 of the Native Land Court Act 1886 was limited to 'giving effect to and recording

411. Native Land Court Acts Amendment Act 1889, s 13

412. Walzl, 'Ngatiawa' (doc A194), pp 503–508

413. Chief Judge Seth-Smith, memorandum, no date (late March or April 1890) (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 415)

414. Chief Judge Seth-Smith, memorandum, no date (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 415)

415. Buckley, Stafford, and Treadwell to Seth-Smith, 24 March 1889; Seth-Smith, memorandum, no date (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 414, 420–421)

the *intended decision* of the Court (emphasis in original)'. 'The only question', he said, 'would be what did the Court intend?' If, for example, it was discovered that a person's name was left out but their right to be included had been 'made out', the court had no power to rectify the error under section 63 'if it did not appear that the Court intended to include him'. Such a person could, however, be included in the title under the new section 13 power. Thus, the 'most extensive power' was a rehearing 'upon which the whole matter may be reinvestigated on its merits'. The least extensive power was to correct errors where a decision had not been properly recorded (section 63). The chief judge concluded that the 'provisions of section 13 seem to occupy an intermediate position giving on the one hand a more extensive power to rectify an error or omission than that conferred by Section 63 (1886) and on the other [hand] not permitting a decided matter to be reopened upon its merits.'[416]

In terms of title decisions, the chief judge stated that the court's decision as to a particular 'class' of owners, whether a tribe, a hapū, the descendants of an ancestor, or a portion of such a group, could only be reconsidered at a rehearing, not a section 13 inquiry. Similarly, if the court had struck out or included a name as the result of an objection, disagreement about that would be a matter for rehearing, not for the correction of errors under section 13. Lists of owners, however, can include hundreds of names, and some absent person could be overlooked by mistake and not apply for a rehearing. There would need to be a 'reasonable excuse' for not applying for a rehearing. 'Such an error', concluded Seth-Smith, would be 'one that is contemplated by this Section [13].' Also, 'if it can be shown that some matter was not brought under the notice of the Court of such a nature that, had the attention of the Court been called to it at the time, the error or omission complained of would not have been made, then Section 13 provides a remedy by which the matter can be rectified'. Such a matter, however, would have to be a matter of detail, not of principle – nothing that would really justify a rehearing could be included.[417]

Finally, Chief Judge Seth-Smith stated that only the name of an individual who makes his or her own application could be added to a list of owners. The court would not consider any application made on behalf of more than one person, including any application on behalf of a tribe or hapū – again, nothing that might necessitate what would in reality be a rehearing.[418]

These were the principles laid down by the chief judge for deciding applications under section 13. Because it was a new jurisdiction, no one could be sure whether it offered a remedy to any or all of those who claimed to have been left out of the Ngarara title in 1873. In the case of Ellen Dafter, for example, she claimed that the court committed an error in its decision in 1873 because (a) it 'confin[ed]

416. Seth-Smith, memorandum, no date (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 416–417)

417. Seth-Smith, memorandum, no date (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 418–420)

418. Seth-Smith, memorandum, no date (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 420–421)

the ownership of the Block to those of the Ngatiawa tribe who were residing on the land'; (b) it excluded the applicant, her grandmother Ihipera Nukiahu, and others of their family, who were in fact living there at the time of the court's sitting; and (c) the court did not decide the ownership 'according to Maori usage and custom.'[419] The chief judge considered that the 'parts marked (a), (b), & (c) might afford grounds for ordering a rehearing' but they did not disclose the kind of error or omission that could be considered under section 13.[420] Many applications did raise the kinds of issues put forward by Ellen Dafter.[421]

4.6.6.3 *Taranaki applications through Wi Kingi Te Rangitake*

Claimants Andrea Moore and Robert Taylor raised the case of Eruera Manukorihi, the son of Wiremu Kingi Te Rangitake:

> In 1889, Eruera Manukorihi applied to be included in the land at Waikanae on the grounds that Ngatiawa were not advised that the land was to be investigated and that the name of the block used by the Court, Ngarara Block, was not the correct name and was misleading. The application was not successful. Ngatiawa had gone back to Waitara, and while they were away the land was investigated by the Native Land Court and given to others.[422]

The application they referred to was made by Erueti Te Manu on behalf of himself, Eruera Manukorihi, and Ngāti Uenuku hapū. Erueti Te Manu argued that Wiremu Kingi Te Rangitake had lived at Waikanae until 1848, that he was the principal chief and owner of Waikanae, that they received no notice of the 1873 hearing, and that the names in the list did not 'comprise all the owners of the Block'. Further, the correct name of the block was 'Waikanae', not 'Ngarara'. They claimed to have been prejudiced by the court's error in omitting their names, and that their 'rights and interests' in the land had been well known by those who 'by direction of the Court' prepared the list of owners. The information before the court was incomplete – and, indeed, purposely withheld by those who knew it.[423]

The chief judge minuted this application that it essentially sought a rehearing and provided no grounds relevant to section 13. Seth-Smith also noted that there was nothing to show that the applicant had authority to act for others, and that he could not entertain a claim on behalf of a hapū.[424] This application was then referred to Judge Mair, who treated it as an application for Erueti Te Manu alone. Mair reported that Te Manu had only lived at Waikanae for two years (1843–45)

419. Ellen Dafter, application, 14 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 406)
420. Chief Judge Seth-Smith, memorandum, 23 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 404)
421. Walzl, 'Ngatiawa' (doc A194), pp 505–507
422. Andrea Moore and Robert Taylor, brief of evidence, 29 January 2019 (doc F20), p [9]
423. Erueti Te Manu, application, 12 March 1890 (Moore and Taylor, brief of evidence (doc F20), pp [80]–[82])
424. Walzl, 'Ngatiawa' (doc A194), p 506

and otherwise lived at Wellington and Arapaoa. He had never claimed before and could not show 'even the shadow of a right to have his name admitted'.[425] The application was dismissed in April 1890.

Matene Te Rangihauku also applied on behalf of Eruera Manukorihi and other of their 'relatives'. This application had similar grounds: Wi Kingi lived at Waikanae until 1848; they received no notice of the 1873 hearing; the name 'Ngarara' was misleading; their rights were known to those named in the certificate but were withheld from the court; and the court had made an error on the basis of incomplete information.[426] This application was, however, withdrawn by Howarth – Te Rangihauku later filed an individual application – and Mair reported separately on the dual aspect of Erueti Te Manu's application for himself and Eruera Manukorihi. According to Mair's report, it was 'evident that Eruera [Manukorihi] has never been consulted in the matter and never authorised that use of his name'.[427]

A further individual application was then filed by Rako Eruera Wiremu Kingi, grandson of Wiremu Kingi, who repeated much the same arguments made in the applications of Erueti Te Manu and Matene Te Rangihauku. In his view, Wi Kingi Te Rangitake 'changed his residence to Waitara' in 1848 but 'he did not release his claims and interest in Ngarara', and that was the fundamental basis of the customary rights. The court's error in 1873 was to confine ownership to those who were resident in 1873, to omit some who were living there (including, he said, himself), and to make a decision that was not based on Māori custom, resulting in a list of owners that was 'erroneous, defective and incomplete'.[428]

The essential problem for all of these applications was that they raised issues which the chief judge considered were more properly matters for rehearing, so their only other alternative remedy was to seek redress from the Crown by way of petitioning Parliament.[429]

4.6.6.4 *Werahiko Te Hau: 11 missing names from the list that was put into court*

Apart from the Taranaki applications, the most important was that of Werahiko Te Hau, who applied on behalf of himself and 10 other people whose names, he said, were left out of the 1873 title by an error of the court. The 11 names were: Werahiko Te Hau, Rahera Eruini, Te Wirihana Te Wawa, Ramari Heperi, Penarepe Hoani, Rama Pirimana, Roka Paihia, Hohepa Hoani, Tohe Tiro, Hopua Tiro, and Karaitiana Te Tupe. Werahiko was the son of Eruini Te Marau and Rahera

425. W G Mair, report, 24 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 374)

426. Matene Te Rangihauku, application, 12 February 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 330–332)

427. W G Mair, report, 24 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 375)

428. Rako Eruera Wiremu Kingi, application, 21 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 390–391)

429. Howarth to Native Land Court, 19 March 1891 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 345–346)

Eruini. Although his father's name was on the 1873 court order for Ngarara, his mother's name was in the list of 11 covered by this application. According to Werahiko Te Hau, the 11 names were included in the list handed into court by Wi Parata, and were also included in a copy of that list which appeared on page 213 of Otaki minute book 2 but, it was claimed, by 'error or omission of the Court the said names were omitted from the said [court] order or Certificate of Title'. The applicant concluded that his 'interest in the Ngarara Block has been prejudicially affected by the said error or omission inasmuch as I do not by the Order or Certificate of Title therefore appear to have any interests at all'.[430]

This list of 11 names was included, as claimed, on page 213 of Otaki minute book 2.[431] Tony Walzl characterised the presence of those extra names on that page of the minute book as a 'peculiar mystery'.[432] The minute book states that Wi Parata's list of names was 'put in and read'. This statement in the minutes was followed by the list of names that were read out in court (there were no objections).[433] The list ends with the name 'Teira Te Ngarara'. But on the righthand side of page 213, in smaller writing and in a different hand, there is a list of 11 names. Mr Walzl explained:

> So although the 55 names are written over three pages of minutes, one below the other, the 11 names are squeezed in at the end on the list to the right of the original list where the space is so cramped that the last three additional names are squeezed in almost to the point of being illegible. Although it is clear that the additional 11 names were added later, there is no clue as to when or by whom.[434]

A copy of the signed and sealed orders of Judge Rogan, which were dated 3 June 1873, directed that eight names be placed on the front of the certificate of title and 48 names be registered under section 17 of the Native Lands Act. There was no mention of the extra 11 names.[435]

Werahiko Te Hau's application was referred to Judge Mair for an investigation and report. According to Mair's report in April 1890, the existence of these extra 11 names was discovered among the papers during the Ngarara commission's inquiry in 1889. He reported:

> A great deal of evidence was tendered to show that it was the intention of the Court in 1873 to include the names of Werahiko and ten others, and the fact of their names

430. Werahiko Te Hau, application, 28 January 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 379–380)

431. Otaki Native Land Court, minute book 2, p 213 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, p [22])

432. Walzl, 'Ngatiawa' (doc A194), p 435

433. Otaki Native Land Court, minute book 2, pp 211–213 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, pp [20]–[22])

434. Walzl, 'Ngatiawa' (doc A194), p 435

435. Copy of Judge Rogan, orders, 3 June 1873 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 261–262)

being found on a slip of paper attached to the file with a memo on the face of it to the effect that the names were to be added, gives some colour to that argument.[436]

Judge Mair did not explain who wrote the memorandum stating that the names were to be added, but the fact that they were added to the list in the minute book suggests that it was a court official. Presumably, it was not a signed memorandum by a judge, which would have been sufficient proof for Judge Mair of the court's intention. This document has not been found in the Māori Land Court files provided to us by Crown Forestry Rental Trust researchers.

After the discovery of these extra names during the Ngarara commission's inquiry, Wi Parata was questioned about them during his evidence to the commission.[437] While answering questions about the 1873 list and how it was compiled, he was asked: 'Have you ever seen the addition to that list (produced)?' Wi Parata answered: 'That is not my handwriting. I have never seen that piece of paper before.'[438] He was later asked specifically about four of the names on the list, Karaitiana Te Tupe, Tohe Tiro, Hopua Tiro, and Penarape Hoani, to which he responded: 'These are new names, I do not know them, I do not know anything about the names in the little list.' When asked if he would have agreed to them going into the list of owners at the time, Wi Parata responded that he would not have consented, it 'would have been wrong.'[439] This answer may reflect in part the community policy discussed by Mair (below), not to put minors into the list if their parents were already in it.

Mair's report went on to say:

> But on the other hand it is shown that Werahiko was a child when the land passed the Court and that his father Eruini Te Marau one of the Registered owners did not put his son's name in his own Block, Muaupoko, nor did he manifest any desire to add his name to the List for Ngarara, indeed it appears to have been the intention not to admit children in Ngarara unless they were orphans; with reference to the other names it is clearly shown that if any of them were entitled it could only be through others whose names were in the list. In any case it has not been shown that any of these eleven persons made any complaint or raised the question of the omissions until this mysterious bit of blue paper with the 11 names written on it, was discovered during the investigation by the Ngarara Commission and I can hardly think that all these 11 persons would have allowed such a grievance as this is now represented to be, to sleep for so many years. I do not think it was the intention of the elders of the people

436. W G Mair, report, 24 April 1890, Otaki Native Land Court, minute book 12, p 1 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki series, Otaki 12 (doc A68), p [9])

437. Walzl, 'Ngatiawa' (doc A194), pp 435–436

438. Wi Parata, evidence to Ngarara commission, 21 November 1888 (doc A194(a)), p 225)

439. Wi Parata, evidence to Ngarara commission, 21 November 1888 (doc A194(a)), p 239); Walzl, 'Ngatiawa' (doc A194), pp 435–436

who arranged the list of names for Ngarara that Werahiko Te Hau or any of the others for whom he applies should be admitted as owners in the Block.[440]

Judge Mair commented in his report that '[i]t has not been shown that Werahiko Te Hau had authority to apply on behalf of others'.[441] As noted above, the chief judge considered that individual applications were required. There were two other applications filed with the court. Karaitiana Te Tupe, the son of the Otaraua chief Eruini Te Tupe, filed his own application on 27 March 1890, putting forward the same arguments as Werahiko Te Hau's application. The 11 names had been omitted from the court's order, he argued, because there was 'an error or omission in the transcribing the names from the minutes to the order or Certificate of Title'.[442] As discussed above (section 4.5.5.2), Karaitiana's share of the Muaupoko block had been bought up by private purchasers by 1887 and he would be landless if he could not get into the Ngarara West title.[443]

The second application was filed by Taniora Love as trustee under the will of Rama Pirimana (one of the 11). As with Werahiko and Karaitiana Te Tupe, Rama was the child of one of the registered owners. Judge Mair reported that Rama was a minor when the land passed through the court in 1873 and concluded: 'It is not shown that Rama Pirimana's parents wished his name to be included in the Ngarara List and I do not think that Taniora has proved his case.'[444] From Judge Mair's reports, therefore, it seems that there was another aspect of the community's decisions in Pukumahi Tamariki in 1873. As well as limiting the title to residents at that time, it was also limited mainly to adults on the expectation that their children would succeed in due course. Based on Judge Mair's reports, the chief judge dismissed these three applications.[445]

4.6.6.5 *Puketapu applications*

There were applications from seven members of the Puketapu hapū. The first was filed by Piripi Tana, Mere Pairoke, and Mere Ngapaku. The latter two were granddaughters of Ihipera Nukiahu, and they lived at Te Uruhi and Paraparaumu on the Puketapu part of the block when the court sat in 1873. There were also applications from William Franklin Browne, Walter Browne, Ellen Dafter, and Jennie Pairoke. These claims were also sourced to the rights of Ihipera Nukiahu, their grandmother, and to residence on the Puketapu lands around the time of the court

440. W G Mair, report, 24 April 1890, Otaki Native Land Court, minute book 12, pp 1–2 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki series, Otaki 12 (doc A68), pp [9]–[10])
441. W G Mair, report, 24 April 1890, Otaki Native Land Court, minute book 12, p 1 (Crown Forestry Rental Trust, MLC minutes document bank, Otaki series, Otaki 12 (doc A68), p [9])
442. Karaitiana Te Tupe, application, 27 March 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 384)
443. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 44, 65
444. W G Mair, report, 24 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 371)
445. See, for example, Chief Judge Seth-Smith, decision, 28 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 370)

sitting. Ihipera (Isabella) Nukiahu was also known as Pakewa, and she was one of the few women to sign the Treaty in 1840.[446]

Judge Mair inquired into the joint application of Piripi Tana, Mere Pairoke, and Mere Ngapaku. Piripi Tana's part was dismissed because he had gone to Taranaki with Wi Kingi Te Rangitake in 1848 and never returned.[447]

The minutes of Mair's inquiry show that the reason for the omission of Ihipera (Pakewa) Nukiahu and all her grandchildren was a quarrel between the whānau and Ihakara Te Ngarara, the Puketapu rangatira. Mere Pairoke had married a Pākehā. As discussed above in section 4.5.3, she had a small area of orchard (two-and-a-half acres) surveyed for herself and her whānau in 1873. This occurred at the time that Ihakara was arguing with Eruini Te Tupe about the boundary between Puketapu and Otaraua for the survey of the Muaupoko block. Ihakara explained at Judge Mair's inquiry that he was

> one who assisted in preparing the list of names, myself and Rihi Kapoata, also Wi Parata, Tamihana [Te Neke], & Te Poihipi, who finished it here. I only had to do with the Puketapu names. The Court called upon Wi Parata & Tamihana to prepare the names. I gave Wi Parata my list, and he handed it to the Court.[448]

Ihakara explained to Judge Mair that he had left out Pakewa's and Pairoke's names because of the quarrel, but that he had also alerted the elderly Pakewa to the fact that the court was sitting and they could have attended if they wished. Part of his reason for excluding their names, he said, was their intention to sell their surveyed piece, adding that he had told Wi Parata, Tamihana Te Neke, and Judge Rogan that the name of Pakewa was to be excluded. According to Ihakara: 'Wi Parata said "Do not let them sell it", and he [Parata] added "when they die let the land revert to the people"'. Thus, the names of this whānau were omitted from the list of owners but the small piece of land was considered theirs, and some of the whānau continued to live there. As noted above, however, the court only awarded the orchard land to one member of the whānau. Ihakara Te Ngarara told Judge Mair that 'their sheep etc still run over the other land after they got the 2½ acres', but this piece had since become the property of the Wellington and Manawatu Railway Company.[449] According to Bruce Stirling, the land had been taken for railway purposes under the Public Works Act, but we have no further evidence on that point.[450] All of the whānau had left the land by the time of the rehearing in 1890; most were living in Napier.

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446. Walzl, 'Ngatiawa' (doc A194), pp 504–506; Walzl, answers to questions in writing (doc A194(d)), p 4

447. W G Mair, report, 24 April 1890 (Walzl, answers to questions in writing (doc A194(d)), p 113)

448. Ihakara Te Ngarara, evidence on application, no date (Walzl, answers to questions in writing (doc A194(d)), pp 105–106)

449. Ihakara Te Ngarara, evidence on application, no date (Walzl, answers to questions in writing (doc A194(d)), pp 103–106)

450. Bruce Stirling, brief of evidence for the Environment Court, 9 February 2009 (doc F5(b)), p [9 n]

Judge Mair reported:

> They state that their names would have been added to the Ngarara list but for the opposition of an elder relative Ihakara Te Ngarara, head of the Puketapu hapu, but this statement is quite unsupported, and in any case if these people had any claim at all it was *not* in Ngarara, but in the block known as Puketapu. It would appear that their claims have been neglected by their parents but there does not appear to be any remedy now.[451]

These findings were extraordinary. First, Ihakara Te Ngarara's evidence clearly established that he, as the rangatira responsible for the Puketapu names in the list, decided not to put their names in because of the quarrel and because – he said – their claim was very small and already surveyed off for them. Secondly, there was no separate block called 'Puketapu'; the Puketapu land had been partitioned off in 1887 as Ngarara West B and it was an undivided part of the Ngarara block in 1873. There was no jurisdictional reason under section 13 that precluded amending the title to Ngarara West B. Thirdly, it is unclear why Judge Mair blamed the parents. Ihipera Nukiahu was elderly, unwell, and died that year, the girls' mother (Pairoke) had died in 1853, and their father, William Jenkins, gave evidence that he was away from Waikanae when the court sat.[452] Fourthly, this kind of case – where Ihakara admitted a right and explained how their names were left out – may have fitted Seth-Smith's criteria for a section 13 amendment. The chief judge, however, accepted Mair's report and dismissed the application.[453]

Four more of Ihipera Nukiahu's grandchildren, William Browne, Walter Browne, Ellen Dafter, and Jennie Pairoke, applied under section 13. Their applications were mainly based on three arguments: first, that the ownership was wrongly confined to residents only; secondly, that Ihipera and others of the whānau had been living there at the time of the court in 1873; and thirdly, that the court failed to decide ownership according to Māori custom.[454] Chief Judge Seth-Smith decided that these might have been grounds for ordering a rehearing but did not 'disclose any specific "error or omission"'.[455]

451. W G Mair, report, 24 April 1890 (Walzl, answers to questions in writing (doc A194(d)), p 113)
452. William Jenkins, evidence on application, no date (Walzl, answers to questions in writing (doc A194(d)), p 103)
453. H G Seth-Smith, decision on section 13 application, 28 April 1890 (Walzl, answers to questions in writing (doc A194(d)), p 114)
454. William Browne, application, 15 April 1890; Walter Browne, application, 15 April 1890; Ellen Dafter, application, 14 April 1890; Jennie Pairoke, application, 11 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 394–395, 396–397, 406–407, 411–412)
455. Chief Judge Seth-Smith, memorandum, 23 April 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 404)

4.6.6.6 *Applications from two individuals who were resident in 1873*

Finally, the court received applications from two individuals who were resident at Waikanae in 1873 but whose particular circumstances resulted in their omission from the 1873 list: Hone Taramena and Hana Field.

Hone Taramena (John Drummond), Wi Tako's stepson, had come to Waikanae with Wi Tako and stayed in occupation after Wi Tako left to take up his seat in the Legislative Council. Wi Tako had sent him away to Gisborne in 1864–68 for assaulting his mother, but he had returned to live at Waikanae before the court hearing.[456] His application was supported by Wi Tako's daughter, Josephine Love, and her husband, Taniora Love. According to Josephine, who never lived at Waikanae herself, Wi Tako had intended to retain the land gifted to him in 1860 and he also intended his interests to be left to Drummond when he [Wi Tako] moved back to Wellington.[457] According to Wi Parata, on the other hand, Wi Tako and his followers were given land to grow food for the duration of their stay but no permanent gift had occurred. Hone Taramena was the only one of Wi Tako's party to claim land at Waikanae on the basis of this 'gift'. Also, Hone Taramena's occupation had only continued because all attempts to drive him off the land failed. Wi Parata told Judge Mair that Wi Tako had attended the court at Wellington when the list was read out, and he had not sought to have his name included in the list. Nor had anyone suggested the inclusion of Taramena's name.[458]

Judge Mair's report to Seth-Smith was based on three main points. First, Wi Tako and his followers were given the use of some land for a number of years but 'it does not appear that he considered that he had any claims to the Ngarara Block' after his return to Wellington. Secondly, there was evidence that Hone Taramena got 'a footing' in the block by marrying the daughter of one of the 'principal owners', Poihipi Hikairo.[459] Thirdly, Taramena and Wi Tako were present when the land went through the court, and 'neither of them applied to have their names admitted as owners'. Mair reported, therefore, that there was no reason to add Taramena's name to the certificate of title.[460]

As with Hone Taramena, Hana Field was a resident in 1873 when the title was investigated. She was living with her father, Tom Wilson, who kept the ferry inn at the mouth of the Waikanae River. According to the evidence of Hana and others at Mair's inquiry, her mother was Paretauhinu of Otaraua.[461] (The evidence about her parentage was disputed in our hearings by Apihaka Mack, who said that Hana

456. Hone Taramena, evidence on application, 23 April 1890 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 13, pp [831]–[840])

457. Josephine Love, evidence on application, 28 April 1890 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 13, pp [849]–[852])

458. Wi Parata, evidence on application, 29 April 1890 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12, pp [852]–[855])

459. Hone Taramena said that he married a sister of Poihipi.

460. W G Mair, report, 30 April 1890 (Walzl, answers to questions in writing (doc A194(d)), p 115)

461. Hannah Field and David Clark, evidence on application, 2 May 1890 (Walzl, answers to questions in writing (doc A194(d)), pp 95–98)

was the daughter of Eruini Te Marau and Rahera Paira Pahuki.[462]) As 'Hannah Erskine', she was included in the list of 10 owners for the Muaupoko block (see section 4.5.3.4).[463] According to Hana, she lived at Waikanae fulltime from 1860 and attended one day of the court's sitting in 1873. She explained to Judge Mair that she was aware her name had been put in the Muaupoko list but did not ask about the Ngarara list at that time, not realising that 'Ngarara' meant Waikanae. She also claimed that hers was the only name in the Muaupoko block left out of the Ngarara list.[464]

Wi Parata's evidence was:

> Hannah's father [Tom Wilson] came into Court and asked me to enquire whether she was not entitled to go into the [Muaupoko] Block. Eruini Te Tupe said she had a right and she was put in. None of us could find out she had a right in Ngarara. Wilson knew at this time that Ngarara was going through the Court. The list of Muaupoko names was not brought to Wellington it was settled at Waikanae. Everybody at Waikanae knew Waikanae was going through the Court.[465]

Judge Mair reported to the chief judge that Hana Field did not 'appear to have occupied any portion of the Ngarara Block in her own right'. 'In any case', he added, 'she has not shown that there has been any "error or omission" for, though in a position to do so, she never brought her name forward for admission in the Ngarara list and I cannot report in favour of this application'.[466]

4.6.6.7 *Why did section 13 fail to give anyone a remedy?*

Henry Howarth, who represented a number of applicants, complained to the Native Land Laws Commission in 1891 about the failure to remedy his clients' plight through section 13.[467] He told the commission that section 13 was 'not wide enough to allow these cases to be heard on their merits'.[468] This was correct. The applications failed either because they raised issues more appropriate for a rehearing on the merits than the correction of errors or omissions or because no particular error was shown in the circumstances of each application. Also, the court was not prepared to consider what Seth-Smith called 'classes' of applicants, by which he meant a tribe, a hapū, or any kind of group. The judges decided that only individuals could apply because that was how they interpreted the nature of errors that could be amended under section 13.

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462. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), pp 43–44
463. Otaki Native Land Court, minute book 2, p 213 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vols 10–11)
464. Hana Field, evidence on application, 2 May 1890 (Walzl, answers to questions in writing (doc A194(d)), pp 93–97)
465. Otaki Native Land Court, minute book 11, p 381A (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 13, p [864])
466. W G Mair, report, 2 May 1890 (Walzl, answers to questions in writing (doc A194(d)), p 100)
467. Walzl, 'Ngatiawa' (doc A194), pp 537–538
468. H Howarth, 14 May 1891, AJHR, 1891, G-1, p 176

The applications of Hana Field and Hone Taramena were dismissed because they had had an opportunity to put their names forward in 1873 but failed to do so. The claims of Werahiko Te Hau (11 names missing) and the Puketapu applicants failed because the issues were more appropriate for rehearing or because parents had neglected to put their children's names forward. Judge Mair discerned a community decision in 1873 to leave out the names of children who would eventually come in anyway by succession, which he considered to have been the cause of some applications. The Taranaki applications, filed on behalf of some who had departed in 1848, were largely dismissed because they raised a rehearing question rather than a specific error. Clearly, the new section 13 jurisdiction was not the hoped-for remedy sought by those whose names were left out of the title in 1873.

The Native Land Laws Commissioners, W L Rees and James Carroll, considered that the real problem lay with the Ngarara and Waipiro Further Investigation Act 1889. They reported in 1891:

> In other cases the Maoris complain that many persons having undoubted rights in land have been omitted from the lists furnished to the Native Land Court. In one of these – the Ngarara Block, Waikanae – an Act was passed to rectify these mistakes; but its sections are too narrow, and the Courts so construe them as to leave the tribunals still unable to rectify the errors originally made.[469]

The commission recommended the establishment of a six-person board, with three members appointed by the Governor and three elected Māori members, which would have 'full power to do substantial justice' in cases like Ngarara.[470] To this board would come

> most of the matters now coming before Parliament by petition. To this Board all applications for rehearing might be referred. By its existence Parliament would be materially relieved, and the best interests of both Maoris and Europeans be advanced. Not only would the Native Land Board relieve Parliament of the bulk of the Native work now cast upon it, and which it cannot understand – it would also relieve the Courts of much labour.[471]

This recommendation was not carried out, despite the commissioners' view that a board with half of the members elected by Māori was better equipped to deal fairly and properly with these kinds of matters. As a result, those whose section 13 applications had been dismissed had little choice but to petition Parliament. In March 1891, when the rehearing court was determining individual interests, Howarth protested against the court making any decision that might 'prejudice the right of [his] clients to participate in the Block'. Howarth wrote to the judges on behalf of Rako Eruera Wiremu Kingi and others, reiterating the arguments that

469. AJHR, 1891, G-1, p xiv; Walzl, 'Ngatiawa' (doc A194), p 538
470. AJHR, 1891, G-1, pp xiv, xxiii–xxiv
471. AJHR, 1891, G-1, p xxiv

Wi Kingi Te Rangitake 'did nothing to deprive himself of his rights and interests to the Waikanae lands, which he held by conquest', that the Waitara people had been misled by the name 'Ngarara', and that the 1873 list of owners was wrongly confined to those living on the land. In this protest, Howarth described Judge Rogan's error as accepting an inaccurate list without 'proper verification' or giving notice to those not living on the block. Since the court had turned down all the section 13 applications, he said, 'it is only reasonable to expect that Parliament will afford them further relief, as soon as the Petitions can be heard'.[472]

As we discuss further below, the Crown was not in fact prepared to consider any further remedies for Ngarara in response to these or the several other petitions that were filed in Parliament.[473]

4.6.6.8 *Other names left out wrongly in 1873?*

Historian Tony Walzl identified several other people whose names may have been left out unfairly in 1873, although they did not lodge section 13 applications. Mr Walzl noted that a number of people did seem to meet the community's criterion of residence as at 1873 but were still left out of the list of owners, whether deliberately or by mistake. Evidence in the Ngarara commission hearings in 1888, he argued, cast doubt on the validity of their exclusion:

- Honi Ngapaki's wife (who was not named) – she was excluded at the insistence of her husband, who said she had no claim, even though she was living at Waikanae.
- Rora Hopowai – she was living at Waikanae and had only just gone to Taranaki in 1873.
- Patihana – he was held to have gone to Taranaki and abandoned his claim, even though he had only left a fortnight before the court sitting in 1873.
- Karangahau Te Hotu – he was left out because he was in Taranaki although 'the inference from questioning was that he had just gone there on a visit'.
- Takaranga – he was at the court sitting at Waikanae but was excluded because he went to Taranaki afterwards.
- Paingataroa – Wi Parata acknowledged that Paingataroa had a right to be included but explained that her brother, the chief Wi Tamihana Te Neke, did not want her name included in the list. Paingataroa was one of a number who continued to exercise rights on the block after 1873 despite (or perhaps unaware of) the exclusion of their names from the legal title.[474]

Other names included Raupena, who was at Picton when the court sat, and Rokopihia, who was in Taranaki.[475] Wi Parata was also asked whether Mere Pomare ought to have gone into the list of owners. His response was: 'No that

472. Howarth to Native Land Court, 19 March 1891 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 345–346)
473. Walzl, 'Ngatiawa' (doc A194), pp 538, 541–542
474. Walzl, 'Ngatiawa' (doc A194), pp 441–442
475. Walzl, 'Ngatiawa' (doc A194), p 442; Wi Parata, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 184)

question had been settled before. She came & asked that the names of her children & herself should be placed on the list.'[476]

As noted above, the commission disregarded all evidence of this kind, mainly due to its focus on the claims of Inia Tuhata and his sister Rangihanu. We note here that Inia and Rangihanu had three siblings, also the children of Inia Tuhata senior and Mere Pomare, but they were not mentioned at all in the Ngarara commission's proceedings or in any of the petitions or correspondence until 1896.[477]

4.6.6.9 *The need for further inquiry was evident*

At this distance in time, it is not possible for this Tribunal to say for certain whether any particular group or individual ought to have been included in the 1873 title, but the evidence suggests that there were many omissions. Some cases (such as the grandchildren of Ihipera Nukiahu) did seem to fit the chief judge's criteria for section 13 but most would have required a rehearing on the merits. No such full or proper inquiry was ever carried out into omissions from the 1873 title. The Ngarara commission could have inquired further into this matter but was constrained by its terms of reference. The brief section 13 investigations were the only real inquiry that these claims ever received.

In our inquiry, the claimant groups all agreed that there were omissions from the title in 1873, and that the Crown was at fault for imposing the native land laws and the court system and for failing to provide an appropriate remedy when advised of the situation.[478] Historian Tony Walzl pointed to a number of group and individual movements that showed the fluidity of customary occupation before and after 1840, and also before and after the new title cut across the customary processes and froze occupation rights as at 1873:

> This report has shown, however, a number of examples of Ngatiawa group migrations to Waikanae occurring decades after an initial departure (Kaitangata returning to Ngarara after 1848; Ngati Kura returning after 1855; Eruini Te Tupe and Otaraua also returning in 1855; and Ngati Hinetuhi just prior to 1860). In addition, there are numerous examples in the 1890 evidence [to the rehearing court] reflecting that, on an individual level, movement by Ngatiawa around their rohe in Te Tau Ihu, Whanganui a Tara, Wharekauri, Taranaki and Waikanae occurred depending on personal circumstance and opportunity provided by resident relatives in any of those places. Furthermore, continual outwards and inwards migration was recorded by Kemp in

476. Wi Parata, 19 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 184)

477. Petition of John Damon (Hone Tuhata), 22 September 1896 (Crown Forestry Rental Trust, petitions and purchase documents (doc A67(b)), pp 10447–10458). The other three siblings were Te Matoha (m), Hone Tuhata (m), and Ngaropi (f).

478. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 46–47, 49–53; claimant counsel (Jones), closing submissions (paper 3.3.49), pp 17–19; claimant counsel (J A Hope), closing submissions (paper 3.3.53), pp 15–17; claimant counsel (J Mason), closing submissions (paper 3.3.55), pp 20–23

1850 and the Wanganui Resident Magistrate in 1878. This was clearly a part of the matrix of Ngatiawa's customary rights.[479]

In addition to groups, the situation for individuals left out of the title at the point of tenure conversion in 1873 is best illustrated by Tamihana Te Karu, who *did* get into the title:

> After the case [the rehearing] concluded, Tamihana Te Karu was one who complained over the size and locations of his awards. The judge noted that his awards could not really be any larger, as he had spent little time in the area. Tamihana Te Karu was among those who left Waikanae for Taranaki in 1847. He remained away for 13 years. During the Taranaki war, he returned to Waikanae briefly, before moving to Collingwood where he lived for two years. He then returned to Waikanae and was there for almost ten years. Luckily for him, this included the year 1873 and therefore, his name was included on the ownership list for Ngarara. In 1874 he left for Taranaki and was away for another 13 years, except for a short visit to Waikanae. Due simply to luck, Tamihana Te Karu was deemed an owner and therefore he was allocated an award in 1890. Others who just happened not to be in Waikanae were excluded and yet Judge Scannell noted Te Karu's occupation as being typical of Ngatiawa: 'Occupation was shown to be of that intermittent kind usual among the Natives. Individuals came and went from Taranaki, Picton and elsewhere in addition to those who remained after the exodus to Taranaki and all cultivated whenever and wherever fancy or convenience dictated, remaining as long as it suited them and left it as they choose; and came again'. Without possibly knowing it, in referring to the specific case of Te Karu, Scannell is recording the absurdity of the result from the Court processes and the likelihood of wider injustices having occurred for others who were not on certificate of title.[480]

In our view, the disenfranchisement of Māori right holders by omission from lists of owners was a very serious matter. The Crown was obliged to inquire fully and properly into the alleged omissions. The court was not in breach of its own procedures in 1873 – it found that Te Ātiawa/Ngāti Awa were the owners of the Ngarara block by Māori custom and then accepted the list of owners prepared by the people. As there were no objections from whoever attended the court in Wellington on the day, the court rubberstamped the list. The court took no evidence as to the basis on which the names on the list were decided. The Crown was not responsible for that but it was responsible for the lack of appropriate safeguards in the legislation at the time, as the Turanga Tribunal has already found before us (see section 4.5.3.2 for a discussion of safeguards).[481] The Crown was also responsible for failing to provide an adequate remedy when made aware of the grievances. The need for further inquiry was evident from Inia Tuhata's petition

479. Walzl, 'Ngatiawa' (doc A194), p 617
480. Walzl, 'Ngatiawa' (doc A194), p 618
481. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 449–452

in 1888, the evidence to the Native Affairs Committee in 1888, the evidence to the Ngarara commission in 1888, and the section 13 process in 1890.

4.6.7 Did the rehearing under the Ngarara and Waipiro Further Investigation Act provide a remedy?

4.6.7.1 *Introduction*

We have already set out the terms of the Ngarara and Waipiro Further Investigation Act 1889 above (section 4.6.5.3). In brief, the Act followed some of the Ngarara commission's recommendations. It cancelled the 1887 partitions and empowered the Native Land Court to rehear the 1887 partition applications. The Act also empowered the court to determine relative interests and subdivide the block on paper by marking each individual interest or 'hapū holding' on a plan of the block. This section of the Act applied to all the owners, whether they had applied for partition back in 1887 or not, and it was also compulsory in nature; the court was empowered to exercise this jurisdiction regardless of whether the owners wanted it to do so.

The rehearing court consisted of Judges W G Mair and D Scannell with Rakena Wi Waitaia as assessor. It sat at Wellington from January to April 1890, after which the decision on rehearing was delivered in July 1890. Tony Walzl noted that the rehearing generated over a thousand pages of evidence.[482] The same court then sat intermittently from January to May 1891, defining the size and location of individual interests. The court also heard successions throughout this period so that the interests of successors could be defined and located in the subdivisions of the May 1891 award. Because this was a rehearing court rather than a court of first instance, none of these decisions could be the subject of an application for rehearing.

Under the 1889 Act, there was no remedy for anyone who had been left out of the title in 1873. Their only remedy was to apply under section 13 of the Native Land Court Acts Amendment Act 1889, which was discussed in the previous section. For those who did qualify under the Ngarara and Waipiro Act, there were two groups: the minority of registered owners, who had applied for partition in 1887 and who had received very small awards; and the majority of registered owners, who had opposed partition in 1887 and who had succeeded in keeping most of Ngarara West in an undivided whole (see section 4.5.5). In this section, we discuss how the rehearing court dealt with their interests, and the extent to which it provided a remedy for their respective grievances. We address the issue of the compulsory division of all individual interests on the block plan, which the Act empowered the court to carry out regardless of the owners' wishes and even in the face of their opposition. We also discuss the consequences of this extreme form of individualisation for Te Ātiawa/Ngāti Awa ki Kāpiti.

The claimants accepted that the Crown was not directly responsible for the decisions of the rehearing court in 1890–91. Nonetheless, they argued that the Crown was at fault for the way the court's jurisdiction was defined and restricted in the

482. Walzl, 'Ngatiawa' (doc A194), p 511

Ngarara and Waipiro Act. In the claimants' view, the Act failed to give an appropriate remedy because (a) it excluded those who had been left out in 1873 and (b) the consequences of its forced individualisation were the disempowerment of tribal authority and the creation of many small sections that were unusable in economic terms. 'Most awards were less than 100 acres', claimant counsel submitted, and 'some were less than 20 acres': 'The effect of this protracted and flawed process was the fragmentation and individualisation of title into small sections' without any provision for hapū management, creating a 'situation where the ability of the iwi to manage their lands in a productive manner was significantly undermined'.[483]

Crown counsel acknowledged that '[e]motions, 120 years after the rehearing of the Ngārara block title investigation, understandably continue to remain high'.[484] Nonetheless, the Crown submitted that its concession about individualisation of title was sufficient to address the claimants' concerns about the Ngarara rehearing and partition process. The Crown reiterated earlier submissions (discussed above) that the Crown was entitled to follow the recommendations of an independent commission of inquiry, and had done so in rejecting the possibility of a *de novo* rehearing of the 1873 title. Further, the Crown was not responsible for the claimant community's decision in 1873 to limit title to those who were resident at that time. Crown counsel accepted the evidence of further complaints after the rehearing but argued that the real issue for the Tribunal was the consequences in terms of land alienation.[485] The Crown submitted:

> Ultimately, after the partitioning of the various land blocks, the situation now is that very little of the land which was comprised within the original Ngārara block (incorporating also the Kūkūtauākī and Muaūpoko blocks) remains in the ownership of Te Ātiawa/Ngāti Awa ki Kāpiti. While not accepting the processes and outcomes of the Ngārara and Kūkūtauākī block title investigations are attributable to the Crown (they being decisions of the Native Land Court and noting again that the Ngārara Commission's principal recommendation (that there be a rehearing of the 1887 investigation) was adopted by the Crown), the Crown has conceded that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[486]

4.6.7.2 *Did the Ngarara and Waipiro Further Investigation Act provide a remedy for the minority who sought partition in 1887?*

The first issue to consider is whether the Ngarara and Waipiro Further Investigation Act provided a remedy for the minority of registered owners who had applied for

483. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 19–20
484. Crown counsel, closing submissions (paper 3.3.60), p 37
485. Crown counsel, closing submissions (paper 3.3.60), pp 31–35, 37–38
486. Crown counsel, closing submissions (paper 3.3.60), p 38

partition in 1887. Essentially, the answer to this question is 'yes'. Their applications were reheard and the size of their awards was significantly increased from the minimal awards in 1887. This did not mean, however, that the rehearing court necessarily accepted the basis on which their claims were argued.

The first group to consider is the Tuhata whānau. The long-running debate about Hone Tuhata resulted in the usual polarised evidence from the Te Ātiawa/Ngāti Awa witnesses so the court relied mainly on two pieces of documentary evidence. The first was Bishop Hadfield's journal entry confirming that Hone Tuhata was present at Kuititanga in 1839 and was injured in that battle. The second was an 1847 letter from a resident magistrate, referring to Hone Tuhata's role in land purchase negotiations. The rehearing court therefore found that Hone Tuhata was a resident, and that Inia Tuhata – now also successor to his deceased sister, Rangihanu – was entitled to a 'substantial interest' in Ngarara West.[487] Inia Tuhata's award was therefore increased from about four acres to 1,220 acres.[488]

The second group was the several Otaraua individuals named on the Ngarara title who had applied for partition in 1887. Such was the bitterness of the dispute by this time, the majority of owners now tried to prevent these people from getting any land at all. This was despite their earlier acknowledgement in 1887 that the Otaraua individuals in the 1873 title were at least entitled to their cultivations outside of the Muaupoko block. Section 2 of the Ngarara and Waipiro Further Investigation Act 1889 contained a proviso on the court's ability to rehear and partition: 'Provided that the parcels of land heretofore awarded to the Puketapu and Otarawa [*sic*] respectively shall not be affected by any order of the Court made in pursuance of this Act'. Morison, counsel for some of the Otaraua, argued that this was intended to preserve the 1873 award of the Muaupoko block to Otaraua. This does seem to be what was meant at the time the Act was passed in 1889. But counsel for the majority of owners claimed that the proviso prevented the rehearing court from changing the small awards made to Otaraua applicants in 1887. The wording of section 2 was in fact ambiguous because it referred to 'Otaraua' by name and did not specify the Muaupoko block. As a result, a case was stated to the Supreme Court (High Court) to determine the meaning of section 2.[489]

This litigation added to the expense of the rehearing. After hearing counsel on both sides, the Supreme Court found:

> any previous award made on the subdivision of the Ngarara Block to members of Otaraua Hapu shall not be disturbed but that there is nothing in such proviso to debar them from coming before the Court under section 2 of the said Act and proving any further right to land in the said Block.[490]

487. Walzl, 'Ngatiawa' (doc A194), pp 515–517, 531
488. Walzl, 'Ngatiawa' (doc A194), pp 470, 532
489. W G Mair and D Scannell, case stated to Supreme Court, 1 May 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 266–275)
490. D Cooper, registrar, transmitting decision of Supreme Court, 14 July 1890 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 359–360)

As a result, the rehearing court could (and did) increase awards, treating the 1887 awards as a minimum to which its own awards were additional.[491]

This group includes Eruini Te Marau. Although he had claimed extensive lands for himself as Ngāti Rahiri, the court did not accept this claim. On the other hand, it disagreed with Judge Puckey's decision to limit Eruini Te Marau and the other Otaraua applicants to the area of their cultivations. Eruini Te Marau's award was increased from about 10–15 acres in 1887 to 395 acres (plus the original award).[492]

Ema Tini of Otaraua and her husband, Enoka Hohepa, were awarded about seven acres of cultivations in 1887. The rehearing court awarded them 520 acres in addition to the original award. Enoka Hohepa's claim was based on his rights as the sole representative of Ngāti Tuaho in the 1873 title. This claim failed because he had not come to live at Waikanae until 1860. Since no other owners identified to the court as Ngāti Tuaho, no one on the list from that hapū had been present at 1840. On that basis, the rehearing court rejected his claim but made him a joint award with his wife (as Judge Puckey had done in 1887).[493]

Of the other Otaraua applicants, it was clear that the court awarded them additional land in the vicinity of their cultivated areas. Ema Tini was awarded 120 acres in addition to her 1887 award. Merekai Putiki was awarded 360 acres, again in addition to her 1887 award. Watene Te Awhio, however, was awarded 125 acres – this was not specified as additional to an 1887 award. Eruini Te Tupe was awarded 420 acres. This was split between three successors – one of them was Karaitiana Te Tupe, who now came into the title despite the rejection of his section 13 application (see above).[494]

Claimant counsel submitted that none of the owners really benefited from the rehearing because the costs and the individualisation of all owners' interests resulted in rapid alienation, regardless of how successfully they fared in their initial awards.[495] With that proviso, to be explored further below, we accept that the rehearing did provide a remedy for the tiny acreages awarded to these groups who had applied for partition in 1887. Inia Tuhata, in particular, had his award increased from four acres to 1,220 acres. This was a substantial improvement, even though it was not the full extent of the land he claimed as the sole surviving Mitiwai owner in the 1873 title.[496]

4.6.7.3 *Did the Ngarara and Waipiro Further Investigation Act provide a remedy for the majority of owners who opposed partition in 1887*

The next issue to consider is whether the rehearing under the Ngarara and Waipiro Further Investigation Act 1889 provided a remedy for the majority of owners who

491. Walzl, 'Ngatiawa' (doc A194), pp 470, 512–513, 530, 532
492. Walzl, 'Ngatiawa' (doc A194), pp 470, 531–532
493. Walzl, 'Ngatiawa' (doc A194), pp 517–518, 531–532
494. Walzl, 'Ngatiawa' (doc A194), pp 517–518, 531–532; 'Schedule of Awards to the Different Owners in the Ngarara West Block', 24 July 1890 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 13, p [895])
495. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 51
496. Walzl, 'Ngatiawa' (doc A194), pp 470, 515–517, 531–532

opposed partition in 1887. The short answer is 'no'. They too had sent petitions to Parliament in 1888 and 1889, had participated in the Ngarara commission and other inquiries, and it was clear that the only ways in which the rehearing could have benefited them was if:

- they succeeded in keeping the 1887 awards to the Tuhata whānau and Otaraua individuals to their 1887 level or lower; and/or
- the court did not proceed to define their individual interests on the plan against their wishes.

On the first point, we note that the debate between the Native Affairs Committee and Chief Judge Macdonald in 1888 is relevant. On the one hand, there was the question of justice if individuals were awarded such paltry amounts as the four acres awarded to Inia and Rangihanu Tuhata. This had clearly been the select committee's major concern about the 1887 partition and had led to the Ngarara commission and the Ngarara and Waipiro Further Investigation Act 1889. On the other hand, as Chief Judge Macdonald argued, there was a countervailing injustice in awarding too much land to the wrong owners, even if that were to lead to very small or no awards for some and large awards for others (see section 4.6.3.3). Macdonald reminded the select committee that the court's task under the native land laws was not to do 'abstract justice' to people but to define their relative interests.[497]

During the course of the rehearing, the majority of owners were led by Wi Parata and represented in court by Stafford. They clearly attempted to prevent the award of any more land to the partition applicants than they obtained in 1887. As noted above, they had taken the matter of section 2 to the Supreme Court in an effort to prevent the award of further land to Otaraua. Their evidence in the rehearing was that Otaraua had no interests outside the Muaupoko block. Similarly, they opposed the Mitiwai claim, arguing that Hone Tuhata had abandoned his claim by leaving Waikanae after the battle of Haowhenua in 1834 to live in the South Island.[498]

Clearly, the rehearing did not deliver the result these owners sought, since the awards of all those they opposed were increased. The rehearing court, however, did award most of Ngarara West to the majority of registered owners who had not applied for partition in 1887. The court did so despite rejecting the 'major basis' of their claim, the customary gift of land from the Ngāti Toa chief Te Pehi Tupe to the Kaitangata chief Haukaione.[499]

In our view, this aspect of the rehearing's outcome for the majority of owners is not an issue that we need to consider further. At this distance of time, it is not possible to weigh the relative interests of all these groups and individuals. Nor is it necessary for us to decide that matter in order to deal with the Treaty claims against the Crown. While it *was* necessary to consider these matters for the minority

497. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 790–792, 795–796, 799)
498. Walzl, 'Ngatiawa' (doc A194), pp 519–520, 531
499. Walzl, 'Ngatiawa' (doc A194), pp 514–515, 519–520, 533–534

owners (given the findings of the Native Affairs Committee and the Ngarara commission about injustice), we have already dealt with this and noted that those groups did receive a remedy from the Ngarara and Waipiro Act. For our purposes, the key issue for the majority was not the awards made by the court to others but the Act's provision for the court to divide their individual interests compulsorily on the block plan (though not surveyed out at this point unless the owners of the new blocks wanted it). We turn to this issue next.

4.6.8 A key aspect of the Crown's remedy: the court's compulsory powers

4.6.8.1 *The owners' attempts to either stop the court exercising its compulsory powers or to control the process themselves*

By July 1890, after extensive and costly litigation in 1888–90, matters had returned to much what they were in 1887. Puketapu retained their 1887 award, Otaraua individuals had received larger awards, Inia Tuhata had received a larger award, and most of the block was vested in the majority of owners as an undivided whole. But the rehearing court considered this to be an intermediate step. Section 4 of the Ngarara and Waipiro Further Investigation Act stated:

> The Court may, if it deems fit, cause the position of every individual share or hapu holding in the Ngarara Block to be shown on a plan of the same; but no survey or actual subdivision of any share or hapu interest shall be made until the owner or owners thereof shall apply in writing to the Registrar of the Native Land Court at Wellington for his or their partition order; and then only of the portion of the owner or owners applying for the same . . .

As noted above, the principal legislation in force at that time – the Native Land Court Act 1886 – did not provide for 'hapū holdings' or any corporate management structures at all. What this meant, in effect, was that if the court identified hapū holdings, they would be turned into partitions vested in multiple individual owners.

The Ngarara rehearing court did not accept that there were hapū holdings. According to the court's decision in July 1890, the Te Ātiawa/Ngāti Awa conquerors had settled too recently for hapū claims to be advanced by 1840, primarily because the population was concentrated together in two or three pā for defence purposes. The judges also found that, apart from the land awarded to Puketapu and Otaraua in the south (Ngarara West B and Muaupoko), no *exclusive* hapū rohe could be shown to have existed at that time. The court considered that the basis for claims, therefore, was the occupation rights of individuals who participated in the conquest and whose occupation right had been transmitted to owners on the list;

and the occupation exercised by individuals since 1840 with 'the tacit consent of others.'[500]

In our view, the main problem there was the fact that the court was not dealing with hapū but a list of individuals selected because they were resident in 1873. Some hapū, for example, only had a single member on the list. The rehearing court (which was limited to rehearing the 1887 applications) could not compensate for the absence of a hapū or corporate title in the native land laws in 1873; its statutory task was to divide the land between a set of named individuals and their successors.

Once the court had delivered its judgment in July 1890, which defined the areas to be awarded to the 1887 partition applicants, the court indicated to the remaining 37 owners that the land would be partitioned into two blocks: Ngarara West A (from the sea to the hills) and Ngarara West C (the forested inland hills). These owners were led by Wi Parata and were now tasked with arranging their individual awards among themselves.[501] This was an important aspect of the court's work. The Native Land Court Act 1886 provided for voluntary arrangements among the parties.[502] Potentially, this provided a significant degree of authority to Māori owners within the court system but there had to be appropriate safeguards.[503] The court could rubber stamp such arrangements without further inquiry. Section 59 of the Native Land Court Act 1886 empowered the court to 'decide such proceedings in accordance with such arrangement', and stated that '[s]uch decision shall be as effectual and binding as if arrived at on evidence taken'. This provision was open to fraud, abuse, mistakes, and omissions, especially given the nineteenth-century court's practice of calling for objectors and accepting matters without further inquiry if there were no objectors. Much depended on who was actually in court on any particular occasion. As we have seen, the absence of safeguards in the legislation in 1873 meant that the court accepted the Ngarara list of owners without further inquiry, which led to the many section 13 applications discussed above.

In the case of the 1886 Act's voluntary arrangements, an instance of severe fraud by three individuals in the Waiohau block led to an inquiry and an amendment of the law in 1890.[504] The Atkinson Government introduced new requirements in September 1890: the voluntary agreement had to be reduced to writing, it had to be signed by all those involved, and the court had to be 'satisfied of the authenticity of the signatures and the *bona fides* of such arrangement before the same is given effect to by the Court'.[505]

What this meant for Ngarara West was that the owners would now need to produce a written agreement, signed by all the owners affected, which was capable of being defended and authenticated in court. This was no small task. Hitherto, these

500. Walzl, 'Ngatiawa' (doc A194), pp 525–529
501. Napier Native Land Court, minute book 22, pp 282–283 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [539]–[540]); Walzl, 'Ngatiawa' (doc A194), p 534
502. Native Land Court Act 1886, s 59
503. Waitangi Tribunal, *Te Urewera*, vol 3, pp 1370–1371
504. Waitangi Tribunal, *Te Urewera*, vol 3, pp 1366–1371
505. Native Land Laws Amendment Act 1890, s 4

owners had been united behind Wi Parata's determination to keep the block undivided and to prevent sales. Now they had to turn their customary rights (which had allowed some people not on the list to continue using the land) into a list of each individual's share and where it was located. This was an extremely difficult task for them. When the court reconvened in August and September 1890, Stafford advised that his clients had not 'come to an understanding about the division of their interests in the portion of the Ngarara block awarded to them'. The case was therefore adjourned to January 1891 to allow more time.[506]

When the court reconvened in January 1891, Wi Parata explained that they had not been able to reach agreement: 'We did attempt to come to some arrangement but when the awards made to certain individuals became known whose interests they considered small, they were surprised, and they only thought of making claims themselves that they too might obtain large awards.'[507] The legal representation changed significantly, therefore, as eight individuals who had been 'surprised' by their small allocations sought separate representation. Stafford kept five clients and Morison had three. Wi Parata and 21 others had engaged E G Jellicoe to represent them. Seven owners appear to have been without representation at that time although they still supported Parata's leadership. The owners at this time were very concerned about the growing costs of the process. Jellicoe sought an adjournment from Wellington to Ōtaki. Wi Parata explained that the court had sat for five months in a 'European settlement' where they could only stay by paying money, and because of the length of time of the hearing they were unable to meet their lawyers' expenses.[508]

It was at this point that Wi Parata and his supporters tried to stop the court from proceeding any further. This was partly due to the growing costs and the disagreement that had occurred among the owners. Primarily, however, it was because of their opposition to further individualisation in the first place. Jellicoe made a submission to the court that its jurisdiction was to rehear the partition applications of Inia Tuhata and others, and the court had no jurisdiction to subdivide the residue. Stafford, on the other hand, argued that the court had authority to continue with the subdivision under section 4 of the Ngarara and Waipiro Further Investigation Act. The court agreed with Stafford and decided to continue. At that point, Jellicoe stated that the 22 owners he represented had instructed him to apply to the Supreme Court for a writ of prohibition.[509] The Supreme Court could issue a writ of prohibition, directing a lower court (in this case the Native Land Court) not to proceed with a case outside its jurisdiction.

506. Otaki Native Land Court, minute book 12, pp 31–32 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), pp [896], [898])

507. Otaki Native Land Court, minute book 12, p 38 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), p [904])

508. Otaki Native Land Court, minute book 12, pp 33–34, 36–37 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), pp [899]–[903])

509. Otaki Native Land Court, minute book 12, p 36 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), p [902])

Action in the Supreme Court would of course involve yet more expense but they were determined to prevent the further individualisation of title, which they had protested against when the Ngarara and Waipiro Further Investigation Bill was before Parliament in 1889. The formal application was lodged in the name of Rakapa Te Puke, the wife of Tamihana Te Karu. She was one of Wi Parata's supporters and had given evidence at the Ngarara commission. Her statement of claim to the Supreme Court stated that no owners had applied to the Native Land Court for subdivision of the residue once the 1887 partition applications had been decided by the rehearing court. Nonetheless, the rehearing court had directed them to agree among themselves how the residue should be divided, and had told them that if they could not agree then the court would 'proceed to allocate and define the interests as it thinks just'. Rakapa Te Puke's statement of claim stated that the Native Land Court acting under the 'Special Act' of 1889 was *functus officio*, having reheard the 1887 partition orders, yet it was now 'proceeding to subdivide the said land and to award and allocate the same'.[510]

This was a desperate last-ditch attempt to stop the court's exercise of its compulsory powers under section 4 of the Ngarara and Waipiro Further Investigation Act. This section empowered the Native Land Court to define the owners' individual interests on a plan of the block, regardless of the owners' wishes, although the subdivisions would not be completed formally until surveys had been arranged. Their Supreme Court case was therefore highly likely to fail, since the Native Land Court clearly had this statutory power and could exercise it regardless of the owners' wishes.

Chief Justice Prendergast issued a writ of prohibition on 31 January 1891,[511] which stopped the Native Land Court from continuing until the case could be heard in the Supreme Court.[512] Once the writ was granted, Stafford and Morison both applied to the Supreme Court to have their clients join Judges Mair and Scannell as defendants in the case, so that they could oppose the writ of prohibition in those proceedings.[513] Even though there had not been any formal applications for partition, it was no longer true that none of the owners of the residue wanted to partition out their interests – the eight owners now represented by Stafford and Morison wanted the court to continue. These were the people who had been unhappy with the owners' discussions about relative interests in the period between the rehearing decision in July 1890 and the resumption of the court in January 1891, and they opposed the writ of prohibition.

On 24 February 1891 the Native Land Court registrar telegraphed the judges: 'Ngarara Prohibition rescinded with costs. Court can proceed with subdivisions.

510. Rakapa Te Puke, amended statement of claim in the Supreme Court, 4 February 1891 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 277–280)

511. Cooper, registrar, copy of decision, 31 January 1891 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 283–284)

512. Otaki Native Land Court, minute book 12, pp 66–67 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), pp [930], [931])

513. Otaki Native Land Court, minute book 21A, pp 38–39 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [32]–[33])

Mr Morison states that he and Mr Stafford are exceedingly anxious also their clients that business should proceed forthwith.'[514] At this point, with the Supreme Court case lost, subdivision inevitable, and costs mounting, Wi Parata asked Judges Mair and Scannell to exclude all lawyers from the court. This was opposed by Stafford and Morison, who had initially offered to withdraw but were now concerned about how their clients' interests would fare without their protection. Parata told the court that 'the people on the other side are not afraid of him – if there were no lawyers the matter would have been settled long ago'. The court agreed to exclude the lawyers for part of the process and allow the various owners to run their own cases. It adopted the procedure that each remaining person on the list would be called one by one to state their case.[515] This procedure was adopted for the owners represented by Stafford and Morison, with the result that seven of those eight owners were awarded a total of 1,500 acres in Ngarara West A and 5,090 acres in Ngarara West C. One owner, Wi Hau Te Pane, who had only been put in the list out of aroha because he was working for Wi Parata at the time, was awarded 20 acres.[516]

Wi Parata represented the remaining 30 owners in court, although Jellicoe kept some involvement as their legal counsel. Henry Field also became involved as an agent, now opposed to Parata and the majority, because his wife Hana had entered the Ngarara West title as a result of succession. By late March 1891, the group of 30 owners had completed a voluntary arrangement among themselves.[517]

The provision for voluntary arrangements gave some control to owners in the court's process. It did not, however, change the fact that customary rights, which were still exercised in common on the undivided part of Ngarara West, had to be converted to individual rights held under a foreign tenure. Essentially, the interests of 29 individual owners were calculated as acreages and situated across multiple subdivisions.[518] We have no evidence about how this work was carried out in detail except that a surveyor was hired to 'make a correct plan', on which they said that they 'clearly and correctly, as well as justly, marked off the portions for those persons having large interests and the portions for those having small interests, as well as the portions for those with very small claims and also having no claims at all'.[519]

514. Otaki Native Land Court, minute book 21A, p 90 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [34])

515. Otaki Native Land Court, minute book 21A, pp 126–128 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [35]–[37])

516. Otaki Native Land Court, minute book 21A, pp 212, 246–247 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [120], [154]–[155]); Walzl, 'Ngatiawa' (doc A194), p 444

517. Otaki Native Land Court, minute book 21A, pp 129, 243–250 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [38], [151]–[158])

518. Schedule, 21 March 1891 (Otaki Native Land Court, minute book 21A, p 245 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [153])

519. Tamihana Te Karu, Wi Parata, and three others to Native Minister, 24 August 1891 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 937–938)

	Ngarara West A (acres)	Ngarara West C (acres)
Awarded in 1887 by Puckey	50	
Partitioned in 1890 (awarded to Inia Tuhata and 7 others)	870	2,290
Wi Hau Te Pane (aroha)	20	
Wi Parata's 'party' of 29 (by voluntary arrangement)	2,135	4,777
Stafford's & Morison's 7 clients (awarded by court)	1,500	5,090
Wi Parata (by voluntary arrangement)	1,550	9,716
Total	6,125	21,675

Table 5: Native Land Court awards estimated as at 23 March 1891. These initial estimates were later adjusted.

It appears from the results that the owners tried to accommodate the various customary uses of each person in various locations across the block. These would have included house sites, cultivations, birding areas, places where certain people went to take eels or other fish, and other customary uses or associations. This meant that individuals' interests were often scattered across a number of sections to reflect their various customary rights as far as possible, rather than consolidated in single sections for more effective farming in the colonial economy. Tutere Te Matau, for example, was to receive 2,765 acres divided across seven subdivisions. Tamihana Te Karu was allotted 2,215 acres located in eight subdivisions. Most individual allocations were smaller and split the interests of owners across two or three sections.[520] There was no provision in the native land laws as at 1890 to allow urupā and other wāhi tapu to be reserved so these were included among the individual allocations.

The position of Wi Parata was a key feature of this agreement. The interests of each person had been calculated for 29 owners but the arrangement was that the thirtieth (Wi Parata) would receive whatever was left over once the court's awards to the owners outside the arrangement were completed. The text of the signed agreement (recorded in the court minutes in English) stated:

> We consent to the Court allocating to each of us the areas specified in the schedule attached subject to variation on the Court allocating to the claimants represented by Mr Stafford and Mr Morison larger or lesser areas than those proposed by Wi Parata and ourselves and described in the book left herewith and we consent to the

520. Schedule, 21 March 1891 (Otaki Native Land Court, minute book 21A, p 245 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [153])

> remainder of the block being awarded to Wi Parata within the terms of the deed already executed by us and also filed herewith.[521]

The 'deed already executed by us' was dated 7 March 1891. It stated (recorded in the court minutes in English):

> We the undersigned being entitled to shares and interests in the Ngarara Block West of unascertained proportions do hereby request and consent, that any rights shares and interests therein belonging to us be awarded and allocated to Wi Parata Kakakura and we hereby relinquish in favour of Wi Parata any claims we may have in the said block, or any part thereof.[522]

Apart from McDonnell's involvement as interpreter, we have no information about how the voluntary arrangement was negotiated among these owners.

One of the main problems was that this voluntary arrangement only covered some of the owners, and that its calculations were made without knowing what the court would award to the others. The 30 owners' schedule of interests therefore had to be amended once the court had made its interlocutory award to the eight owners represented by Stafford and Morison. The court revised the acreages in the voluntary arrangement downwards as a result. It also recorded the revised acreages as part of Ngarara West A (the flat land) and Ngarara West C (the inland hills).[523] The preliminary result as calculated by the court in March 1891, prior to survey and some later adjustments, is set out in table 5.

The 29 owners who signed up to the voluntary arrangement received far less than expected, as they had asked the court to grant 535 acres to the clients of Stafford and Morison.[524] Instead, the court awarded those seven owners 6,590 acres. At this point, the voluntary arrangement should have been amended to reflect this development but instead, as specified in the arrangement, the 29 owners' awards were all adjusted downwards. This left the 29 owners with 6,912 acres. Clearly it was not fair to stick to the 'voluntary arrangement' – such a material difference could not have been anticipated when it was negotiated. In particular, the 29 owners might not have agreed for all the leftover land to be awarded to their rangatira, Wi Parata, if they had known that their awards would be that much smaller than expected.[525]

521. Otaki Native Land Court, minute book 21A, p 244 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [152])

522. Otaki Native Land Court, minute book 21A, p 246 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [154])

523. Otaki Native Land Court, minute book 21A, pp 249–250 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [157]–[158])

524. Otaki Native Land Court, minute book 21A, p 250 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [158])

525. The voluntary arrangement was presented to the court on 21 March 1891. The court made an interlocutory award to the clients of Stafford and Morison on 23 March 1891.

Owners	11	9	6	14	9	6	0	6	1
Sections in which interests were held	1	2	3	4	5	6	7	8	16

Table 6: Fragmentation of owners' interests across multiple sections.

When Jellicoe submitted the voluntary arrangement to the court on 21 March 1891, only nine of the 30 owners had signed it. A further five signed on 23 March 1891, appearing in court and testifying to their consent. The months of April and May were spent in collecting and witnessing the remaining signatures. This was no easy task as some owners were scattered around New Zealand and, where owners had died since 1873, the signatures of all successors had to be obtained as well. While this process continued, the court was occupied in 'marking off subdivisions and allocations on the map'. The last signatory signed as trustee for the grandchildren of Poihipi Hikairo on 2 June 1891.[526] The court stated in its judgment that it had carried out its statutory duty under section 4 of the Native Land Laws Amendment Act 1890 by

> having satisfied itself of the authenticity of the signatures and the bona fides of the transaction by personal examination of all interested who were attending the Court, and in the case of those not so attending by the examination of Lieut Colonel McDonnell, the principal witness and interpreter on the occasion, as well as the evidence on the face of the document.

The court confirmed that the voluntary arrangement would be 'given effect to as part of this judgment'.[527]

Did the voluntary arrangement mean that the owners had finally consented to the division of their land into individualised pieces? In our view, it did not. The majority of owners had tried to have compulsory subdivision removed altogether from the Bill in 1889 (see section 4.6.5.3). This attempt failed. Carroll's compromise removed compulsory partition (which required surveys) but still empowered the court to divide all interests and define new partitions on the block plan prior to survey, without the need for applications from the owners and regardless of their wishes. The majority of owners took action in the Supreme Court to try to stop the Native Land Court from carrying out these powers vested in it by the special Act. This failed as well. The fact that they then sought to exercise as much control over the court's exercise of its compulsory power as possible by entering into a voluntary arrangement does not signify their consent to the division of their

526. Otaki Native Land Court, minute book 21A, pp 244, 248, 277, 279–282 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14) pp [152], [156], [159], [536]–[539])

527. Otaki Native Land Court, minute book 21A, pp 283–284 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14) pp [540]–[541])

individual interests. At every step of the way, however, the majority against subdivision became smaller as the court's process rolled inexorably along.

Also, the voluntary arrangement was flawed for two reasons. First, it was finalised before the outcome of the other awards was known, and, secondly, the attempt to transform customary uses into individualised titles resulted in the scattering of individual interests across multiple blocks. This reduced the economic viability of farming for some of the owners. The Crown later developed consolidation schemes in the 1920s to try to correct such problems but this came too late for the owners of Ngarara West. Many of the sections in Ngarara West A and C were too small for individual farms as well (see below).

4.6.8.2 *The outcome of the court's compulsory powers: individualisation and fragmentation*

The court, acting under the special Act of 1889, created 79 subdivisions in Ngarara West A. Once the court completed its process of defining separate interests in a series of blocks and issued its orders in 1891, the new blocks were surveyed, and each owner bore a share of the survey costs.[528] In his block narratives report, Tony Walzl explained the outcome:

> Ngarara West A has the largest number of subdivisions. It is located in an area that today is mostly east of State Highway 1 and extends to the coast. From south to north, Ngarara West A covers an area that runs from Paraparaumu Beach north of Martin Road, through Otaihanga to include all of Waikanae. Around 24 of the 79 subdivisions created in 1890 were between 9 and 25 acres with one 2-acre section. A further 26 sections ranged from 26 to 60 acres in area. Fifteen sections were between 65 and 120 acres in size. This left 12 sections mostly between 180 and 300 acres in size with three large sections of just over 579, 679 and 1000 acres respectively. When numbers of owners of these sections are examined, 36 of the sections were awarded to sole owners and 18 others to groups of two or three owners. The largest number of owners in one section was 13. It is also clear that various owners were awarded more than one subdivision.[529]

For the hilly inland area of Ngarara West C, the sections were larger, and more than half were awarded to sole owners. Mr Walzl summarised the situation as:

> Ngarara West C (21,527 acres) lies to the west of the route of State Highway 1 and stretches from an area located just to the north of Paraparaumu through to the north of Waikanae. The Ngarara West C blocks run eastwards towards the Crown purchase block (subsequently known as Ngarara East). With the exception of flat

528. Walzl, 'Ngatiawa' (doc A194), pp 572–573; Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues Report', December 2018 (doc A214), pp 400–401; Barry Rigby and Kesaia Walker, summary of Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues Report', 14 January 2019 (doc A214(b)), pp 2–4

529. Walghan Partners, 'Block Research Narratives', November 2018, vol 1 (doc A212), p 265

land immediately to the east of the highway and around the riverflats alongside the Waikanae River as it flows through the Reikorangi Valley, Ngarara West C land is hilly extending into the Tararua Forest Park. Not surprisingly the Ngarara West C sections created in 1890 tended to be much larger in size than other parts of Ngarara West. In addition to the very large C41 block of 8,818 acres, seven other sections of between 600 and 1100 acres in size accounted for just over half of the total acreage of Ngarara West C. A further nine sections ranged from 300 to 550 acres in size and 15 sections were 100 to 300 acres in size. The nine remaining sections of between 30 and 90 acres were located either alongside the highway or on the Reikorangi Valley riverflats. Of the 41 sections of Ngarara West C, 26 were awarded to sole owners with a further five being awarded to ownership groups of 2 or 3 persons.[530]

Thus, Ngarara West had been divided up into 120 sections (not counting the Puketapu block (Ngarara West B) and the Muaupoko block). Just over half the sections were in sole ownership. Most of the sections in multiple ownership were held by 'small whanau groupings' of two, three, or four owners.[531] The court had thus carried out its mandate to separate individual interests on the block plan, as recommended by the Ngarara commission.

As noted above, the attempt to recognise various kinds of customary uses in various places resulted in scattered rather than consolidated interests, especially for those who had long associations with the Waikanae lands. Table 6 shows Mr Walzl's calculations for the number of sections held by the 63 owners, either solely or with co-owners.[532]

Thus, the majority of sections were held by one or two owners (as discussed above), and most owners had interests in four or more sections. Title had become both fully individualised and fragmented. The native land laws provided no mechanisms for collective control or management in either 1873 or 1891. While Ngarara West was undivided, however, customary law could still be enforced and the chiefs had managed the land through decision-making at hui. This was the situation from 1873 to 1886 (see section 4.5.5). But the system was vulnerable because any owner at any time could exercise their rights under the native land laws, which included the right to apply for partition. Several did so in 1886–87. The result was five years of ruinous litigation, compulsory division of individual interests by the court, surveys and subdivision, and fragmentation.

It is helpful at this point to reiterate one of the Crown's concessions in this inquiry:

> The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa/Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa ki Kāpiti. The Crown

530. Walghan Partners, 'Block Research Narratives', vol 1 (doc A212), p 279
531. Walzl, 'Ngatiawa' (doc A194), pp 545–546
532. Walzl, 'Ngatiawa' (doc A194), pp 546–548

> conceded that its failure to protect those traditional tribal structures was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles[.][533]

This is an apt concession but it does not go far enough to cover the compulsory powers conferred on the court to divide all individual interests on the block plan regardless of the owners' wishes, provided for in the Ngarara and Waipiro Further Investigation Act 1889. These virtual subdivisions became legal, surveyed subdivisions once the court process was completed. The fragmentation of Ngarara West would only worsen in the following decades as sections or parts of sections were sold, successions occurred, and partitions continued.

The situation as at 1891 had two primary causes:

- the special Act of 1889, which empowered the court to subdivide all interests regardless of the wishes (and even against the opposition of) the owners; and
- the requirement in the native land laws that individual titles be superimposed on customary tenure, which created scattered, fragmented interests across multiple blocks.

The Crown was well aware of the likely effects of individualised title at the time. The Native Affairs Committee recognised in 1888 that 'the alienation of the greater part of the block is likely to be effected at an early date'.[534] The committee therefore recommended an embargo on sales for a year until a remedy for the petitioners was found, such was the inevitable effect once land held in common was individualised. Richard Hobbs, member for the Bay of Islands, implied that his parliamentary colleagues were inconsistent in opposing the use of compulsion in the 1889 Bill: 'As to the question of subdivision, that was a policy they had all been, he might say, clamouring for for years – that the Native title should be individualised'.[535] Individualisation without any provision for some form of collective management created a system in which rapid, large-scale, and uncontrolled sales were inevitable, fueling the growth of settler farming and the colony itself.

The Native Land Laws Commission reported to the Governor in May 1891. Commissioners W L Rees and James Carroll stated in their report:

> Without doubt, all lands in New Zealand were held tribally. The certificates of title should have been issued to the tribes and hapus by name, and some simple method of public dealing with the land provided, analogous to that which had always been recognised and acted upon in the early days, and which, in the ownership of land and dealings of all corporate bodies, had been practised from time immemorial by civilised nations. Had this been done the difficulties, the frauds, and the sufferings,

533. Crown counsel, closing submissions (paper 3.3.60), p 21
534. 'Petition of Inia Tuhata', report, 27 August 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 763)
535. Richard Hobbs, 3 September 1889, NZPD 1889, vol 66, p 254

with their attendant loss and litigation, which have brought about a state of confusion regarding the titles to land, would never have occurred.[536]

Instead, the commissioners stated, 'no method of corporate or tribal dealings' with the land was allowed, and the principle of individualisation was introduced in the early native land laws and taken to its extreme in the Native Land Act 1873. The result had been 'confusion, loss, demoralisation, and litigation without precedent'. The 'strength which lies in union was taken from them' and the 'authority of their natural rulers was destroyed'.[537] The commission warned:

> Of all the purchase-money paid for the millions of acres sold by the Maoris not one sixpence is left. Their remaining lands are rapidly passing away. A few years more of the Native Land Court under the present system, and a few amended laws for free-trade in Native lands, and the Maoris will be a landless people.[538]

We address the impact of individualisation and the rapid alienation of land in Ngarara West in the 1890s in section 4.7. Next, we address the attempts of various Te Ātiawa/Ngāti Awa groups to seek a further remedy from the Crown in 1891–92, either to undo the effects of the rehearing or to get back into the title after their omission back in 1873.

4.6.9 Further attempts to obtain remedies from the Crown

4.6.9.1 *The right to apply for a rehearing was taken away*

The right to apply for a rehearing ought to have been the first remedy available to those aggrieved about the outcomes of the compulsory division of all individual interests carried out by the court. For Inia Tuhata and the Otaraua individuals who had applied for partition in 1887, the 1890 hearing *was* a rehearing and there was no further recourse for them. In fact, these people appear to have been satisfied with the result. None sought a further remedy from the Crown. But for those who had not sought partition in 1887, Judge Puckey had left their land undivided in a single block. Under the ordinary course of the law, those people would have been able to apply for partitions in the future by a court of first instance and, if dissatisfied with the outcome, could have applied for a rehearing or (after 1894) appealed to the Native Appellate Court. This right, however, was taken away from them by the Ngarara and Waipiro Further Investigation Act 1889. This was because the court that subdivided their interests was technically a rehearing court, even though it was not rehearing any applications from them for partition.

This question was tested by Tamihana Te Karu, who was dissatisfied despite having signed up to the voluntary arrangement. As noted above, the results had been quite different than expected due to the contraction of each person's share following the court's awards to those outside the agreement. Chief Judge

536. AJHR, 1891, G-1, p vii
537. AJHR, 1891, G-1, pp vii, x
538. AJHR, 1891, G-1, p x

Seth-Smith turned down Tamihana Te Karu's application for rehearing. Te Karu's lawyer, T R Ellison, wrote to the chief judge in May 1892 questioning this decision. Ellison stated that it 'has been taken for granted to be a Rehearing Court; and that no doubt is the reason why you have passed over the application above without considering it'.[539] Ellison's doubts on this point were dismissed by Seth-Smith. He instructed the registrar to write to Ellison:

> Write Mr Ellison that a letter dated 4th June 1891 was received asking for a rehearing of the Ngarara case. The signatures are not attested. As the decision complained of was given upon a rehearing ordered by statute there appears to be no jurisdiction to entertain the application.[540]

Ellison asked the chief judge to reconsider this decision. Tamihana Te Karu was not, said Ellison, seeking a 'rehearing upon a rehearing' because the balance of the block was divided for the *first* time in 1891, and the court that did so was a 'new' court with a 'new subject matter' and new parties before it, even if it was still acting under the special Act of 1889:

> The first attempt to divide the entire balance of the block was made in 1891 and that is one of the most important reasons why I have contended that the Court of 1891 was in reality an original Court just as the Court of 1887 was held to be such.
>
> It would also be taken that the Court of 1891 was conducted under the control of the Act of 1888 [*sic* – 1889] . . . otherwise the Court would not have compelled the native owners, other than Field and party, to have their interests ascertained & defined. This however was done and . . . the Block in its entirety was subdivided for the first time. If the above is true then it must be admitted that the Court of 1891 was not a continuation of the previous Court but a separate and new Court . . .[541]

The chief judge was unmoved and remained of the view that no rehearing could be granted. The only alternative remedy, therefore, was to appeal to the Crown and/or petition Parliament.

Thus, the injustice arising from the conferral of compulsory powers on the court under the Ngarara and Waipiro Further Investigation Act 1889 was compounded because the Act deprived the owners of the very important right to apply for a rehearing. Without that right, the only safeguard in the native land laws for those unhappy with a court decision was removed.

539. T R Ellison to Seth-Smith, 21 May 1892 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 450)

540. Seth-Smith, minute, 21 May 1892 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, p 458)

541. T R Ellison to Seth-Smith, 30 May 1892 (Crown Forestry Rental Trust, MLC document bank (doc A70(d)), vol 16, pp 455, 456–457)

4.6.9.2 *Appeals to the Crown and petitions to Parliament*

Claimant counsel submitted that the Crown failed in its Treaty duties because it 'failed to act in response to the petitions and letters of complaint with respect to the rehearing'.[542] The first point to note about these petitions is that there were none from Inia Tuhata and the Otaraua individuals who had applied for partition in 1887. Nor were there any petitions or appeals to the Crown from the seven individuals who had withdrawn from the early attempt to reach a voluntary arrangement in 1890, and who were represented in court by Stafford and Morison. These owners were presumably satisfied with the awards they had obtained or saw that no benefit could be obtained from further, expensive appeals. The petitions came from the other side, those who had signed the voluntary arrangement and who objected to the awards that the court had made to others. There were also petitions from two of the groups who had failed to get a remedy under section 13 of the Native Land Laws Amendment Act 1889: descendants of Wi Kingi Te Rangitake; and the grandchildren of Ihipera Nukiahu (Pakewa). None of these parties had yet given up hope of securing a remedy from the Crown.

According to the Native Land Laws Commission's report in 1891, the situation had become dire by this time:

> The pernicious consequences of Native-land legislation have not been confined to the Natives, nor to the Europeans more immediately concerned in dealing with them for land. The disputes thence arising have compelled the attention of the public at large, they have filled the Courts of the colony with litigation, they have flooded Parliament with petitions, given rise to continual debates of very great bitterness, engrossed the time of Committees, and, while entailing very heavy annual expenses upon the colony, have invariably produced an uneasy public feeling.
>
> In one year – 1888 – there were eight Acts passed, and in 1889 nine, especially dealing with Maori lands and Courts, besides others partially touching them; and, again, others were introduced but thrown out or abandoned. There were in ten years, from 1880 to 1890, more than a thousand Native petitions presented for consideration to the House of Representatives.[543]

As noted above, the commission recommended the establishment of a specialised six-person board, three appointed by the Crown and three elected by Māori, to (among other things) deal more justly with petitions from Māori.[544] This recommendation was not carried out and the petitions from aggrieved Te Ātiawa/Ngāti Awa were referred to the Native Affairs Committee in the usual way for inquiry and report.

542. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 50
543. AJHR, 1891, G-1, p xi
544. AJHR, 1891, G-1, pp xxiii–xxiv

4.6.9.3 *Petitions from owners who had signed the voluntary arrangement*

Most of the petitions were from owners who had signed the voluntary arrangement but were aggrieved at the final outcome once all awards had been determined. Bitter divisions had become entrenched, fuelled in part by a genuine belief that people who either had no rights or only limited rights had obtained more than was fair in the rehearing and subdivisions carried out by the court in 1890–91.

Most of the petitioners also appealed directly to the Native Minister, the Premier, or both. By this time the Atkinson Government had been defeated and the Liberals were in power, with John Ballance as Premier and A J Cadman as Native Minister. Tamihana Te Karu, Tutere Te Matau, and Paretawhara sent a series of letters to the Premier and his colleagues, requesting a 'further hearing of the subdivision' because they disagreed with some of the awards that had been made.[545] The undersecretary, T W Lewis, recommended to the Native Minister that 'all the writers be told that the last hearing was a final one granted by Parliament & Govt cannot interfere'.[546] Cadman agreed with Lewis, and this became Crown policy towards all the letters and petitions from that point onwards. Tamihana Te Karu and Wi Parata appealed to Cadman in August 1891, asking him to change his mind but without success.[547]

At the same time as these appeals were made to Ministers, petitions were sent to Parliament. The petition of Wi Parata and 22 others asked for a commission of inquiry or a committee to inquire into the court's judgment in favour of Inia Tuhata. It also asked 'that their claims should be reheard by a competent tribunal'. Clearly these petitioners wanted an alternative body to the Native Land Court, as did many Māori at that time who sought systemic reform. The Native Affairs Committee reported on 16 July 1891 that it had no recommendation to make because 'the matter referred to in this petition has already been dealt with under special legislation'.[548]

This petition having failed, Tamihana Te Karu filed petitions in conjunction with others seeking a rehearing in the Native Land Court. One of those petitions, filed by Tamihana together with Tutere Te Matau, Parewhara, Rakapa Te Puke, and Pohipi, pointed out that the Ngarara and Waipiro Further Investigation Act had ordered a rehearing of the applications of Inia Tuhata and others. The petitioners, however, held undivided interests in the remainder of the block and had not filed one of the applications to be reheard. Nonetheless Judges Mair and Scannell, 'claiming to act under the provisions of the said Act in making an order of partition on the applications in the said Act directed to be reheard[,] determined what as among your Petitioners and the several other Native owners were your Petitioners' relative shares or interests in such land and made an order accordingly'. Tamihana

545. Walzl, 'Ngatiawa' (doc A194), p 538; Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 945–953

546. T W Lewis, minute, 7 August 1891; A J Cadman, minute, 7 August 1891 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 944)

547. Tamihana Te Karu, Wi Parata, and three others to Native Minister, 24 August 1891 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 937–939)

548. AJHR, 1891, I-3, p 10; Walzl, 'Ngatiawa' (doc A194), p 535

and the others argued that their homesteads and cultivations had been awarded to others but they could not apply for a rehearing in the usual way:

> [Y]our petitioners therefore submit that a grave injustice has been done them and they are advised by the chief judge of the Native Land Court and believe that the state of the law is such that he has no jurisdiction or power to entertain an application for a rehearing of the several matters the subject of the said adjudication and that notwithstanding the fact that they were not parties to the applications by the Ngarara & Waipiro Further Investigation Act 1889 directed to be reheard[,] and the ascertainment, subdivision and partition of their relative shares and interests in the said land only became indirectly necessary as incidental or collateral to the exercise of the powers conferred upon the Native Land Court by the said Act.[549]

It was certainly the case that these owners along with many others had become caught up in the court's compulsory division of their interests into separate blocks on the plan, even though they had filed no applications and had in fact tried to stop it in the Supreme Court. The Act ordered a rehearing, and everything done by the court was considered to be a rehearing whether the court was acting under section 2 (the rehearing of 1887 applications) or section 4 (division of all interests in the block). Hence Chief Judge Seth-Smith had declined Tamihana's application for rehearing. Petitions to Parliament offered the only potential remedy. As discussed above, the effect of the Act in removing the right of rehearing for everyone, and not just the 1887 applicants, was a serious matter when the Act empowered the court to subdivide all interests regardless of the wishes – and in fact despite the opposition – of the owners.

The Native Affairs Committee seems to have agreed that there was an issue requiring investigation. The committee referred both of Tamihana Te Karu's petitions to the Government for further inquiry,[550] which took no further action in response to these petitions. A third petition was the subject of inquiry by the Native Affairs Committee a year later in 1892. At this stage, the adherence of Tamihana Te Karu and his co-petitioners to the voluntary arrangement was considered the crucial factor in turning down their petition:

> On making full inquiry into the matter of this petition, the Committee found that the petitioners had signed documents which in effect consented to the allocations made by the Native Land Court – in fact, that they had made themselves party thereto. I am therefore directed to report that the Committee has no recommendation to make.[551]

549. Petition of Tamihana Te Karu and four others, no date [August 1891] (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 934–936)
550. Walzl, 'Ngatiawa' (doc A194), pp 535–536
551. AJHR, 1892, I-3, p 9; Walzl, 'Ngatiawa' (doc A194), p 536

Under the voluntary arrangement, Tamihana Te Karu was supposed to receive 2,215 acres located in eight subdivisions.[552] As noted above, this arrangement was finalised before the court had made the awards for the owners outside of it, and it was in fact subject to significant revision later by the court as a result. After the figures were revised downwards as a result of those awards, and the court had fixed locations on the block plan, Te Karu received 1,653 acres in six sections.[553] These changes were not part of the voluntary arrangement but were made by the court. The fatal flaw in the voluntary arrangement was that only some owners were involved and the quantum of land available for them was undecided, hence the court had to alter the arrangements once it had finalised its awards to the other owners. It appears to have done so without further consultation with the signatories to the arrangement, as far as we can tell from the minute book. Wi Parata and Tamihana Te Karu explained to the Native Minister: 'This plan was brought before the court but the judges refused to accept it – they rejected our just arrangement and followed either their own course in the matter or the advice given them by the lawyers acting for the other side.'[554]

Judge Scannell was asked to comment on Tamihana Te Karu's case. He advised that Te Karu was not awarded his cultivations because his occupation there was relatively recent, he had 'as good or as bad a claim to other parts as to this', and the court considered it undesirable to locate Te Karu near Inia Tuhata.[555] These two men had quarrelled badly in the events leading up to the partition hearing in 1887.[556] As noted earlier (in section 4.6.8.1), entering into the voluntary arrangement did not in fact mean that the owners had accepted that their lands should be individualised; it was simply the only alternative to leaving their interests entirely in the hands of the court.

All petitions were turned down and the Crown continued to maintain its policy of no further remedy for the rest of the decade.[557] Ironically, the Native Affairs Committee finally reported in July 1891 on the 1889 petition of 22 owners, presented under the name of Watene Te Nehu. This petition had protested against the inclusion of compulsory subdivision and other clauses in the Ngarara and Waipiro Further Investigation Bill. The committee now reported on it two years too late. Unsurprisingly, the committee had no recommendation to make about the petition.[558] The provisions for a compulsory sale to pay the costs of the Ngarara commission had in fact been removed from the Bill in 1889, but the provision for a

552. Schedule, 21 March 1891 (Otaki Native Land Court, minute book 21A, p 245 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), p [153])

553. 'Schedule of awards made by the Court confirming the voluntary arrangement', 2 June 1891 (Otaki Native Land Court, minute book 21A, pp 291–292, 295–296 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 14), pp [548]–[549], [552]–[553])

554. Tamihana Te Karu, Wi Parata, and three others to Native Minister, 24 August 1891 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 938)

555. Walzl, 'Ngatiawa' (doc A194), pp 539–540

556. Anderson and Pickens, *Wellington District* (doc A165), p 296

557. Walzl, 'Ngatiawa' (doc A194), pp 541–542

558. James Wilson, 3 September 1889, NZPD 1889, vol 66, p 250; AJHR, 1891, I-3, p 9; Walzl, 'Ngatiawa' (doc A194), pp 499–500

compulsory identification and division of all individual interests on the block plan (Carroll's compromise) remained in the Act.

4.6.9.4 *Petitions from section 13 applicants*

Rako Eruera Wiremu Kingi, grandson of Wi Kingi Te Rangitake, presented a petition on behalf of himself and his hapū. The other petition came from the children and grandchildren of Ihipera Nukiahu (Pakewa) of Puketapu. These petitioners no longer sought a rehearing of the original 1873 title. Rather, they asked for a legislative amendment to allow their particular claims to be heard as 'an original application on the merits'. This was in response to their inability to get back into the title through section 13 of the Native Land Laws Amendment Act 1889. Alternatively, they asked for a special commission of inquiry to hear their claims or compensation for the 'loss of the land through the action of the Native Land Court'.[559] Unusually, the committee inquired into Rako's petition twice: the first time the committee stated that it had no recommendation to make; and the second time it reiterated its earlier decision.[560] This petition was therefore disregarded by the Crown, and a meeting with Cadman in early 1892 did not get the petitioners any further.[561] The petition of Jane (also known as Jini) Clements and Mere Ngapaki Hughes received a more favourable hearing because the evidence showed that they were landless. The committee therefore referred their petition to the Government for inquiry.[562] Ihakara Te Ngarara, the Puketapu chief who had blocked the inclusion of this whānau in the Ngarara title in 1873, wrote to Cadman in May 1892 opposing any further action on the petition.[563]

The Crown took no action in response to all the petitions. Mr Walzl noted that the petition of Mere Ngapaki Hughes and Jini Clements was raised in Parliament in 1894 and 1903. In 1894 the Government was asked whether it had inquired into the petition as recommended by the select committee. Premier Seddon, who had replaced Cadman as Native Minister, responded that 'the Government had decided that they could not, as a Government', do anything about it but that members could try to insert a provision in a relevant Bill if they wanted to do so. In 1903, the member for Hawera asked the same question: had the Government inquired further as recommended?[564] The Native Minister at that time, James Carroll, replied that there had already been a full inquiry resulting in special legislation, and the Ngarara and Waipiro Further Investigation Act 'did not authorise an investigation of the claim of Mrs Clements and her family'. He added: 'Of course, it might be true that Mrs Clements and her family had suffered an injus-

559. AJHR, 1891, I-3, p17; petition of Mere Ngapaki Hughes and Jini Clements, no date (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 943)

560. Walzl, 'Ngatiawa' (doc A194), p 541

561. Rako Eruera Wiremu Kingi to Cadman, 27 February 1892 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 927)

562. Walzl, 'Ngatiawa' (doc A194), p 535

563. Ihakara Te Ngarara and others to Cadman, 30 May 1892 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 925–926)

564. Walzl, 'Ngatiawa' (doc A194), p 541

tice, but the Government could take no action in the matter in the face of the House having already passed special legislation affecting that particular block.' Astonishingly, Carroll suggested that 'the only course open' was for a petition to Parliament seeking an investigation, but 'he offered no opinion on the matter'.[565] This was an unusual response given that a select committee had already recommended favourably on their earlier petition.

As far as we are aware, there were no further petitions from this particular whānau. A petition from Raniera Erihana was dismissed in 1892 with a 'no recommendation' verdict from the Native Affairs Committee.[566] A petition from the three siblings of Inia and Rangihanu Tuhata was filed in 1896, which received a more favourable response. The committee recommended this petition to the Government for its consideration.[567] No action, however, was taken by the Crown and by that time there had been large-scale alienation of land within both the Ngarara West A and Ngarara West C blocks. For that reason alone, any petition filed after 1891 was highly unlikely to succeed. Even in 1891, Tamihana Te Karu and Wi Parata tried to reassure the Native Minister that resolving their issues need not affect 'the portion of the block upon which the Government has claims'.[568] The Crown had already begun to purchase interests in the newly subdivided Ngarara West C.

4.6.10 What was the outcome of five years of litigation and attempts to obtain remedies?

The many petitions and appeals to the Crown from 1887 to 1891 raised issues about fairness and injustice, with which the Crown and Parliament had to grapple. The head of the Native Department thought the fairest solution was a rehearing of the original 1873 title. His view was overruled by the Native Minister, Edwin Mitchelson, after advice from the former Ngarara commissioner, Chief Judge Seth-Smith. The Native Affairs Committee in 1888 considered it unjust that two individuals were only awarded four acres. Chief Judge Macdonald, on the other hand, said that there was an injustice in awarding individuals more than they were entitled to in custom, even if it resulted in awards that were too small for customary subsistence let alone farming in the new economy. To some extent this became the focus of the debate within the community of owners as various groups tried to maximise their own awards and reduce those of others who – they considered – had smaller rights or no rights at all. But this focus on the size of individual awards concealed the underlying injustice which gave rise to all these problems, which was individualisation of title itself. Individualisation was forced on a people that did not want it, and the compulsory power conferred on the court in the special Act of 1889 was only a more extreme form of a systemic problem, not an

565. James Carroll, 30 September 1903, NZPD 1903, vol 126, p 91
566. Walzl, 'Ngatiawa' (doc A194), p 536
567. Petition of John Damon (Hone Tuhata), 22 September 1896 (Crown Forestry Rental Trust, petitions and purchase documents (doc A67(b)), pp 10447–10458); AJHR, 1896, I-3, p 26
568. Tamihana Te Karu, Wi Parata, and three others to Native Minister, 24 August 1891 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 938)

isolated example. The Native Land Laws Commission's report in 1891 understood these points very well.

After five years' attempts to obtain remedies, the results were not positive. Those who had been left out of the title in 1873 never received the full and independent inquiry that their complaints clearly required. In fact, they obtained no redress whatsoever. The Ngarara commission was too focused on the situation of the Tuhata whānau, mostly because of its terms of reference, to consider their situation properly. Their claims were left out of the rehearing granted under the Ngarara and Waipiro Further Investigation Act 1889. Section 13 of the Native Land Laws Amendment Act 1889 was not the remedy they had hoped for, and none of their applications were granted. The chief judge considered that most of the issues raised by the applicants really required a rehearing on the merits. Subsequent petitions obtained no action from the Crown, which stuck to its position that special legislation had been granted already in 1889 and could not be considered a second time.

For those who did get into the title in 1873, Wi Parata and the majority of owners tried to prevent partitioning in 1887 but could not because of the rights conferred on individuals by the native land laws. They did manage to avoid a rehearing in 1888 because the chief judge accepted that there were no adequate grounds for a rehearing. They then tried unsuccessfully to prevent:

- the passage of special legislation to provide a rehearing of the partition applications in 1889;
- the inclusion of compulsory power for the court to divide all individual interests into blocks on the plan in the special legislation; and
- the court's exercise of that power regardless of their opposition in 1891 (seeking a writ of prohibition from the Supreme Court, adding to the growing expenses).

For these people, their overwhelming wish was to keep the tribal estate undivided and intact from any alienations apart from leases. Some individuals did do well in respect of their awards in 1891, especially the chief Wi Parata who obtained by far the largest single award, located in the hilly, forested lands of Ngarara West C. But this was a pyrrhic victory, a victory that was so damaging that it was actually a defeat. As the Native Land Laws Commission found in 1891, the consequence of individualisation was that the 'strength which lies in union was taken from them' and the 'authority of their natural rulers was destroyed'.[569] The individualisation and fragmentation of title in 1891 resulted in rapid alienation, as we discuss in the next section. We agree with claimant counsel that the

> impact of the Ngarara Block litigation was not only to remove land from the control of hapū and iwi but also to place those who did acquire title in a weakened position. It is beyond peradventure that there were considerable costs involved in participation in land court hearings: court costs, survey costs and the costs associated with travel to

569. AJHR, 1891, G-1, pp vii, x

> Court (particularly when the Court sat in Wellington). Moreover, the individualised land titles were often small and uneconomical.[570]

The impact of the compulsory power conferred on the court was exacerbated by the large burden of costs that had accumulated by 1891 as a result of five years' litigation, to which would now be added survey costs as the awards on paper had to be translated into surveyed sections on the ground.

For the relatively small minority who had sought partition in 1886–87, the 1890 rehearing was a vast improvement in terms of the size of their awards, but they too now faced the pressures of debt, individualisation, and fragmentation. We agree with claimant counsel that none of the owners 'truly benefitted' from the rehearing due to the impact of the costs and individualisation on their ability to retain their land.[571]

All these developments showed the flaws in the 1873 title and also in the wider native land laws. We comment further on these when we make our Treaty findings at the end of the chapter.

Finally, we note the legacy of bitterness and division that followed upon the initial individualisation of title in 1873, the alienation of almost the whole of the Muaupoko block by 1887, and the long, drawn-out contest of 1887 to 1891. Ben Ngaia told us that the community was so divided that the 'beach' people would watch tangi from outside the fence rather than go onto Whakarongotai Marae.[572] These long-lasting effects came partly from the split when Wi Parata's people moved from Tuku Rakau to take advantage of the new railway, but also from the rapid alienation of the Muaupoko block and the events of the Ngarara West partitions and rehearing.[573] Ane (Ani) Parata, who is a descendant of Eruini Te Marau, referred in her evidence to the 'feud' that developed between the descendants of her tupuna and Wi Parata's descendants. These chiefs tried to heal the breach, she said, by arranging a marriage between two of their grandchildren but the bitterness persisted.[574] Mrs Parata told us that her own marriage to Te Pehi Parata was controversial at the time:

> when I married Pehi, 'Oh, the Beach Road and Parata's are married.' You know, we had children. We have three children. You know I used to be quite smart and say, 'Well, what do you want me to do, cut my kids in half?' You know, so that was always just something that we had to live with, all my children have had to live with and so you know let's hope this hearing will make a difference for us in the future. I definitely believe that Pehi would want that you know.[575]

570. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 20
571. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 51
572. Transcript 4.1.16, pp [595]–[596]
573. See, for example, Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), pp 33–35.
574. Transcript 4.1.16, p [456]; transcript 4.1.17, p 119
575. Transcript 4.1.17, p 115

4.7 What Was the Impact of Individualisation on the Ability of Te Ātiawa / Ngāti Awa to Retain their Lands after 1890?

4.7.1 Introduction

By 1900, the Māori owners of Ngarara West had lost almost 40 per cent of Ngarara West A and 71.3 per cent of Ngarara West C.[576] These highly significant inroads into the tribal estate had occurred in just 10 years and despite the wish and will of the tribal community, the majority of which had clung to their undivided lands until the court's exercise of its compulsory powers in 1891. There was a significant degree of agreement among the parties as to the causes of this land loss. The claimants argued that the result of individualisation and fragmentation of title, without any provision for collective management in the native land laws, was rapid, large-scale alienation of land. The Crown mostly agreed with this position and conceded that its failure to protect traditional, tribal structures was in breach of Treaty principles. The Crown also conceded that the cumulative effect of its acts and omissions was to render Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless. We see the full force of the Crown's concessions in this section of our chapter. Crown counsel, however, disagreed with the claimants on some points, especially on (a) the effectiveness of protective mechanisms and (b) the impact of survey and other costs on alienation.

This debate between the parties concerned the twentieth century as well as the late nineteenth century, because the impacts of individualisation, fragmentation, and the costs of obtaining title continued seamlessly through the 1890s into the 1900s. The twentieth-century dimension of these issues will be addressed in chapter 6. In the present chapter, we examine the situation in the 1890s.

4.7.2 Crown purchasing

Before 1891, the Crown had purchased the Wainui block, the Whareora block, 35 per cent of Ngarara (the Maunganui block), and 37.5 per cent of the Muaupoko block. This is essential context to further Crown purchasing in the 1890s. It is fair to say that the Crown had showed no great desire to acquire land at Waikanae since 1875 but this changed as title was finalised for the Ngarara West subdivisions. The Native Minister agreed in September 1890 to buy about 5,000 acres for a fruit growers' association, and a land purchase officer was sent to sound out each of the individual owners on the possibility of sale. The owners on the seaward side of the railway line, which comprised the flatter, more arable sections of Ngarara West A and Ngarara West B, 'were completely opposed to selling to the Crown'.[577]

The Crown agent, J W Butler, therefore focused his efforts on Ngarara West C. Most of the land east of the railway was 'very broken and only fit for pastoral purposes; the soil for the most part is not of first class quality'. Here, the individual owners were more willing to sell but they wanted market prices for their land. Butler suggested that unless the Crown was 'prepared to give the market value or the dealings of private individuals are prohibited altogether', the Crown would

576. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 25, 39
577. Walzl, 'Ngatiawa' (doc A194), p 552

not be able to buy up the land. He added that 'unless the pre-emptive right of purchase is resumed by the Crown our operations will only be successful in localities remote from settlement'.[578] The Crown did have power to prohibit private purchasing and impose pre-emption on particular blocks under the Government Native Land Purchases Act 1877,[579] but the Government did not exercise that power in respect of Ngarara West.

Essentially, the Crown's main problem was that Waikanae was too close to Wellington and therefore market values favoured private buyers, not the Crown. Butler estimated market values for each of the Ngarara West C blocks but he cautioned: 'It must however be borne in mind that owing to the abnormal demand for land in the vicinity of Wellington at the present time, my values which are only approximate might be considerably exceeded especially near the railway line'.[580] What Butler under-estimated, however, was the need of the owners to sell quickly, at least in part due to mounting costs and corresponding debts. Wi Parata was not willing to sell when approached by Butler in July 1891 but changed his mind and sold 5,000 acres of Ngarara West C41 for £1 an acre a month later. In addition, the Crown was able to purchase sections C26–C39 and parts of C24 and C25 in September 1891, with a total area of 3,777 acres. Butler considered this to be the flattest, highest quality land in Ngarara West C and said that it could fetch 50 shillings (£2½) on the market. The Crown paid £4,343 11s for these sections, which fell well short of what Butler thought private buyers would have paid for them.[581]

The Crown had thus purchased 8,777 acres within three months of the court's final decision in June 1891. This area turned out to be slightly smaller upon survey, comprising 8,242 acres or 37.7 per cent of Ngarara West C. The Crown's sections 'formed a bloc of land in the hills to the east of Waikanae township and down into the Reikorangi Valley', which 'linked up with the previously Crown purchased Ngarara East [Maunganui]'.[582] The Crown leased its land to small farmers and to the fruit growers who had first approached it seeking a Crown purchase.[583] Claimant Apihaka Mack criticised the Crown for removing the owners' opportunity to obtain 'constant revenue' from long-term leases.[584]

The Crown did not attempt to buy up more of the Ngarara West subdivisions. Private purchasers had approached the Government about their interest in buying land at Waikanae,[585] and the Government did not seem to have a strong interest in obtaining any more land there. Otherwise, it could have used its monopoly powers

578. W J Butler, report, 13 July 1891 (Walzl, papers in support of 'Ngatiwa' (doc A194(a)), pp 987–988)

579. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 576–579. The powers established in the 1877 Act were replaced in 1892 in the Native Land Purchases Act 1892, which repealed the 1877 Act.

580. W J Butler, report, 13 July 1891 (Walzl, papers in support of 'Ngatiwa' (doc A194(a)), p 987)

581. Walzl, 'Ngatiawa' (doc A194), pp 553–554; Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 961, 973–991

582. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 39

583. Chris & Joan Maclean, *Waikanae*, 2nd ed (Waikanae: Whitcombe Press, 2010), p 68

584. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), p 41

585. Walzl, 'Ngatiawa' (doc A194), pp 552–553

under the new Native Land Purchases Act 1892 to prohibit all private transactions. Instead the Crown left the field clear for private purchasing. Thus, although the Crown received an offer in March 1892 of five sections and part of a sixth (1,160 acres) from three owners (Timoti Te Uru Tauwhare, Te Kiri Haehae, and Ngapari Te Kati),[586] it declined to buy. First, the assistant surveyor-general had valued the sections and the Crown was only prepared to pay one-third of the prices in his valuation. This must have confirmed officials in their view that it was better to concentrate their efforts on more remote areas. Secondly, the issue of access was raised for the first time, as far as we are aware. Officials considered that it would be difficult to get roads to two of the sections, Ngarara West A66 (71 acres) and A69 (41 acres).[587] Not only had the compulsory division of interests fragmented the interests of some owners over multiple blocks, but access had not been a factor in the court's final decisions.

In 1894 the Crown reintroduced pre-emption nationwide. Nonetheless, it still chose not to purchase any more land at Waikanae and allowed private purchases to continue there by a system of exemptions. This system was introduced in 1895, by which private persons could apply to the Governor-in-Council (essentially Cabinet) for an exemption in respect of a particular piece of land. The exemption would then be gazetted.[588]

Although the Crown did not make any purchases under pre-emption, it did establish a native township on Ngarara West C41 in 1899, using the Native Townships Act 1895. This is discussed in chapter 6.

4.7.3 Private purchasing

In 1897, H R Elder referred to a settler custom that had arisen since 1891, the 'Waikanae custom of section grab – no matter who it may hurt'.[589] This referred to the complicated web of leases and debts employed by a few local families in an intense competition to obtain Ngarara West sections from their Māori owners.[590] In respect of Ngarara West A, Tony Walzl explained:

> By 1900, 30 purchases had occurred. Families featuring as multiple land purchasers were the Field, Elder and Morison families. Both smaller and larger sections were acquired. When a map for 1900 is examined, it can be seen that the purchases were concentrated in three areas: north of Paraparaumu Beach; around Otaihanga (both

586. Timoti Te Uru Tauwhare, Te Kiri Haehae, and Ngapari Te Kati to Morpeth, 12 March 1892; Sheridan to surveyor-general, 21 April 1892 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 968, 971)

587. Minute, 25 July 1892, on assistant surveyor-general's report; Sheridan to surveyor-general, 21 April 1892 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 962, 968)

588. Hearn, 'One past, many histories' (doc A152), pp 660–661

589. Elder to W H Cruickshank, 15, 17 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 291)

590. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 273–292

sides of the railway); and towards Waikanae Beach, just back from the coast. The purchases totalled 2,424½ acres (38.5%).[591]

The same private buyers were hard at work in Ngarara West C in the 1890s. Settlers acquired 19 sections with a total of 7,360 acres, comprising one-third of the block's total area. Ten of these purchases were conducted by the Field and Elder families. As a result of both Crown and private purchases, only 6,277 acres (28.7 per cent) of Ngarara West C remained in Māori ownership by 1900.[592]

The majority of private purchasing took place in 1892 and 1893 (28 purchases). When the Crown reintroduced pre-emption in 1894 the rate of purchasing dropped to two to four per year, presumably due to the requirement that private purchasers had to go through the process of obtaining an exemption from the Crown for each purchase.[593]

Alongside purchasing, a number of sections were leased to settlers, including to the Fields, Elders, and Morisons. There had already been a significant amount of informal leasing before 1891 but leasing accelerated once title was both finalised and fully individualised.[594] Wi Parata and other owners wanted some European settlement to foster economic development but they preferred leasing to purchases. Most of the new leases were taken out after the Crown reintroduced pre-emption in 1894. The Ngarara West A leases tended to be for the small blocks. These leases in combination with purchases enabled settlers to concentrate their holdings in a way denied to the Māori owners under the native land laws.[595] The growth of leasing was the only potential bright spot for the future, so long as the owners could prevent leases from turning into purchases – lessees usually doubled as major creditors, especially the Fields and H R Elder. Norman Elder, son of H R Elder, described how that process worked:

> The tenant in taking over the land took over the responsibilities linked with it, so that in a sense he assumed the former tribal obligations, as of a chief; any section owner in need of assistance naturally appealed, as of right, to H R E[lder] or C B M[orison], if not both. Rent does not seem to have been necessarily paid periodically; it could accumulate with the occupier to be drawn on when wanted, so that he became essentially a banker. When overdrawn, payouts soon developed into advance instalments towards the eventual purchase of the freehold.[596]

Some settlers also used leases to get around the Liberal Government's anti-aggregation laws, which were designed to prevent speculation and encourage

591. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 25
592. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 39–40
593. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 113–114; Hearn, 'One past, many histories' (doc A152), p 660
594. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 66–68
595. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 97–101
596. Norman Elder, 'Waimahoe', vol 31, p 18 (C & J Maclean, *Waikanae*, p 76)

closer settlement by limiting the amount of land any one person could acquire. No person could acquire more than 640 acres of first-class land and no more than 2,000 acres in total. The Fields evaded these laws by splitting their land portfolio between W H Field, his wife Isobel, Hannah Field, her husband Henry, and another Field brother called Charley. H R Elder leased rather than purchased parts of his Waimahoe estate in the Reikorangi valley for the same purpose, acting in concert with his brother-in-law, C B Morison. Dr Rigby commented: 'Neither Elder nor Morison tried to hide the fact that Waimahoe Station after 1893 exceeded 2,000 acres.'[597] According to the Stout–Ngata report in 1907, there was nothing in the law to prevent the aggregation of leasehold land when leasing from Māori.[598] Elder's leases included seven sections and two part-sections on 1,000-year terms, most of which were taken out in 1892–93. These leases were in effect permanent alienations. Elder paid an upfront sum to his 'lessors' and then a peppercorn rental (one peppercorn per year).[599] It was not until 1895, when the Crown was empowered to exempt purchases or leases from pre-emption, that the anti-aggregation requirements applied directly to acquisitions of Māori land, including leasing.[600]

One of the claimants, Hauangi Kiwha, explained her experience in trying to find out what had happened to the land of her great-grandfather, Te Hira Maeke:

> he was the sole owner of a section of land in Ngarara West C25. So, I thought that I would find out what happened to it. I contacted the Land Registry and was told that it was still in his name. Lands and Survey in turn told me that I should ask the Māori Land Court. So, I made an application to the Court for information. The Māori Land Court set up a court time and they told me that Te Hira Maeke owned no land. Then the Registrar said he did own land and that had been succeeded by 50 people. They provided me with a certificate that did not give any administration over the land. So, I went back to the Land Registry and Mr Sam Brown the Land Commissioner, to help me to research the block and discovered it was leased.[601]

Upon further research, Ms Kiwha discovered that the Crown had purchased part of C25 and the remainder of that block had been leased along with part of C24, belonging to Tamihana Te Karu, to H R Elder for 1,000 years. She also discovered that her great-grandfather had been left with just 15 acres of C25, which is still Māori land.[602] As far as we can see, the sole reason for these 1,000-year leases instead of outright purchase was to avoid the anti-aggregation laws.

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597. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 271–272

598. AJHR, 1907, G-1C, p 11; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 271

599. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 98, 100. The sections were A70, A74, C5, C6, C8, C12, C13, C24, and part of C25.

600. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 82; Native Land Laws Amendment Act 1895, ss 4–6

601. Hauangi Kiwha, brief of evidence, 30 July 2018 (doc E7), p 10

602. Hauangi Kiwha, brief of evidence (doc E7), pp 10–11

4.7.4 Why did the Māori owners sell?

Many claimants today struggle to understand why their ancestors sold their land. Claimant Hauangi Kiwha, who as noted had discovered the 1,000-year lease of her great-grandfather and Tamihana Te Karu, wrestled with this question:

> I cannot say why Te Hira Maeke leased the land for such a long period of time. Some people simply wanted to sell. However, I do see that the lessee assumed the responsibility of paying the rates. So, perhaps it was the pressure of the rates was a reason to do so. If he had been involved in the Ngarara Court case to obtain the title then this in itself may have placed him under a lot of financial pressure. The certificate of title indicates that he paid towards the costs of survey. In addition, the section of 25 that he was awarded is very small and it may have been that he could not use it profitably.
>
> I do not know what financial pressures Tamihana Te Karu may have been under. However, his is likely to have been under similar pressures as Te Hira Maeke. In addition, I believe that he supported Parihaka and may have wanted to send money to Taranaki, as many did.[603]

Some of the reasons for the rapid alienation of land, despite the wish of the community and its leaders to lease rather than sell, have already been explained. The Native Land Laws Commission of 1891 attributed the largest share of responsibility to the destruction of community controls on alienation through the individualisation of title,[604] and the evidence has shown that Ngarara West was no different in that respect. By 1891 Wi Parata was prepared to make some strategic sales to obtain capital and develop the local farming economy, such as selling 'the most remote and rugged parts of his land in the Ngarara West C block'.[605] But the general preference was still for leasing, not selling, and to keep settlers out of the flatter, more arable land of Ngarara West A.[606] Individualisation of title without any mechanisms for community control, however, led to uncontrolled sales and uncontrolled retention – owners often had little control over what they kept as well as what they lost, making any kind of strategic decision-making nearly impossible.

In addition, many owners were impeded from farming their own lands themselves. Some sections were simply too small for viable farms in both Ngarara West A and C. Prior to the subdivision process in 1891, the owners had obtained income from rents, cultivated in common, and ran their sheep near their homes (any decisions or problems were usually dealt with by the chiefs and community at hui). As discussed above, many of the owners had petitioned Parliament in 1889 against including compulsory subdivision requirements in the Ngarara and Waipiro Further Investigation Bill:

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603. Hauangi Kiwha, brief of evidence (doc E7), pp 11–12
604. AJHR, 1891, G-1, pp vi-xi, xvii-xviii
605. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 66
606. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 66–68; C & J Maclean, *Waikanae*, pp 53, 56–57, 85

> They asked that the desire should be complied with of those persons [the 1887 partition applicants] . . . that the shares to which they were entitled should be cut off, leaving the other people, who at present were living in common, to continue as they were at present, or to make application to the Court to have their part partitioned off; but that these latter should not be compelled, whether they liked it or not, to have their shares partitioned, which might result in the portions allotted them being so small as not to be sufficient for the maintenance of each of them individually.[607]

They clearly foresaw the consequence which did indeed occur after the court's exercise of its compulsory powers in 1891. Some sections were simply too small for individual farms. In 1897 Ngarara West C was classified by the Land Board as suitable for pastoral farming, which could not be profitably occupied in areas of less than 640 acres.[608] This meant that individual farms could not be established on 33 of the 41 sections of Ngarara West C: nine ranged from 300 to 550 acres; 15 sections were 100 to 300 acres; and nine were between 30 and 90 acres.[609] Land next to the railway and the more arable lands of Ngarara West A were considered first-class lands and suitable for subdivisions less than 640 acres, although there were also sandhills along the coastal lands which made some sections less viable.[610] Many of the blocks in Ngarara West A, however, were very small; almost two-thirds of the sections were smaller than 60 acres, some much smaller. There were only three large sections: 579 acres; 679 acres; and 1,000 acres.[611]

In addition, the title had become fragmented because many owners now held their interests in two or more non-contiguous sections.[612] Māori ownership did not survive for long enough at Waikanae to benefit from the later consolidation schemes of the twentieth century, which tried to remedy this deficiency of nineteenth-century titles by consolidating each owner's interests in one block.[613] Nor were Māori owners allowed to create trusts to manage their lands under the native land laws, which removed another way of concentrating interests and establishing usable farms.[614]

The problem of fragmentation and/or too-small individual sections made it easier to sell them rather than keep them in three ways. First, the lands were of little use to retain in economic terms, and secondly, an income could not be derived from them and so had to be found elsewhere – for many Māori in the nineteenth century, that income came from land sales. Sales for consumption rather than accumulation and development were economically disastrous. Thirdly, the growth

607. Patrick Buckley, 23 August 1889, NZPD 1889, vol 66, pp 41–42
608. Walzl, 'Ngatiawa' (doc A194), p 574
609. Walghan Partners, 'Block Research Narratives', vol 1 (doc A212), p 279
610. Walzl, 'Ngatiawa' (doc A194), pp 574–575
611. Walghan Partners, 'Block Research Narratives', November 2018, vol 1 (doc A212), p 265
612. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 25, 39; Walzl, 'Ngatiawa' (doc A194), pp 545–550, 622
613. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 726–740
614. AJHR, 1891, G-1, p xv

of settlement brought with it a growth in settler local government, and the subdivided sections became rateable even if they were not productive:

> There is no doubt that Ngarara West landholders were soon confronting the costs of retaining land. As European title became more prominent in Waikanae, the role of local government arose. Roads in the district were built and rates brought increasingly into effect. Maori owners were soon seen participating in forums to have the values of their lands restrained so as not to attract high rates.[615]

Mr Walzl rightly concluded: '[T]he way in which title was held as at 1891 (multiple non-adjacent parcels held by very small numbers of owners) provided inherent incentives to either sell lands that were of no practical use (but which would now attract rating charges) or to sell a portion of the multiple but scattered holdings of better lands to raise capital'.[616]

For multiply owned blocks, the land also became less usable to its owners as settlers bought up individual shares, which inhibited co-owners from investing in improvements since it was impossible to know which part of the block would be acquired by the private purchaser when their share was eventually partitioned out. This in turn brought further fragmentation and fresh survey charges for those owners who had retained their interests in that block. At Takamore, for example, Ngarara West A24 was awarded to five owners in 1891. Patiana Tuterangi's share was purchased by C B Morison in 1897 and other individual interests were later purchased by Barber and Weggery.[617]

Even the multiply owned sections, however, were held by just a few owners. The way in which title was individualised under the special Act of 1889 made the sections vulnerable to sale in a very practical sense. Purchasers only had to obtain the agreement of one or two owners, sometimes four or five, to obtain complete titles. This land was vastly easier to acquire than many other Māori land blocks in the North Island as a result. The evidence to the Native Land Laws Commission in 1891 was full of examples where purchases were difficult to complete or even invalid because hundreds of signatures had to be obtained over a number of years, and frequent law changes meant that the requirements for purchasing were often different at the end than they were at the beginning. The process of purchasing had turned into a protracted, tangled mess across the North Island.[618]

In addition, a number of owners were living outside the block, many of them in Taranaki (including at Parihaka).[619] It was easier for absentees to dispose of land they did not or could not use themselves. Such sales foreclosed on the possibility of the return of those owners to Waikanae, which some had done periodically

615. Walzl, 'Ngatiawa' (doc A194), p 622
616. Walzl, 'Ngatiawa' (doc A194), p 622
617. Susan Forbes, statement of evidence in Environment Court, 21 November 2001, p 20 (Ben Ngaia, papers in support of brief of evidence (doc E3(a)), p 42)
618. See, for example, AJHR, 1891, G-1, pp 28–29, 44, 74, 109, 113–114, 122; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, ch 8.
619. Walzl, 'Ngatiawa' (doc A194), p 600

since 1874. At the same time, the existence of so many absentees made it harder for those living fulltime at Waikanae to prevent sales. Dr Rigby explained:

> The Taranaki residence of many Waikanae landowners undoubtedly made them more vulnerable to losing control of their land to skilled operators such as W H Field and Hannah Field. For Taranaki-based owners, Waikanae rents were a secondary source of income. Field's purchase offers to them were, therefore, bound to be tempting.[620]

Individualisation, fragmentation, and absenteeism were the 'push' factors that made it difficult for owners to retain their land. There were also a number of 'pull' factors. The major one at first was the accumulation of costs from five years of intensive litigation, with the addition of survey costs as the subdivisions were gradually surveyed. The second 'pull' factor was that the main source of credit for Māori came from those who wanted to buy their land and were often their tenants, who in turn had access to capital from settler financial institutions that were largely outside the reach of Māori. The result of these two 'pull' factors was a debt cycle that enabled settlers to obtain a foothold in, and eventually the freehold of, individual sections.

Historians Chris and Joan Maclean described how these factors enabled W H Field to defeat Wi Parata's strategy as rangatira to keep settlers to the less profitable lands east of the railway, preserving Ngarara West A for his people:

> Although much of the land was leased, he [Field] was also able to buy a considerable amount of land on the coastal plain, overcoming Wi Parata's strategy of keeping the settlers to the eastern side of the line. The process by which he bought the land is reminiscent of Norman Elder's description of the Waimahoe leases. In effect, Field became the banker for a growing number of local Māori landowners. At their request he would lend them money for tangi and various other expenses, with their land as security for the loan. But if the repayments fell behind or the loan was increased, the money owed was credited towards the eventual purchase of the land. In this way Field was able to gain a toehold on the coastal plain.[621]

Mr Walzl stressed the role of litigation and survey costs in the growing debts. He pointed to the example of Ngapari Te Kati, who had tried to escape her debts by offering some of her land to the Crown in 1892 (see above). Ngapari Te Kati's individual interests were in four sections of Ngarara West A (A9, A48, A59, and A66) and one section of Ngarara West C. She possessed 289 acres spread across these five non-contiguous sections. The Crown having declined to purchase, she had little choice but to sell all her interests to her creditor, Hannah Field, in 1892. The price was £221 but the sum she received was £78 because the rest of the total

620. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 279
621. C & J Maclean, *Waikanae*, p 85

represented the size of her debts. Ngapari Te Kati had been paid five cash advances by Hannah Field during the hearings in 1890 and 1891. Mr Walzl calculated that the direct costs of obtaining title, which included her accommodation costs during the hearings and her share of the legal and survey costs, amounted to £93 15s or 42 per cent of the value of her scattered interests at Waikanae.[622]

Was this an unusual or isolated example?

The Crown disagreed with the claimants that the burden of costs had been a significant factor in land alienations for Te Ātiawa/Ngāti Awa ki Kāpiti. Crown counsel acknowledged that in previous inquiries the Crown has accepted that 'the native land system contributed to or at times exacerbated division between hapū, involved considerable expense and disruption, and in some cases led to land having to be sold or indebted to cover the costs of participation.'[623] According to the Crown, however, the only 'evidence before the Tribunal addressing the costs of the title investigations and/or re-hearings' in this case is 'found in Walzl', referring to his example of Ngapari Te Kati. Crown counsel submitted that 'there is no conclusive evidence before the Tribunal (or found by Mr Walzl in his research, as recorded by him and noted above) that the costs of the titling process was a cause of land sales'. Therefore, the Crown submitted, 'the Tribunal should be cautious in making any such finding'.[624]

In our view, there are a number of factors to be considered in evaluating this submission.

First, we note that the costs were proportionately high – the costs of litigation over five years were high in proportion to the relatively small size of the Ngarara West block (29,500 acres) and relatively small number of owners. There were:

- the partition hearing of 1887;
- the rehearing applications and the chief judge's hearing of those applications;
- the petitions, select committee hearings, and lobbying of members in 1888–89 and 1891, in all of which the various groups were represented by counsel;
- the Ngarara commission hearings in 1889;
- the section 13 applications and hearings in 1890; and
- the rehearing and subdivision hearings in 1890 and 1891.

In addition, the Ngarara and Waipiro Further Investigation Act 1889 and section 13 of the Native Land Court Acts Amendment Act 1889 created new and untried powers for the Native Land Court which resulted in three cases of litigation in the Supreme Court to determine their exact meaning and extent. Another unusual factor was the number and long duration of events in Wellington which the owners had to attend, including the Ngarara commission, the 1890 rehearing, and the 1891 subdivision hearings.[625]

622. Walzl, 'Ngatiawa' (doc A194), pp 572–573
623. Crown counsel, closing submissions (paper 3.3.60), p 30
624. Crown counsel, closing submissions (paper 3.3.60), p 30
625. See, for example, Otaki Native Land Court, minute book 12, pp 36–37 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), pp [902]–[903]).

Secondly, some of these costs were forced on the owners against their will by the Crown and Parliament – despite the protests of many of the owners, the Crown included compulsory subdivision of all interests in its remedial Bill in 1889. This was amended according to Carroll's compromise but the final Act still conferred power on the court to cut out all individual interests on the block plan, requiring a survey to complete the subdivision. This power could be exercised regardless of, and even against the express wishes of, the land's owners. For the 22 owners represented by Jellicoe who sought a writ of prohibition to stop the court, all the costs of subdivision in 1891 and afterwards (including survey costs) were forced on them as a result of the Ngarara and Waipiro Further Investigation Act 1889.

Thirdly, there is other evidence of how the costs of obtaining title contributed to the alienation of land in the 1890s – a 1992 report suggested: 'It is significant that by 1892, 3,000 acres of the block had been sold to the counsel acting for the Tuhata family, presumably reflecting the high level of costs incurred in pursuing the special Act and rehearing.'[626] C B Morison represented other owners as well as Inia Tuhata in the 1888–91 litigation, and his pursuit of land in the Ngarara West subdivisions has been discussed in the report of Barry Rigby and Kesaia Walker. According to their report, Morison targeted absentee owners and made advances to them so as to secure a foothold and exploit their relationships with other owners to secure their acceptance of advances. Morison was said to have acquired the 3,000 acres by persuading an absentee owner to let his cousins accept large advances. Dr Rigby commented: 'Even though Tangotango was a Parihaka movement supporter, his residence far from Waikanae made him more likely to accept Morison's purchase offer.'[627]

Dr Rigby, however, focused mostly on how the various members of the Field family exploited their kinship links to Te Ātiawa/Ngāti Awa (through Hannah Field) and their ability to obtain finance from settler institutions to develop a network of leases and debts that eventually obtained for them the freehold of thousands of acres. Some of those debts arose from survey costs, which was one of the costs of obtaining title, but it is not clear from this evidence the extent to which the costs of obtaining title were the reason for the advances accepted by numerous owners.[628] We know from Hannah Field's accounting for her payments to Ngapari Te Kati that every owner had to pay a share of the legal costs of 1890–91 as well as the survey costs for their own section(s), and their accommodation costs and living expenses during the hearings in Wellington.[629] W H Field was actually one

626. Crown Congress Joint Working Party, 'Preliminary Draft Paper on Ngarara West A4', 1992, p [6] (Rawhiti Higgott, papers in support of brief of evidence (doc F3(d)))

627. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 279

628. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 270–271, 278–281

629. Walzl, 'Ngatiawa' (doc A194), pp 572–573

of the lawyers at Stafford, Buckley, and Treadwell, which had represented various Ngarara owners from 1888–91. In 1895 he became a partner in that firm.[630]

Fourthly, there is contextual evidence on the issue of costs which should be taken into account – the Native Land Laws Commission identified a list of 'universal' Māori complaints about the Native Land Court system in 1891. These included: 'expenses, fees, and duties'; the 'excessive cost of surveys, especially for subdivisions'; and 'enforced attendance of claimants at distant places, inducing poverty, demoralisation, concerted perjury, injustice, false claims, uncertainty, and ruinous loss'. This list also included 'rehearings, and applications for prohibition to [the] Supreme Court'.[631] Rehearings and the ability to obtain relief from the superior courts were of course important safeguards, but they also restarted or prolonged the cycle of costs and ruinous loss that had been demonstrated by Māori to the commission.

These issues were very well known to the Crown at the time. The select committee asked the chief judge in 1888 about the costs of rehearings during its investigation of the Tuhata whānau petition:

> Is the expense of rehearing great?
>
> The Court has a certain jurisdiction and may order the unsuccessful parties to pay costs and court fees, the main expense of a rehearing to the natives is the expense of living where the Court is held and the neglect of their business.
>
> And the lawyers?
>
> Since the purchase of native land ceased[632] the lawyers have had nothing much to do. Often on a rehearing the merits are so evenly balanced that it would be hardly fair to saddle the losing side with costs.
>
> The land has to pay?
>
> In some cases the land is exceedingly valuable, or there may be a very long & expensive contention for land almost valueless.[633]

In the case of the Ngarara West rehearing in 1890–91, lawyers *were* involved at every step of the way in order to protect their clients' interests in the highly divisive litigation, despite Wi Parata's attempt to ban them from court in early 1891. Many of the members who had debated the Ngarara and Waipiro Bill were aware of the heavy burden of costs that the title system placed on Māori, and that this litigation in particular would place on the Ngarara West owners. One member had predicted that the owners would get the shell while the lawyers got the oyster, and another defended compulsory subdivision on the grounds that it would be less expensive for the owners to have to do it all at one hearing than inevitably having

630. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 281

631. AJHR, 1891, G-1, p xii

632. This refers to Ballance's Native Land Administration Act 1886, which was repealed in August 1888.

633. Chief Judge Macdonald, evidence to Native Affairs Committee, 20 August 1888 (Walzl, papers in support of 'Ngati Awa' (doc A194(a)), pp 788, 790)

to do it at more hearings in the future.[634] The Ngarara commission also commented in 1889 that the owners' costs to date 'appear[ed] to have been considerable, and no doubt further costs will be necessarily incurred before a final decision can be arrived at', while recommending that the costs *should* be paid by the land since – although there had been a 'substantial failure of justice' – the commission blamed the owners rather than the court.[635]

It is also important to consider appeals from the owners themselves to be relieved of the accumulating of costs. Wi Parata, for example, explained to the court on 16 January 1891 that Wellington was an expensive place for the owners to find accommodation and meet their daily living expenses – the rehearing in 1890 had taken five months and, he said, they were unable to pay their lawyers.[636] His request to move the hearings to Ōtaki was denied and the court continued to sit in Wellington on and off for the next six months.

We conclude that the costs of obtaining title were exaggerated in this case, forced upon some owners by the special Act, and clearly a factor in the rapid alienation of land after June 1891. The accumulated costs were one of a number of factors that resulted in this alienation of land but not the only factor.

4.7.5 What was the outcome for the Ngarara West owners?

Within a decade of the subdivision of all individual interests in 1891, 71.3 per cent of Ngarara West C was sold and almost 40 per cent of Ngarara West A.[637] This is a testimony to the power of individualised titles to undermine the tino rangatiratanga and collective will of a tribal community. As discussed above, most members of the community had been determined to keep their land undivided and unsold until the court's exercise of its compulsory powers took the choice out of the community's hands in 1891. Although the Crown made no submissions about the compulsory powers conferred on the court by the special Act of 1889, it did concede that 'the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa/Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa ki Kāpiti'. The Crown 'conceded that its failure to protect those traditional tribal structures was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.[638]

Our analysis in section 4.7 shows that the key factors in the rapid loss of so much land in the 1890s were:

- the full individualisation of title as a result of the Ngarara and Waipiro Further Investigation Act 1889, without any provision for collective management and decision-making;

634. Richard Turnbull, William Jackson, 3 September 1889, NZPD 1889, vol 66, pp 249, 256
635. Report of the Ngārara commission, 19 December 1888, AJHR, 1889, G-1, p 3
636. Otaki Native Land Court, minute book 12, pp 36–37 (Crown Forestry Rental Trust, MLC minutes document bank (doc A68), vol 12), pp [902]–[903])
637. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 25, 39
638. Crown counsel, closing submissions (paper 3.3.60), p 21

- fragmentation of land as a result of partitioning 29,500 acres into 120 subdivisions in 1891, and the fragmentation of ownership as a result of scattered interests across non-contiguous sections;
- the significant number of absentee owners with less incentive to retain the land;
- the disproportionately high costs of obtaining title in 1887–91 for a relatively small block with a relatively small number of owners; and
- the debt trap in which lessees and would-be purchasers were the only source of credit for the Māori owners – these creditors advanced finance as a means of obtaining the freehold of the land while getting their own credit from reputable, settler financial institutions.

Three other points need to be noted here.

First is that we have not considered the protection mechanisms in the nineteenth century. There were two: the duty of trust commissioners and later the court to confirm purchases; and the power of the court to restrict land from alienation. We received no evidence or submissions about how those mechanisms functioned in respect of Waikanae. The only clear point that can be made is that those mechanisms did nothing to restrain the alienation of land in the 1890s.

Secondly, the reintroduction of pre-emption did slow the rate of sales after 1894, because the Crown did not want to purchase more land at Waikanae and settlers had to go through the process of obtaining exemptions from the Crown. Land sales continued but at a slower rate.

Thirdly, it was very clear to the owners that the cycle of leases, debts, and uncontrolled sales would continue into the next decade and beyond if nothing was done to stop it. Hence, Te Ātiawa/Ngāti Awa ki Kāpiti joined the Kotahitanga movement in the 1890s, seeking control of their own affairs through a Māori parliament, control of their own lands through committees, and an end to all purchases of Māori land, confining alienation to leases only. We discuss that development in the next section.

4.8 Māori Demand Systemic Remedies from the Crown

4.8.1 Introduction

By the end of the 1880s Māori leaders were demanding systemic remedies from the Crown (see section 4.6.5.2). This demand intensified in the Kotahitanga or Māori parliament movement, which began to gather support among Māori in the early 1890s. Michele Parata-Hamblin explained:

> All Maoridom was stirring during these years. Men from such diverse backgrounds as Wiremu Parata, first member for Western Māori, Te Rangihiwinui Kepa (Major Kemp) a decorated Wanganui 'loyalist' and Hone Heke, sitting member for Northern Maori and grand-nephew of his great namesake, turned to kotahitanga, a oneness, and formed a Māori parliament to defend the land. The parliament held sittings in different tribal districts for eleven years and at one stage could claim 35,000 signatures on its pledge of unity. For a time, its first meeting in 1892 held symbolically at Waitangi, the parliament sought redress within the existing framework of pakeha laws.[639]

The situation at Waikanae galvanised the people there; the long litigation in the Native Land Court and the beginning of rapid land sales were of great concern to the iwi and its leaders. According to historian John A Williams, Waikanae was important in the movement.[640]

Prior to the 1890s, the Waikanae people were inextricably bound up with the politics of confiscation and Parihaka. They supported Parihaka with money and food. Some lived there, including Wi Parata's son Winara and his daughters Ngauru (married to Te Whiti's son) and Utauta.[641] Wi Parata himself was a strong supporter of Parihaka but his approach was different from that of Te Whiti. He used whatever tools had been provided by the new order, especially Parliament and the courts, to challenge confiscation and protect Waikanae lands. He acted as one of Te Whiti's advisers and attempted to persuade him to appeal to Parliament and the law for redress.[642] We have already referred to the protest of the ploughmen above (see section 4.5.5.2). Te Whiti did not support Kotahitanga.[643] It is clear from the evidence that Wi Parata became strongly aligned with Te Keepa Te Rangihiwinui (Major Kemp) in the 1890s, both of them convinced that systemic remedies could be obtained from the settler Parliament.

In 1892 a number of meetings were held which culminated in the formation of the Māori paremata (parliament) at Waitangi in April 1892. There was a large meeting at Parikino on the lower Whanganui River in January 1892, convened by Te Keepa and attended by mainly central and coastal North Island iwi. Wi Parata spoke strongly against the native land laws and the court, calling for it to be 'cleaned out', and warning: 'I tell you that if you men let this chance to free yourselves pass, that the rising water will soon be above your throats'.[644] The meet-

639. Michele Parata-Hamblin, brief of evidence, 4 October 2018 (doc E18(b)), p 10

640. John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Washington: University of Washington Press, 1969), p 58

641. Hemi Sundgren, brief of evidence (doc F19), pp 19–21; Hauangi Kiwha, brief of evidence (doc E7), pp 3–4, 12

642. Walzl, 'Ngatiawa' (doc A194), pp 559–560; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 78–90

643. Williams, *Politics of the New Zealand Maori*, p 63; Michele Parata-Hamblin, brief of evidence (doc E18(b)), p 10

644. *Wanganui Chronicle*, 14 January 1892 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 98–99)

ing resolved that Māori should have control of their own affairs under the New Zealand Constitution Act 1852, that the native land laws should be abolished, and that a law should be passed to stop all Crown and private purchasing of Māori land forever.[645]

4.8.2 The Māori parliament appeals to the Crown for reform, 1892–97

A formal parliament was established at Waitangi in April 1892 with two houses and national elections. Parata offered to set aside 500 acres at Waikanae for the parliament's residence but it was eventually decided that the parliament would hold annual sessions in different parts of the North Island. The authority for establishing their own parliament was held to be the 1835 Declaration of Independence, the Treaty of Waitangi, and section 71 of the New Zealand Constitution Act 1852, which provided for native districts in which Māori customary law would continue.[646] Following the Waitangi meeting in April and the first sitting of the Māori parliament in June, a deputation of chiefs met with the Native Minister in August 1892. Wi Parata was one of those who spoke, stating that the four Māori members were powerless in the settler Parliament. Māori were uniting to form 'a Native Parliament to manage native affairs' but this was not done 'in any spirit of hostility to the existing law'. He again condemned the native land laws and the removal of Māori authority over their own lands, making a strong argument that all restrictions on leasing should be removed.[647]

In January 1893, Governor Glasgow visited Waikanae and was welcomed by Te Ātiawa/Ngāti Awa. In his speech, Wi Parata explained the plight of his people but also expressed hope that change could still occur that would render colonisation beneficial to both peoples. By this time the impacts of the 1891 court decision were clear and the rapid alienation of land was underway. Parata accepted that settlement had increased the value of the land but only the settlers, he said, were benefiting:

> The land laws which had been imposed by the Europeans were not just to the native race because they enabled white people to usurp the lands, leaving nothing for the Maori. Nevertheless they recognised that the value of the lands they possessed had been increased, and they had no doubt that by future wise legislation and the wise guidance of His Excellency, the grievances which he (Wi Parata) had referred to would be rectified. If more harmonious laws were introduced, then there would be peace and happiness amongst the two races. He had always welcomed the Europeans, and had advised his people to do the same, and to treat them well, as it would be for their benefit in the end.[648]

645. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), pp 799–800
646. Walzl, The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 100; Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 800
647. *Hawera & Normanby Star*, 6 August 1892, p 2 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 100–101)
648. *Evening Post*, 14 January 1893; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 101–102

The *Wi Parata* case and the Treaty of Waitangi

Wi Parata's leadership role in Kotahitanga and his representations to the select committee about the Treaty of Waitangi in 1893 were influenced by the decision of Chief Justice Prendergast and Justice Richmond in the 1877 case *Wi Parata v Bishop of Wellington*.[1] The Supreme Court's decision is today perhaps the most infamous in New Zealand's legal history. The details of the case are not relevant here (see Professor David Williams' book *A Simple Nullity?*).[2] What concerns us is the court's finding that, in the case of indigenous peoples (whom the court referred to as 'primitive barbarians'), their 'property rights and status' were considered to be 'political matters, not matters for judges' (in the words of Professor Williams).[3] The court stated that, upon the cession of territory by indigenous peoples, 'the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice'. The Crown's acts in such a case 'cannot be examined or called in question by any tribunal'.[4]

In our view, the court's comments about the Treaty were based on this Eurocentric logic, and on the idea that indigenous peoples were 'primitive barbarians' who did not have the European-style institutions and laws that the court considered necessary to cede sovereignty from one 'civilised' State (in the terminology of the court) to another.[5] The court stated:

> The existence of the pact known as the 'Treaty of Waitangi,' entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium* [under international law], vested in and devolved upon the Crown under the circumstances of the case.[6]

These statements were followed by the further point, which Professor Williams has emphasised in his book on *Wi Parata*, that the sovereign of the 'settling nation'

1. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) Supreme Court (72)
2. David V Williams, *A Simple Nullity? The* Wi Parata *Case in New Zealand Law and History* (Auckland: Auckland University Press, 2011)
3. Williams, *A Simple Nullity*, pp 168, 170
4. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) Supreme Court (72) at 78
5. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) Supreme Court (72) at 77–78
6. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) Supreme Court (72) at 78

(that is, Britain) acquired the 'exclusive right of extinguishing the native title' (pre-emption), and therefore assumed the 'correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy'. The court observed that this was not 'properly a treaty obligation' but was 'in the nature of a treaty obligation'; as such, it was a protective duty of the sovereign 'represent[ing] the entire body-politic' and no other part of the State could interfere with it (including the courts).[7]

Wi Parata has been remembered as the case which declared the Treaty a legal nullity and therefore non-justiciable in the courts. Professor Williams commented that if it had been remembered instead as a case where the court recognised the Crown's duty as 'supreme protector of aborigines', it might have been 'invoked as a nineteenth-century source for the obligation akin to a fiduciary duty that is imposed on the Crown in its partnership relationship with Maori, and for the Crown's duty of active protection of Maori interests'.[8]

Both are important points. Wi Parata's representations to the select committee emphasised the Treaty, the 'guarantee of Royal protection', the protection of 'just rights and property', the guarantee of the rights and privileges of British subjects, and the Crown's breaches of the Treaty. As Parata told the committee, the 'Europeans [in New Zealand] were not fulfilling the trust conferred on them by Her Majesty the Queen', and Māori did not know whether to blame the British or the New Zealand Government, but they wanted the 'promises and conditions' of the Treaty fulfilled.[9] Wi Parata (and Kotahitanga) petitioned the House of Representatives in the 1890s rather than the courts to hold the Crown to account for its Treaty breaches. It was understandable that they were confused as to whether the British or New Zealand Government was responsible for the failure over the last 53 years to fulfil the promises of the Treaty. Deputations to the sovereign in London continued over the next few decades as Māori leaders sought to get the Treaty's provisions carried out. The courts remained a potential avenue to justice, of course, and this was evident when Wi Parata's supporters applied to the Supreme Court in 1891 in an attempt to stop the Native Land Court from subdividing their lands.

The *Wi Parata* case was followed by others, including *Nireaha Tamaki v Baker and Te Heuheu Tukino v Aotea District Maori Land Board*. In the latter case, the Privy Council confirmed in 1941 that the Treaty had to be incorporated into statute law for it to be 'cognisable in New Zealand courts'. According to Professor Williams' study in 2011, this has remained 'current legal orthodoxy', and the Privy Council reaffirmed the decision of *Te Heuheu Tukino* in 1994.[10] The Ratana movement attempted to have the Treaty enacted as a statute, presenting a petition to

7. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) Supreme Court (72) at 78–79
8. Williams, *A Simple Nullity*, pp 170–171
9. Wi Parata, 4 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), pp 6–7, 8)
10. Williams, *A Simple Nullity*, pp 232–233

Parliament with 45,000 signatures.[11] Modern governments have chosen instead to establish the Waitangi Tribunal as a standing commission of inquiry, which examines Crown acts or omissions, statutes, and other instruments for their Treaty-consistency, and to incorporate the principles of the Treaty in various statutes. This has given the courts more scope in recent years.

11. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 425

At this stage, the Waikanae people were still hopeful that Kotahitanga could obtain systemic reforms from the Crown in time to save most of their remaining lands, and that they could live in mutual prosperity with the growing number of settlers in their midst.

The Māori parliament sat at Waipatu in April 1893 and formulated a petition which eventually gathered 21,900 signatures. In essence the petition asked the settler Parliament to empower the Federated Māori Assembly to control Māori lands and affairs, including 'that the power to govern the Natives be delegated to the Federated Maori Assembly of New Zealand'.[649] The petition was accompanied by a Bill which it was hoped the General Assembly would pass, abolishing all the native land laws and authorising the Federated Māori Assembly to appoint district committees to administer Māori lands. The Māori assembly would have power to make rules for the committees, and – with the land under the control of the committees – Māori land could be dealt with on the same basis as European land.[650] Wi Parata clarified the statement in the Bill that 'the Maoris' right to deal with their lands shall be placed upon the same footing as the European subjects of the Queen'.[651] This meant, he said, that Māori should hold their lands as Europeans did, in the sense that Europeans held their lands 'in such a way that no one can come and disturb [them] in [their] title'. No outsiders should be permitted to 'interfere with us in any way'. Parata was anxious that this clause of the Bill should not be misunderstood; in other words, it did not mean that Māori land would be bought and sold on the same basis as European land.[652]

In August 1893, Te Keepa (the first signatory of the petition) and Wi Parata were examined by the Legislative Council select committee during its inquiry into the

649. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 102–103; 'Petition of the Members of the Federated Māori Assembly of New Zealand', May 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e), pp 1–2)

650. Federated Māori Assembly Empowering Bill (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 3)

651. 'Petition of the Members of the Federated Māori Assembly of New Zealand', May 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 3)

652. Wi Parata, 4 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 11)

petition. Parata set out the history of his people's grievances, beginning by reference to the establishment of peace through Christianity. He also described the Treaty of Waitangi which, he said, was 'accepted by the Natives on the strength of the assurance that their rights and privileges would be preserved to them; for that treaty undertakes to secure to them "the protection of their just rights and property"'. 'We were also informed', he said, 'that it was provided by the treaty that all their fishing-rights and fishing-grounds would be preserved to the Maoris for their own use.' But both Christianity and the Treaty were breached by the Europeans in a series of wars and violent altercations to obtain land, 'contrary to the guarantee of Royal protection, under which passed to the Natives all the rights and privileges of British subjects'. Following the wars, the first native land laws were enacted without the consent of Māori and without consulting Māori.[653]

Wi Parata then described the outcome of the native land laws. He condemned the 10-owner rule of 1865 as in breach of the Treaty, and stated that the Native Land Act 1873 and the laws that followed it showed Māori that 'the Europeans were not fulfilling the trust conferred upon them by Her Majesty the Queen'. As a result, Māori were now applying to Parliament to have certain powers conferred on them. This request was based on 'a certain amount of right' (rather than a mere plea), derived from the provisions of the Treaty of Waitangi and section 71 of the 1852 Constitution Act. He stated:

> In clause 71 it states that it is expedient that the laws, customs, and usages of the aboriginal inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, shall be for the present maintained for the government of themselves in relation to their relations to and with each other. I would point out to the Committee that all matters repugnant to humanity, such as the shedding of blood and cannibalism, had been dropped, and the Natives were never again likely to take to these ways. It further states in this clause that these provisions should be granted forthwith; it says 'for the government of themselves;' this was to be granted at once. It is now fifty-three years since the Treaty of Waitangi was signed, and these provisions have never yet been fulfilled. We do not exactly know whether to blame the Government of England, or the Government of this Colony, for the omission. The Natives of these Islands now desire that these assurances given to us by the English Government shall be fulfilled to the Natives of the present day. The Native people of these Islands have left it to the Government to fulfil those promises and conditions; but, so far, the Government of the colony have not done so. We, having waited this great number of years for you to fulfil those conditions, have now applied to you to grant us those privileges. It is not that we are asking for them upon the customs of our ancestors, but we are asking for them upon your own grounds. In making our present demand, that we should have power to deal with our own lands, we do so because of the bad effect which the laws passed by the Government of the colony have upon

653. Wi Parata, 4 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), pp 6–7)

Native lands and upon us. We are only asking for those privileges which were assured to us by the Queen.[654]

Wi Parata went on to state to the select committee that Māori had never broken the Treaty, but instead were now 'forced to resort to the Treaty of Waitangi, owing to the fact that they have been so badly treated as regards their lands'. He added: 'The hardships of which we complain are not unknown to you', since those hardships had been the work of the very Parliament of which the committee was a part. Māori had given up inter-tribal warfare as a result of the Treaty, he said, and had now joined together in mass meetings to consider the reform of the native land laws. Parata told the committee: 'The Natives who have recently assembled together and signed this document or compact among themselves, wonder why you make so much ado about giving them what they consider is only right and just, and which has already been promised to them by the Queen of England.' And yet, he said, a new Native Lands Purchase and Acquisition Bill and other native Bills were even then under consideration in Parliament before their petition had been dealt with; 'It appears to me that if all these new Bills should be passed, there will not be a single provision of the Treaty of Waitangi left in force.'[655]

Having explained the context for the Kotahitanga petition, Wi Parata explained it clause by clause to the Native Affairs Committee. The petition condemned the Native Lands Act 1865 for the 10-owner rule, which had been so damaging to many who were left out of the titles. It also condemned the Native Land Act 1873, which had seen the land of iwi and hapū vested in individuals 'for the convenience of Pakeha purchasers and lessees', since 'this practice of empowering a single person to do whatever he pleases with tribal lands has been a complete innovation to us, because lands never belonged to one person but to the whole tribe or family [hapū]'. The petitioners complained that the powers vested in individuals by Parliament had 'debarred' them from 'dealing with [their] own lands'; 'we are like sheep without a shepherd, being driven hither and thither'. The 'laws of Parliament have made us appear an ignorant and inferior people; and the Native Land Court has ignored the existence of the rights of chiefs; and the Natives generally have been dispersed, and those who had homes have been deprived of them'. The petitioners, however, took a more positive view of the Native Lands Act 1867, stating that it was 'the best law which has ever been passed respecting Native lands'.[656] Section 17 of the 1867 Act had enabled the names of all right-holders to be registered in the court or listed on the back of the certificate of title, and it had also made land granted under that provision inalienable apart from leases for up to 21 years.

In his commentary on the petition, Wi Parata emphasised the way in which the legislation from 1873 onwards had individualised title and destroyed the authority

654. Wi Parata, 4 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 8)
655. Wi Parata, 4 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 8)
656. 'Petition of the Members of the Federated Māori Assembly of New Zealand', May 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e), p 2)

of chiefs over the land with disastrous effects. He also argued that Māori had been denied both economic and political equality with Europeans. First, as stated in the petition, Māori wanted to be able to manage, cultivate and improve their lands just as the settlers were able to do, and to obtain the real profit themselves (instead of it going to settlers). Secondly, the Māori assembly needed to be able to make rules for the management of Māori land, just as the Pākehā assembly did for the lands of Pākehā, especially since the four Māori members of Parliament had no ability to get their views heeded. Reasonableness and equality were constant themes:

> We trust that the Committee will see their way either to bring in an Act giving us power to deal with our lands, or allowing us to frame a measure for ourselves. We do not think there is any presumption in asking that we should be allowed to manage our own lands. You Europeans have had the management for a great many years, and we have derived no benefit from it. The Acts of Parliament passed have in every case been hurtful to the Natives. We do not think that we are asking a very great privilege, because we only ask that we may be allowed to manage our land in the same way that you Europeans manage your properties.[657]

Wi Parata emphasised, too, that the members of the federated assembly were not going outside 'the laws of England'. Instead, they were applying to the New Zealand Parliament for the powers that they sought. He also noted that their Bill asked for nothing that was unusual in terms of the laws of England or Acts of Parliament. They were simply asking for the power to establish committees to manage land and to set rules for those committees; there was nothing unusual about such a request, he said, and it was explicitly allowed for Māori 'under the provisions of your own Act', the 1852 Constitution Act.[658]

Following Wi Parata's evidence, William Swanson asked him why he had voted in 1873 as a member of the Government to repeal the Native Lands Act 1867, which the petitioners favoured, and enact Donald McLean's Native Land Act 1873 in its place. Parata's response was that he was supporting the Government that he believed would return some of the confiscated land in Taranaki, and that his key objective had been to get rid of the 10-owner rule by repealing the 1865 Act. He had 'very little schooling at that time, and very little experience', and had not understood the implications of the 1873 legislation.[659]

H K Taiaroa, who had been the main proponent of the Federated Māori Assembly Empowering Bill in the Māori parliament,[660] was obviously more sympathetic and his questions were more directed at underlining the point to his fellow committee members:

> Do the Natives believe that the Treaty of Waitangi is still in force?

657. Wi Parata, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 10)
658. Wi Parata, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 10)
659. Wi Parata, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 11)
660. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), p 803

Yes, the Maoris consider that the Treaty of Waitangi is still in force.

Do the Natives ask that articles 2 and 3 should be given effect to?

Yes, they do.

Did all those Natives sign that document saying that they wished to have reserved to them their rights over their lands, properties, forests, fisheries, and everything belonging to them?

Yes, that is why all the chiefs signed the treaty.

Do you consider that these articles have been broken?

Yes.

And if so, by whom?

Up to the present time, I do not know of any of the provisions of that treaty having been broken by the Natives; but the Europeans have disregarded its provisions.[661]

At this point, Taiaroa raised an issue that was highly important to his own iwi, Ngāi Tahu, and also to Te Ātiawa/Ngāti Awa ki Kāpiti, given the Crown purchases of the 1850s, 1870s, and early 1890s:

Do you think the Government of New Zealand have infringed the provisions of that treaty by taking the lands of the Natives without paying value for them?

Yes, I say the Government of New Zealand have broken the Treaty in that direction.[662]

Following the committee's hearing, at which both Te Keepa and Wi Parata gave evidence, it reported that the 'changes proposed to be effected by the Bill . . . are of a grave constitutional character' and could only be introduced by the Government (not by the Māori assembly's Bill). The committee did not accept, therefore, the argument that empowering an elected Māori body to appoint committees was quite as commonplace as Wi Parata had claimed. The committee recommended the petition to the Government for its consideration.[663]

The Liberal Government's response was announced to the House by James Carroll on 5 September 1893, stating that the Government had 'no reason to believe that the rights intended to be conferred on the Native race by the Treaty of Waitangi, and also the rights given them by the Constitution Act, were not enjoyed by them at the present time'. The Government therefore 'had no intention to give effect to the prayer of the petitioners', but was prepared to consider any 'practical views' that 'had been given expression to in the petition'.[664] When H K Taiaroa moved in the Legislative Council that the minutes of evidence should be printed, the colonial secretary responded that he 'did not think it desirable that a

661. H K Taiaroa to Wi Parata, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 11)

662. H K Taiaroa to Wi Parata, 5 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 11)

663. Native Affairs Committee report, 9 August 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e)), p 1)

664. James Carroll, 5 September 1893, NZPD 1893, vol 81, p 635

matter of that sort should be printed and placed upon their records, as it was not of a sufficiently serious nature.'[665]

Thus rejected by the Crown, a delegation of 40 chiefs met with the Governor and Premier to protest against the proposed Bills that the Crown had introduced into Parliament instead of their own. Wi Parata acted as 'chief spokesman', stating their grievances as to the Bills' 'total departure' from the Treaty and the Constitution Act, 'to the great detriment of the Maori race'. He asked the Governor to refuse his assent to the Bills until they had had time to appeal to the British Government but the Governor responded that his own role was 'nominal' although he could forward any memorial that they wished to send.[666]

Wi Parata attended the sitting of the Māori parliament at Pakirikiri in April 1894.[667] The newspaper cited by Tony Walzl for this sitting, the *Auckland Star*, stated that there were two representatives from Waikanae at this meeting, Wi Parata and Raniera Ellison. Among other things, the idea of an appeal to Britain was still on the cards:

> The Committee of Ngatikahungunu who convened the 'Parliament' intend to open the business with a discussion on the question as to whether the Treaty of Waitangi of 1840 is obsolete or otherwise; and to ask the Government whether that Magna Charta of the Maoris is still in force. If they are answered that it is not now in force, they propose to appeal to England that their rights under the Treaty may be respected.[668]

In the event, the 1894 Māori parliament tried again with a new Bill which they decided to put more directly to the settler Parliament. Rather than attaching it to a petition, they had the Native Rights Bill introduced into the House as a private member's Bill by Hone Heke, the member for Northern Māori.[669] This Bill was shorter but more far-reaching than the 1893 Bill, which had asked for powers to appoint and control committees. The 1894 Bill stated:

> **2.** A Constitution shall be granted to all the persons of the Maori race, and to all persons born of either father or mother of the Maori race who are or shall be resident in New Zealand, providing for the enactment of laws by a Parliament elected by such persons.
>
> **3.** Such laws shall relate to and exclusively deal with the personal rights and with the lands and all other property of the aboriginal native inhabitants of New Zealand.[670]

665. Sir Patrick Buckley, 25 August 1893, NZPD 1893, vol 81, p 339
666. *New Zealand Herald*, 12 September 1893, p 5 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), pp 103–104)
667. 'A Maori Parliament', *Auckland Star*, 5 April 1894 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 104)
668. 'A Maori Parliament', *Auckland Star*, 5 April 1894, p 2
669. Williams, *Politics of the New Zealand Maori*, pp 55–56
670. Native Rights Bill 1894, cls 2–3

This Bill left the details to be worked out later. Its avowed aim was full equality with the settlers, making the two peoples 'equal in status under the queen, with neither one subordinate to the other'. Wi Pere, the member for Eastern Māori, explained that the Māori people sought emancipation from their present subordination. Their parliament's powers would be limited to personal, land, and property rights – they were not seeking to establish a separate State.[671] The Central North Island Tribunal described the outcome of the Bill:

> Maori leaders continued to seek the cooperation and authorisation of governments (both British and New Zealand). Thus, Hone Heke brought the Kotahitanga's Native Rights Bill to the New Zealand Parliament, explaining in 1894 that Maori should have 'the sole right of enacting laws for themselves. There was not the slightest doubt that the intention of section 71 of the Constitution Act of 1852 was to give them that right.' This was, he argued, the opportunity for the Government to carry out the spirit of the Constitution Act. Carroll replied for the Government that the spirit of the Act was embodied in the Maori seats, and the power they gave to represent Maori views and interests within the New Zealand Parliament.[672]

James Carroll was now holding the general seat of Waiapu and he was a member of the Government, working closely with Premier Seddon. The Native Rights Bill was never put to the vote because the European members simply walked out until there was no longer a quorum. Carroll told Heke that it was a kindness to disillusion Māori of the belief that they could ever have a separate constitution, and that it was absurd to suppose that Māori could do the work of the Native Land Court.[673]

Rather than support the Kotahitanga Bill, the Crown promoted other legislation in 1894. We have already described how the Native Land Court Act 1894 reintroduced pre-emption. This was supposed to prevent speculators and land sharks from holding up further settlement, although an amendment in 1895 allowed private purchases to continue with the Government's consent. The Native Land Court Act was accompanied by the Lands Improvement and Native Lands Acquisition Act 1894, which allowed the Crown to borrow £250,000 for the 'purchase and preparation of Maori-owned lands for settlement'.[674] The powers of the Native Land Court continued but its composition was altered. Māori assessors were no longer deemed essential to a lot of the court's business and their concurrence was no longer required in any court decisions.[675] The Māori role in title determination was thus reduced rather than increased.

The Māori parliament met in Rotorua in 1895, pursuing a dual strategy: reintroducing the Native Rights Bill in the settler Parliament; and calling for a nationwide boycott of the Native Land Court. The leaders hoped that if the boycott

671. Williams, *Politics of the New Zealand Maori*, p 56
672. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 371
673. Anderson, Green, and Chase, 'Crown Action and Māori Response' (doc A201), pp 804–805; Williams, *Politics of the New Zealand Maori*, p 56
674. Hearn, 'One Past Many Histories' (doc A152), pp 635, 661
675. Native Land Court Act 1894, s 18

could be maintained for a year, then the Government would have to give in to get settlement moving again.[676] We have no information, however, about whether Waikanae members continued to send representatives or whether Wi Parata was further involved after 1894. Tony Walzl was unable to find further information on this point.[677] Mr Walzl did find, however, a newspaper report of 1896 showing Wi Parata's frustration and anger at the inability to get reforms through Parliament.[678] In the meantime settlers continued to deal with individuals and buy up more land at Waikanae. There was finally a vote on the Native Rights Bill in 1896 and it was decisively defeated, indicating to many that the Crown would never agree to empower a Māori parliament and that an alternative remedy had to be sought.[679]

4.8.3 The Crown proposes a reform package, 1898

We will discuss Kotahitanga in a subsequent volume of our report, after the remaining parties have been heard and their further evidence has been considered. Here, we note that a split developed between those chiefs who wanted to persist in seeking constitutional change and their own parliament (the 'home rule' party),[680] and others who sought to compromise with the Crown and obtain land reforms by negotiation with Seddon and Carroll. This came to a head at the Pāpāwai sitting of the Māori parliament in 1898. Seddon and Carroll toured various North Island Māori centres that year to explain and promote their proposed Native Lands Settlement and Administration Bill. In brief, their proposal was to abolish the Native Land Court and vest all remaining Māori land in district boards, composed of two Government appointees, two elected Māori representatives, and the local commissioner of Crown lands. These boards would set aside sufficient land for the use of the Māori owners, which would be inalienable, and would lease the remainder on behalf of the owners. No more purchases would be allowed.[681]

Wi Parata went with Te Keepa to hear the Government's proposals at Waipatu in Hawke's Bay on 29–30 March 1898.[682] At this hui a Gisborne rangatira and member of Parliament, Wi Pere, presented Seddon with the requests of those assembled at the meeting: all Crown and private purchasing of Māori land to stop; all remaining Māori land to be reserved in Māori ownership forever; the Native Land Court to be abolished; and the Crown to provide a way for Māori owners to borrow

676. Williams, *Politics of the New Zealand Maori*, pp 53, 56, 72
677. Transcript 4.1.21, pp 75–76
678. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 104
679. Williams, *Politics of the New Zealand Maori*, p 56
680. The term 'home rule' had developed in Britain. It referred to a proposal for Irish self-government in which Ireland would receive its own parliament (called an 'assembly' rather than a 'parliament').
681. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 520–521, 524–527
682. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106. Te Keepa spoke at the hui on 29 March 1898. He died soon after in April 1898.

money at low interest rates so that they could develop their lands.[683] All of these were points that Wi Parata supported. Private lessees and purchasers were the only source of credit for Ngarara West owners, as we discussed earlier, and the result had been the accelerated loss of land in the 1890s.

Premier Seddon responded that their ancestors had signed the Treaty because

> they saw the danger of their descendants becoming landless; they also saw the need of food being secured for their descendants: the forests must be preserved, so that the birds might live; the water to conserve the fish, and that is why the rivers and lakes were mentioned. They also saw the necessity of preserving the lands; for without the lands the Natives, of course, could not live.[684]

According to Seddon, however, the present-day Māori were improvident and had sold their lands. Given the findings we have made in chapter 3 about the conduct of the Crown's land purchasing, we doubt that Seddon's words there could be taken at face value. The Premier also said that what was necessary now was for the Crown to provide the protection sought by the rangatira in their many meetings and stop any further purchases. The Premier rightly stressed the protective role of the Crown, even though he did so in the paternalist language of the day, referring to Māori as children. The protection guaranteed by the Treaty of Waitangi was much discussed at this time, and was raised by Wi Parata (see below).

Seddon outlined the proposed Bill that was to provide the protection sought by Kotahitanga, stressing that it could only be brought into operation if Māori in a district petitioned for it. The boards provided for in the Bill would give joint control to Māori and to Government appointees. No advances in terms of cheap finance, as sought by Wi Pere, would be made to Māori owners outside the board system: 'As to this, I tell you candidly that you will not get any advance from the Government if it is simply to be handed to Natives. In the matter of advances there must always be some Europeans appointed by the Government who are to account to the Government.' Parliament, he said, would never accept his proposed reforms without joint control of Māori lands by the boards. In respect of the Native Land Court, he agreed that it should be abolished 'within a reasonable period'.[685]

Wi Parata did not speak at this meeting but he did give his views at a hui at Whanganui in late April 1898, the day after Te Keepa's tangi. Carroll took advantage of the tangi to make another presentation about the Bill to the thousands of assembled people. Wi Parata was the first chief to speak in response, paying tribute to his late friend.[686] According to the newspaper account cited by Mr Walzl, Parata

683. *Notes of Meetings Between His Excellency the Governor (Lord Ranfurly), The Rt. Hon. R. J. Seddon, Premier and Native Minister, and the Hon. James Carroll, Member of the Executive Council Representing the Native Race, and the Native Chiefs and People at Each Place, Assembled in Respect of the Proposed Native Land Legislation and Native Affairs Generally, During 1898 and 1899* (Wellington: Government Printer, 1899), p 6

684. *Notes of Meetings Between His Excellency*, pp 6–7

685. *Notes of Meetings Between His Excellency*, pp 7–11

686. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 105

questioned the Crown's sincerity about stopping all purchasing of Māori land, given that the Crown had 'recently, without the knowledge of the owners, confiscated Kapiti'.[687] This was a reference to the Kapiti Island Public Reserve Act 1897, which will be addressed in a later volume of our report.[688] Parata also questioned the Crown's sincerity due to the long history of Taranaki grievances, including the confiscation, the imprisonment of the ploughmen, and Bryce's attack on Parihaka in 1881. He asked Carroll: 'if you have the aroha you express to have, why do you not give relief to those who are suffering under injustice? Again, why does this Government so brimming over with affection for the Maoris, permit my people to remain in gaol?'[689]

Wi Parata had adopted a more conciliatory approach back in 1893 when he had hoped that the Crown would agree to empower the Māori parliament and Māori committees to manage their lands. The Kotahitanga Bill at that time had been a more moderate one than the Native Rights Bill proposed by Kemp a year later, yet it had been rejected by the Crown without any serious consideration. Wi Parata did not find the Crown's 1898 Bill to be an acceptable alternative:

> Now, referring to the Bill, I was present with Kemp at Waipatu when its provisions were explained by the Premier. There are two points in it acceptable to all the Maoris. These are: (1) Stoppage of sales to Government and individuals, and (2) the abolition of the Native Land Court. If the Bill stopped at that then we would all accept it. But there are 25 or more clauses in the Bill which we do not accept, because we see no relief from them; on the contrary, their effect must be most injurious to the natives. With all your affection can you not see your way to permit the natives to devise means and frame a Bill that would give them relief? The stoppage of sales and the abolition of the Court entirely lie in the hands of the Government. Let the Government do this, and when done let the natives consider what should next be done.[690]

Carroll's response was: 'As to the abolition of the Courts, if you have devised any scheme which would prove more acceptable than our Bill, let us have it.'[691] Tony Walzl commented that 'the irony of Carroll's words would not have been lost on Parata', given the events of 1893 and following years.[692]

Thus, Wi Parata supported the 'home rule' side of the debate among Māori leaders. He argued that the Crown should abolish the native land laws and prevent any

687. 'The Tangi over Major Kemp', *Evening Post*, 5 May 1898, p 2
688. John Barrett, brief of evidence, 22 January 2019 (doc F12), pp 3, 10; V Wood and others, 'Environmental and Natural Resource Issues Report', 2017 (doc A196), pp 383–385
689. 'The Tangi over Major Kemp', *Evening Post*, 5 May 1898, p 2 (Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 105)
690. 'The Tangi over Major Kemp', *Evening Post*, 5 May 1898, p 2; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106
691. 'The Tangi over Major Kemp', *Evening Post*, 5 May 1898, p 2; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106
692. Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106

more purchases, leaving it to the Māori parliament to devise their own Bill for the administration and management of Māori land.

The massive Māori support for Kotahitanga and the unprecedented unification of tribes against the Crown did achieve a major shift in Crown policies. Seddon and Carroll said that they were willing to get rid of the court and stop all Crown and private purchases. This was a huge concession to Māori wishes but it must be remembered that the Liberals purchased 2.7 million acres of Māori land in the 1890s.[693] The price for these reforms was that settlement would continue through leasing, and a substantial degree of Government control would ensure that large-scale leasing occurred. Individual dealings would cease but the corporate mechanism for land management was to be a board with a majority of Crown appointees; for the proposed new system to work, therefore, Māori would have to trust the Crown and be willing to vest their lands in the new boards. First, however, the Crown had to win sufficient support from the Māori parliament to proceed.

The parliament met at Papawai in May 1898, where the main topic of discussion was Seddon's Bill. According to John Williams, the parliament was 'in full agreement about the virtues and shortcomings of the bill' but disagreed over whether they should continue to demand legal powers for their own parliament, whether they still needed the Crown's protection, and whether the settler-dominated Parliament could be trusted to legislate in the best interests of Māori. Those who did not want to negotiate with Seddon and amend his Bill walked out, bringing the session to an abrupt end. Those who did want to negotiate were inclined to trust Seddon.[694]

4.8.4 What was the outcome?

The Crown and the Māori parliament negotiated an agreement in 1898–1900, which resulted in two pieces of legislation: the Māori Land Administration Act 1900 and the Māori Councils Act 1900. The former instituted the board system, although the name of the corporate mechanism was changed from 'board' to 'council', and the latter established a system of local government specifically for Māori communities. The negotiations of 1898–1900 will be discussed in a later volume of this report if the evidence permits. We simply note here that the Crown and Māori did reach agreement on a path forward which was designed to preserve all remaining Māori land, to constrain alienations to leasing only, and to provide Māori a role in land management and title determination.

The Māori Land Administration Act 1900 established a system of Māori Land Councils, consisting of elected Māori representatives and Crown appointees. The land councils took over some of the functions of the Native Land Court. The Act also established Māori committees, called papatupu committees, which were given a role in the investigation of title. The court, however, continued to exist

693. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 265

694. Williams, *Politics of the New Zealand Maori*, pp 98–100; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 518–527

and remained an alternative for Māori to use instead of the land councils. The first task of the land councils was to set aside sufficient land for the owners' present and future needs, after which the remaining land could be leased, but owners had to agree to vest their lands in the councils before any of this could occur. No alienations were allowed, however, without sufficient land having been reserved first. Alienation was primarily limited to leasing, and the Crown undertook to make no more purchases. At first it seemed that private purchasing had been banned absolutely, as Kotahitanga had sought, but some loopholes were later found to allow a limited amount of private purchasing to continue. This is a broad outline of the new 1900 system, as established following the agreement between the Crown and the Māori parliament, and the details will be provided in chapter 5.

The nineteenth century therefore ended on something of a positive note for Te Ātiawa/Ngāti Awa ki Kāpiti. Although they had lost nearly 40 per cent of Ngarara West A and 73 per cent of Ngarara West C, there was now the prospect that they would be able to retain the rest in perpetuity and obtain an income from leasing. On the other hand, they had lost so much: their interests in the Wainui and Whareroa blocks; most of the Muaupoko block; and most of the Ngarara block (through Crown purchasing in 1874 and the 1890s and through private purchasing in the 1890s). Their remaining interests on Kāpiti Island were also under threat. If they were to retain a significant stake in their own rohe, then it was essential that the 1900 legislation became embedded, further reforms were carried out, and a cheap, reputable source of finance was provided for development.

We turn next to make our Treaty findings for the claim issues in respect of the period 1873 to 1900.

4.9 Treaty Findings

4.9.1 Breaches

Our general findings on the native land laws and the Native Land Court will be made after hearing the evidence and submissions of all parties. Our findings in this section are specific to the aspects of the native land laws that applied to and affected Te Ātiawa/Ngāti Awa ki Kāpiti. We find that the native land laws breached the principles of the Treaty of Waitangi and the plain meaning of article 2 of the Treaty in the following ways:

- The Native Lands Act 1865 provided for land to be granted to a maximum of 10 owners (the 10-owner rule), regardless of the number of right-holders in a block, which resulted in the exclusion of all right-holders in the Kukutauaki 1 and Muaupoko blocks other than those named in the certificates of title, to their detriment.
- The Native Lands Act 1867 provided for the individualisation of title, which froze the fluid and mobile customary tenure of Te Ātiawa/Ngāti Awa ki Kāpiti in a finite list of individual owners for the Ngarara block who happened to be resident at that point in time, and who customarily would have kept the fires lit for those living in Taranaki and elsewhere who had the right to return and take up land under customary law. That right to return would

have continued and been regulated by rangatira if the native land laws had not cut across the tikanga of Te Ātiawa/Ngāti Awa ki Kāpiti in this way. The 1867 Act also lacked sufficient safeguards against errors in the compilation of lists of owners, in this case for the Ngarara block, which resulted in the inclusion of some from aroha who had no or little right, and the exclusion of others who were either overlooked or omitted as a result of internal quarrels.

- The Native Land Act 1873 abolished the trustee-like powers of the owners on the front of the Ngarara certificate of title (conferred under section 17 of the 1867 Act) but provided no corporate management structure as an alternative. This Act's individualisation of title and destruction of chiefly authority was strongly condemned by Wi Parata in his representations to the select committee in 1893.
- The Native Land Court Act 1886 empowered any individual to apply for partition regardless of the wishes of the community, resulting in the 1887 partition of Ngarara West against the wishes of the majority of owners who wished to retain their land intact and undivided.
- The Ngarara and Waipiro Further Investigation Act 1889:
    - restricted the rehearing to the partition applications of 1887 rather than the original 1873 list of owners, despite the clear evidence given to the 1888 select committee and Ngarara commission about the way in which the native land laws had frozen custom at a single point in time and thereby excluded absent right-holders from the title, and despite the recommendations of the Native Department Under-Secretary that the 1873 title should be reheard to allow their inclusion;
    - empowered the court to identify all individual interests on the block plan regardless of the wishes of the owners and even against the wishes of the owners, resulting in:
        - the compulsory division of all individual interests in Ngarara West into Ngarara West A2–A78 and Ngarara West C1–C41, with detailed descriptions of the boundaries and acreages of each section although prior to survey (followed soon after by the survey of these blocks to complete the subdivisions);
        - the fullest form of individualised title for Ngarara West;
        - scattered interests across non-contiguous sections for many Ngarara owners in an attempt to accurately reflect customary rights in the new form of title;
        - rapid alienations outside of community controls; and
    - deprived owners of a right to apply for a rehearing because the compulsory division of all individual interests by the court was technically done by a rehearing court instead of by a court of first instance.

These aspects of the native land laws were in breach of the tino rangatiratanga guarantee in article 2 and the principles of partnership and active protection.

The Native Lands Act 1865 and the amending 1867 Act were highly damaging to Te Ātiawa/Ngāti Awa ki Kāpiti because they converted the 'ahi kā', the residents

who were keeping the fires lit, into the sole legal owners, thus disenfranchising all other members of the iwi who had rights in the Ngarara block. Also, the Ngarara and Waipiro Further Investigation Act 1889 was particularly flawed due to the narrowness of the remedy provided, the element of compulsion, and the complete undermining of all tribal authority over Ngarara West. This Act also breached the principle of mutual benefit because the settlers were the main beneficiaries of the individual titles conferred under this Act and of the economic development of the Waikanae district that followed.

We accept, however, that the 1887 partition applicants did obtain a remedy from the special Act of 1889 in the sense that their individual portions of the block were significantly increased. We also accept that the Crown did not insist on imposing the costs of the Ngarara commission on the land, which had been recommended by the commission. On the other hand, the Crown did not act to relieve the owners of any of the costs despite much of the litigation occurring as a result of a mistaken decision by a court.

Section 13 of the Native Land Court Acts Amendment Act 1889 did not provide a remedy to certain classes of owners wrongly omitted from lists, in this case all those who applied in respect of the 1873 list of owners for Ngarara. We do not consider that section 13 itself was in breach of the Treaty. It was simply not intended to cover the situation of those excluded from the title in 1873, which required (Chief Judge Seth-Smith found) a rehearing on the merits. In particular, the question of whether those who had departed from Waikanae under Wiremu Kingi Te Rangitake in 1848 retained customary interests needed to be considered on its merits. This is where the failure to order a rehearing of the 1873 title in the wake of the Ngarara commission was so prejudicial to all right-holders who were not resident at the time or merely absent when the court sat in 1873.

The Native Lands Act 1867 also lacked sufficient safeguards against either large or small-scale errors in lists. As noted in section 4.5.3.2, the problems had been identified by Justice Richmond at the time, and a preliminary inquiry by a native council (under the failed Bill of 1872) or by district officers or some other mechanism was essential as a necessary corrective for those who were overlooked or deliberately left out due to internal tensions (such as the rangatira Pakewa and her whānau). We agree with the Turanga Tribunal on this point and have found the legislation in breach accordingly.[695] We also make further findings below.

In addition to the breaches in the native land laws, we find that the acts or omissions of the Crown breached the principles of the Treaty in the following ways:

- The Crown failed to pursue the Native Councils Bill 1872 past its first introduction to Parliament or any similar Bill and thereby failed to provide the appropriate safeguards that were missing from the native land laws and failed to provide Māori with a proper role in the determination of their own land entitlements.
- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became of aware of them but the Crown was

695. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 449, 451

responsible to some extent for compromising the outcome of the Ngarara commission by:

- appointing relatively inexperienced commissioners;
- failing to appoint any Māori commissioners and thereby depriving the commission of any expert Māori knowledge; and
- limiting the commission's inquiry to court decisions in respect of Ngarara West (instead of the original decision for the full Ngarara block in 1873).

- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became of aware of them but the Crown never provided a proper inquiry into the situation of those who alleged that they had been wrongly omitted from the Ngarara list of owners in 1873, and never provided them with an adequate remedy.
- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became aware of them but the Crown refused to consider any further remedies when petitions were lodged with Parliament after the enactment of the Ngarara and Waipiro Further Investigation Act 1889.
- The Crown did nothing to ameliorate the impact of full individualisation of title on Ngarara West in the 1890s.
- The Crown purchased land in the Muaupoko block in 1875 and in Ngarara West C in the 1890s without sufficient regard to the best interests of the Māori owners, including the payment of prices in the 1890s that were lower than its own purchase official's valuation.

These acts or omissions of the Crown were in breach of the principles of partnership and active protection.

We make no specific findings of breach in respect of the purchase of Ngarara East or 'Maunganui' in 1874 because no allegations were made about this purchase and no specific breaches have been identified in our inquiry. We do, however, note the overall contribution of this purchase to the significant reduction of the land left to Te Ātiawa/Ngāti Awa ki Kāpiti by the 1890s.

In respect of the Kotahitanga appeals to the Crown for systemic remedies in the 1890s, we note that the Government of the day refused to accept that the Treaty had been breached and refused to provide any remedies until 1898, when negotiations began for a partial remedy that was introduced in 1900. In particular, the Crown refused to abolish the native land laws, refused to prohibit all sales of Māori land, and refused to empower a Māori assembly to appoint committees to administer Māori land. The denial of remedies from 1893 to 1900 meant that the surviving land base of Te Ātiawa/Ngāti Awa ki Kāpiti was much reduced by the time the Māori Lands Administration Act was passed in 1900.

In respect of the voluntary arrangement provisions in the Native Land Court Act 1886 and the Native Land Laws Amendment Act 1890, we accept that those provisions gave Māori owners a degree of control over the title process, and that

the Crown had introduced amendments in 1890 to help guard against fraud. In the case of the 1891 subdivisions, the key problem was that the arrangement only covered some owners (albeit the majority) and was made before the court had made its awards to other owners. As a result, this particular arrangement was faulty and the court departed from it in its final allocations. That was not the Crown's fault. As above, however, the Crown failed to provide a remedy when petitioned about the outcome or to inquire fully into the circumstances of the voluntary arrangement in response to the petitions.

In terms of the inability of the community to prevent partition in 1887, the sale of land in the Muaupoko block in the 1880s, and the rapid alienation of the Ngarara West block in the 1890s, the Crown's concessions are relevant and appreciated. The Crown accepted two Treaty breaches in its concessions:

- individualisation of title contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa ki Kāpiti, and the Crown's failure to protect those structures was a breach of the Treaty; and
- the Crown's failure to ensure the retention of 'sufficient land for their present and future needs' was a breach of Treaty principles.[696]

In addition, the Crown conceded that individualisation of title made 'the lands of Te Āti Awa/Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition' but it did not concede that this was a Treaty breach other than to the extent that these things undermined traditional tribal structures. The Crown also conceded that the cumulative effect of its acts and omissions was to render Te Ātiawa/Ngāti Awa virtually landless but, again, it did not concede that this was a Treaty breach. Rather, Crown counsel conceded that one act of omission was in breach, the Crown's failure to ensure that Te Ātiawa/Ngāti Awa retained sufficient land. This tends to undermine the value of the Crown's concessions in this inquiry to a significant extent.

4.9.2 Prejudice

Te Ātiawa/Ngāti Awa ki Kāpiti suffered considerable prejudice as a result of the above breaches.

Individualisation of title had prejudicial effects in the almost complete alienation of the Muaupoko block in the 1880s.

In section 4.7 of this chapter, we attributed the rapid, uncontrolled alienation of land in Ngarara West A and C to the impacts of the special Act of 1889. These included the compulsory powers conferred on the court to divide all individual interests without provision for collective management and decision-making, and the fragmentation of 29,500 acres into 120 subdivisions (these figures do not include Ngarara West B). In addition, the requirement in the law that customary tenure be translated into individual ownership resulted in the fragmentation of some owners' interests across several non-contiguous sections. It also resulted in a significant number of sections that were too small for individual farms. These prejudicial effects of individualised title in general, and of the special Act of 1889

696. Crown counsel, closing submissions (paper 3.3.60), p 29

in particular, made the land easier to sell than retain and contributed to rapid land loss. The ease with which absentees could sell their individual interests also contributed to land loss in the 1890s. As with sales by individuals in general, absentee sales were a prejudicial consequence of removing control from chiefs and the community.

We also attributed land loss in the 1890s to the disproportionate costs of obtaining title. These included the protracted litigation in the Ngarara commission in 1888 and in the Native Land Court in 1890–91. Subdivision of all individual interests, with all its associated costs, was forced on many owners regardless of their opposition to it (even if the surveys were delayed for a time). Individualisation of title also exposed each owner to the dangers of the 'debt trap', in which lessees and prospective purchasers were the only source of credit, and individual sections could be acquired as a result of accumulated debt.

Individualisation of title and the disempowerment of the tribe could have been ameliorated in the 1890s had the Crown agreed to support the Federated Māori Assembly Bill in 1893 or the Native Rights Bill in 1894. The Crown's refusal to entertain Kotahitanga's proposals, including those communicated to the Crown by the Waikanae representative, Wi Parata, had prejudicial effects on the ability of Te Ātiawa/Ngāti Awa ki Kāpiti to control their lands and restrain sales in the 1890s.

While the effects of the special Act of 1889 were significant, the earlier native land laws also had prejudicial impacts on Te Ātiawa/Ngāti Awa ki Kāpiti. The title to Kukutauaki 1 and Muaupoko was individualised under the Native Lands Act 1865, and the 10-owner rule disenfranchised a significant number of right-holders. Evidence to the Ngarara commission and in the 1890 rehearing showed that there were people who were left out of both blocks, especially the Muaupoko block which was supposed to have been the hapū block for Otaraua, although there is some evidence that Eruini Te Tupe struck a deal with those excluded that they would have a larger share of the Ngarara block.

The Native Lands Act 1867 converted customary rights into a finite list of individuals who were resident at the time. While those who compiled the list understood that they were acting according to tikanga, they did not anticipate the effect that this would have on all those who were not resident at the time and who thereby lost all their rights in the land. The 1867 Act also lacked sufficient safeguards to prevent errors in lists of owners. These key flaws had a highly prejudicial impact on those who were omitted from the 1873 list of owners for the Ngarara block. The prejudicial effect was compounded by the Crown's failure to investigate their grievances properly or provide an adequate remedy. The evidence discussed in section 4.6 of this chapter suggests that the omissions may have been numerous and covered various classes of persons but with no proper inquiry at the time it is not possible for us to identify the full extent of the prejudice. We believe the prejudice to have been significant and long-term.

Finally, we note another prejudicial effect of individualised title and the native land laws. The protracted litigation of 1887–91 resulted in bitter conflict and divisions within Te Ātiawa/Ngāti Awa that were still evident in our hearings. Under customary tenure, the chiefs could provide for the highly mobile population by

allocating resources to those who had the right to return to Waikanae, as and when they returned, and any disputes could be resolved by customary mechanisms such as rūnanga and hui. The conversion of customary tenure into a finite list of individuals, and the requirement to identify the extent of each individual's entitlement – to assign acreages and boundaries to each individual – inevitably resulted in conflict, especially since the final decisions lay with the court and not the community. The nature and extent of the conflict was particularly bitter at Waikanae and it has had long-term effects.

CHAPTER 5

TWENTIETH-CENTURY LAND ALIENATION

5.1 Introduction

5.1.1 What this chapter is about

In this chapter, we address Te Ātiawa/Ngāti Awa claims about loss of land in the twentieth century. By the end of the nineteenth century, the land holdings of Te Ātiawa/Ngāti Awa ki Kāpiti had been reduced to the Ngarara West block, which had been split into three (the A, B, and C blocks). As a result of Crown and private purchasing in the 1890s, Te Ātiawa/Ngāti Awa only retained about half or 11,750 acres of Ngarara West in 1900. At the time our hearings began in 2018, however, Te Ātiawa/Ngāti Awa retained less than one per cent of the Ngarara West block.[1] The crucial period of land loss was the first three decades of the twentieth century. Most of Te Ātiawa/Ngāti Awa ki Kāpiti were landless or nearly so by 1930, and the remaining pockets of land (principally in the Ngarara West A and B blocks) were gradually lost in the remaining decades of the century. For that reason, our focus in this chapter is on the period from 1900 to 1930. It is also the period on which we have the most detailed evidence, arising in part from the focus of the main technical report on the private purchases of W H Field and the Elder family.

Māori land administration went through a number of permutations during the twentieth century, which had varying effects on Māori-owned land in this district. A number of statutes were enacted over this period providing for the vesting of Māori land for lease or sale in Māori Land Councils, Māori Land Boards and the Native Trustee (later Māori Trustee), and for these bodies to undertake other functions relating to the administration of Māori land. One of the key issues for this chapter is whether the Crown provided sufficient protections for Māori land in its legislation, and whether those protections were implemented effectively on the ground. The Crown conceded that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa landless, in breach of Treaty principles.[2] We set out the concession in full later in the chapter. The Crown also argued in this inquiry, however, that the legislative protections for Māori land were adequate, and that the real problem lay with the implementation of the protections by Māori Land Court judges, who were independent of the Crown. We focus on the legislative protections in section 5.4 of this chapter, setting out the key provisions of the Māori Lands Administration Act 1900 and its amendments, and the Native Land

1. Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues Report', December 2018 (doc A214), pp 299, 399
2. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), pp 23–24

Act 1909 and its 1913 amendments. These were the principal statutes for the period under review. The main technical report by Dr Barry Rigby and Dr Kesaia Walker did not examine the 1900 Act and its amendments in any detail, so we have also considered relevant Rangahaua Whanui reports (which are available for all inquiries), the parliamentary debates, and the statutes themselves in particular detail in this section.

We then provide an overview of land loss in section 5.5, which shows the rapid and uncontrolled loss of land between 1905 and 1930 as a result of private purchases by local settlers. There were no Crown purchases in this part of the inquiry district during that period. In section 5.6 we examine how the private purchase system operated in the Waikanae district, especially the part played by debt and the lack of development finance in the transfer of land from individual Māori owners to local Pākehā purchasers and lessees. We then examine the operation on the ground of the Crown's main protection mechanism, the confirmation of purchases by the Māori Land Board, in section 5.7.

Following our analysis of claim issues in relation to private purchasing, we consider Te Ātiawa/Ngāti Awa claims about the loss of land in the twentieth century due to rating. In particular we examine the role of the Crown in the statutory processes for exempting Māori land from rates and the compulsory vesting of Māori land in the Māori Trustee for sale to pay rates arrears. The claimants felt very strongly about their rating grievances, especially because many recalled the struggle of their parents and grandparents to retain land that produced no revenue, received no services, and yet was accumulating rates charges every year. The compulsory vesting of land for sale was a grievance raised by the Higgott whānau, the Baker whānau, and other claimants, who argued that their last surviving turangawaewae at Waikanae was confiscated from them by compulsory vesting for sale. The Crown made a concession about the Baker whānau claim in respect of Ngarara West A78E2, concerning the role of the Crown in the loss of that land. The Crown's concession is set out in full later in the chapter. The concession did not relate to the other compulsory vestings.

Our findings are located at the end of the chapter in section 5.9.

We do not address claims about Parata Native Township in this chapter. This township was established on Ngarara West C41 in 1899 under a special legislative scheme, the Native Townships Act 1895. The history of the township, its administration, and the eventual sale of its sections, bridges the nineteenth and twentieth-century and was the subject of specific claim issues. Those claim issues will be addressed in chapter 6.

5.1.2 Issues for later consideration in this inquiry

Te Ātiawa/Ngāti Awa claims about twentieth-century land loss raised a number of general issues that we were not in a position to report fully on without hearing the rest of the evidence and submissions in this inquiry. We do not address the full and wider range of issues in respect of rating, for example, but rather focus on the specific matters that most affected Te Ātiawa/Ngāti Awa ki Kāpiti. Inevitably, we

Rating Terminology used in this Chapter

For the period covered in this chapter, there were two principal Acts: the Rating Act 1925 and the Rating Act 1967. These Acts provided for certain key mechanisms, including:

Charging orders: After the elapse of two years from when rates were levied against Māori land, local authorities could apply to the Native (later Māori) Land Court for a charging order to recover unpaid rates. Charging orders were recorded in the court's records and registered on the land transfer title (if one existed). Such orders remained on the title until repaid, which could include deducting the amount from rent or the purchase price if the land was leased or sold. Under the Rating Act 1967, the period before applying for a charging order was reduced to six months.

Receiverships: Once a charging order had been made, the court could appoint a receiver to lease the land so that the rates could be recovered from rents. Receivers could lease land for periods of up to 21 years. The court usually appointed the district Māori Land Board as receiver or the Native (later Māori) Trustee. Receiverships for Māori land were abolished by the Rating Act 1967.

Vesting orders: If a charging order remained unpaid for a year or more, local authorities could apply to the court for an order vesting the land in the Native/Māori Trustee for sale so that the rates could be recovered from the purchase money. Under the Rating Act 1925, no vesting order could take effect without the consent of the Native Minister (later the Minister of Māori Affairs). The Minister's role was removed in the 1967 Act.

have to address relevant aspects of the legislation, and will do so again later in this report.

Other issues have been omitted altogether. In particular, we have not addressed the full range of issues relating to public works takings and compulsory Europeanisation of title. In respect of public works takings, we have already considered some takings in chapter 3, and will also address the claims relating to the Kāpiti airport (and the public works issues associated with the airport) in chapter 7. Otherwise, there is little specific detail in the evidence on public works takings relating to Te Ātiawa/Ngāti Awa ki Kāpiti. In respect of compulsory Europeanisation of title, this issue relates to the Māori Affairs Amendment Act 1967. For the most part, it is best dealt with after hearing all evidence and submissions in respect of that Act and the Europeanisation of title, but we do consider it briefly in chapter 7 in respect of Ngarara West B.

We turn next to summarise the relevant submissions of the parties and to identify the key issues for inquiry in this chapter.

5.2 The Parties' Arguments

5.2.1 The claimants' case

5.2.1.1 Land alienation under the native land laws

The claimants expressed broad dissatisfaction with the Crown's twentieth-century land legislation and the effect of local administrative structures on Māori land in the district. They said that both the legislation, and its implementation in the inquiry district, breached the Treaty of Waitangi and its principles and caused prejudice to Te Ātiawa/Ngāti Awa.

According to the claimants, the primary cause of land loss was the individualisation of title. The rehearing of 1890 (discussed in chapter 4) 'resulted in a new tenure which consisted of individualised sections at Waikanae being awarded and was vastly different from Te Ātiawa customary ownership'. The claimants argued that, as a result of this individualisation, the land was so 'quickly alienated' that 'by 1925 there were only a handful of landholdings relating to the Ngarara land which remained with Te Ātiawa individuals'.[3] Today, very little land remains in Māori ownership, much of it in the hilly, less valuable Ngarara West C.[4]

The claimants argued the Crown has a duty to actively protect the land and resources of Māori and to ensure they retain sufficient land for their present and future needs. Claimant counsel acknowledged that the Crown did take 'steps towards fulfilling its protective obligations' in the Native Land Act 1909. Nonetheless, the claimants argued that, '[c]ontrary to the requirements of the relevant statutory provisions', the Crown did nothing to restrain private purchasers. In the claimants' view, Te Ātiawa/Ngāti Awa were subjected to a predatory system in which private purchasers used their advantages as settlers to obtain cheap credit and then leverage the debts of Māori owners to acquire land. It was also fairly easy, they claimed, for such persons to evade the Crown's anti-aggregation laws. In particular, the claimants suggested that W H Field 'used his position as a Member of Parliament to ensure that lines of credit remained open to him, which were not available to his Te Ātiawa debtors'.[5]

The claimants alleged that the Crown failed to protect Māori land from such predatory activity:

> Under the [1909] Act the obligation lay with Native Land Court Judges. The Crown will no doubt submit that because decision-making power was reposed in the judiciary, the Crown bears no responsibility for the failure of the legislation to provide real protections to Te Ātiawa landowners. For the Tribunal to accede to such a submission would have the effect of undermining the protections of the Treaty.
>
> Whilst the Crown is not responsible for particular judicial decisions nor, necessarily, for the approach of a particular Judge, the Crown has overall responsibility for the effectiveness of the judicial system that it establishes and maintains. The powers

3. Claimant counsel (B Gilling, S Dawe, and R Brown), closing submissions, 21 October 2019 (paper 3.3.51), p 51
4. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 51
5. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 21

that it provided to Judges, the resources which it provides them and their staff and the quality of those who it appointed to judicial office were all matters that lay in the hands of the Crown.

The fact that, within that failing system, a conscientious Judge, such as Judge Harvey, could make a difference in particular cases, does not mean that the operation of the system was not deeply flawed.

That the Crown's system of protection was flawed is evident from the record of land lost: under a number of Judges, over several decades land was purchased from Te Ātiawa at an astonishing rate, to the point where they were made, by the middle of the 20th century, effectively landless.[6]

The claimants relied on the evidence of Dr Barry Rigby to argue that the system failed because it was grossly under-resourced by the Crown, so that alienations could not be policed effectively by the Native Land Court or the Māori Land Boards.[7]

5.2.1.2 *Rating*

Claimant counsel contended that local authorities, performing functions delegated by the Crown, used unpaid rates as a tool to forcibly acquire Te Ātiawa/Ngāti Awa land. In several cases, land upon which local authorities levied rates and subsequently acquired to recoup rates arrears, was undeveloped and, therefore, unable to be utilised profitably. The claimants alleged that the Crown, in delegating its kāwanatanga powers to local government without sufficient checks and balances, did not fulfil its Treaty obligations to protect Māori land and made owners vulnerable to the actions of local authorities.[8] The claimants likewise contended that the Crown's failure to oversee how local authorities used rating policies clearly breached te Tiriti/the Treaty's guarantee of tino rangatiratanga and Treaty principles.[9]

5.2.2 The Crown's case

5.2.2.1 Land alienation under the native land laws

The Crown submitted that Crown policy in the nineteenth and much of the twentieth centuries 'generally supported the alienation of land from Māori ownership'. This policy 'dovetailed both with the philosophy that the right to alienate land was a fundamental right of ownership inherent in the rights conferred by Article 3 of the Treaty, and the Crown's overarching goal to turn unproductive land – whether Māori-owned or not – into production for the benefit of local, regional and national economies'. According to the Crown, the ability to alienate land was 'seen as key to the colony's economic development, and as a benefit to

6. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 21–22
7. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 22
8. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 56
9. Claimant counsel, (J Mason), closing submissions, 2 December 2019 (paper 3.3.55), p 35

Māori, indeed vital to their prosperity'.[10] Crown counsel submitted that there was no evidence of bad faith in this policy, and that 'good intentions at times had unintended negative consequences', so the focus of the Tribunal should be on whether 'consequences were foreseeable, and on the adequacy of the Crown's response to such consequences once identified'. The Crown also submitted that there was no intention that the introduction of the Native Land Court would result in landlessness, although the Crown did admit that 'individualisation of title made land more susceptible to alienation'.[11]

In respect of the specific case of Te Ātiawa/Ngāti Awa ki Kāpiti, the Crown accepted that '[u]ltimately, after the partitioning of the various blocks, the situation now is that very little of the land which was comprised within the original Ngarara block (incorporating also the Kukutauaki and Muaupoko blocks) remains in the ownership of Te Ātiawa/Ngāti Awa ki Kāpiti'.[12] The Crown conceded that:

> the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[13]

The Crown also made specific concessions in respect of the effects of the native land laws on the ability of Te Ātiawa/Ngāti Awa to retain their tribal lands. The Crown conceded that the individualisation of Māori land tenure made the land more susceptible to fragmentation, alienation, and partition.[14] In relation to private purchasing, however, the Crown maintained that it was not responsible for the actions of private individuals. Moreover, while the Crown agreed W H Field made several major purchases of Ngarara West lands during his tenure as a member of Parliament, the Crown argued that he did not make these transactions in an official capacity.[15]

Crown counsel also submitted that the restrictions on land alienation contained in section 220 of the Native Land Act 1909[16] and preceding native land legislation, were adequate protections against landlessness. Moreover, the Crown contended it was not responsible for the actions of the Native Land Court, which was responsible for implementing the protections contained in the law. In other words, Crown counsel argued that landlessness was a result of the ineffective implementation of the law by the Native Land Court, not of the native land laws or Crown policy. In making this submission, the Crown relied on a statement by Dr Rigby

10. Crown counsel, closing submissions (paper 3.3.60), p 26
11. Crown counsel, closing submissions (paper 3.3.60), pp 26–27
12. Crown counsel, closing submissions (paper 3.3.60), p 38
13. Crown counsel, closing submissions (paper 3.3.60), p 38
14. Crown counsel, closing submissions, (paper 3.3.60), p 30
15. Crown counsel, closing submissions, (paper 3.3.60), pp 38–39
16. Section 220 required that all Māori land alienations be confirmed by a Māori Land Board against a set of protective criteria before the alienations would take effect (see section 5.4.4).

that 'the issue was about the implementation of the law by the Native Land Court, not the law itself'.[17] Crown counsel accepted, however, that the Crown might have a responsibility to respond to court decisions, when potential for Māori to be landless was brought to the Crown's attention. Crown counsel also contended that the Crown was unaware of any concerns regarding W H Field's purchasing activities.[18] Here, the Crown was referring to a letter from the iwi to the Minister of Justice in 1918, appealing for an inquiry into the Fields' purchases. This letter was found by claimant kaumātua Tutere Parata, but the Crown argued that there is 'no record to verify the letter was actually received by the Crown' and no other evidence that the Crown was aware of any problem.[19]

Ultimately, the Crown submitted that 'it was not its role to supervise private land purchasing; that was the role of the Māori Land Council and the Māori Land Court'.[20]

5.2.2.2 *Rating*

The Crown expressed sympathy with the difficulties iwi members described in their dealings with local authorities. Nonetheless, as a matter of general principle, the Crown's view is that its responsibility has been restricted to 'creating (and reviewing) the statutory framework in which local authorities operate'. The Crown has 'a duty to ensure that the statutory framework within which local authorities operate is Treaty-consistent', but the Crown is not responsible for the councils' day-to-day decisions. Reviewing the *actions* of councils, the Crown submitted, lies with the courts, not the Crown.[21] More specifically, the Crown does not levy or collect rates, it is responsible for the 'statutory framework in which local authorities levy and recover rates'.[22]

The Crown acknowledged that, historically, Māori land could be subjected to charging orders (see the sidebar on page 363), managed by a receiver, potentially leased to recover rates arrears, and even subjected to forced sales to recover arrears. The Crown argued that a forced sale was a 'last step' in a system that 'balanced fairly' the burdens and advantages of local infrastructure development. There were protections in the form of procedural requirements for forced sales. Also, the statutory scheme included 'special considerations to mitigate hardship'. Finally, Crown counsel submitted that the Crown's policy was generally not to permit forced sales for payment of rates.[23]

The Crown conceded that one of the examples provided in this inquiry, the sale of Ngarara West A78E2, was not consistent with Treaty principles. In this particular case, the Crown acknowledged that there were steps available to the Department

17. Crown counsel, closing submissions, (paper 3.3.60), p 39; transcript 4.1.18, p 640
18. Crown counsel, closing submissions, (paper 3.3.60), p 39
19. Crown counsel, closing submissions (paper 3.3.60), pp 39–40
20. Crown counsel, closing submissions (paper 3.3.60), p 40
21. Crown counsel, closing submissions (paper 3.3.60), pp 118–119
22. Crown counsel, closing submissions (paper 3.3.60), p 126
23. Crown counsel, closing submissions (paper 3.3.60), p 126

of Māori Affairs which it failed to take, with the result that the land was unnecessarily vested in the Māori Trustee for sale.[24]

5.3 Issues for Discussion

In light of the arguments advanced by claimants and the Crown, and the Crown's concession(s), this chapter addresses the following general questions:

- Were the Crown's legislative arrangements for Māori land adequate for its protection and the prevention of landlessness?
- How did the native land laws and their protection mechanisms operate in practice in respect of the alienation of Te Ātiawa/Ngāti Awa lands? Was the Crown aware of the problems?
- How and why was so much of the remaining Te Ātiawa/Ngāti Awa land sold to private purchasers in the first three decades of the twentieth century?
- Did W H Field, a major private purchaser in the district, abuse his public position as a member of Parliament to the detriment of Te Ātiawa/Ngāti Awa?
- Were there flaws in the rating legislation applicable to Māori land (for the period relevant to this volume of the report)?
- Was the compulsory vesting of Māori land for the non-payment of rates compliant with the Treaty of Waitangi and its principles?

5.4 What Legislative Arrangements Did the Crown Provide for Māori Land, and Did those Arrangements Give Adequate Protection?

5.4.1 Introduction

In this section of the chapter, we address the issue of legislative arrangements for the management, alienation, and retention of Māori land in the first three decades of the twentieth century. In the 10 years from 1891–1900, 61 per cent of Ngarara West was alienated from Te Ātiawa/Ngāti Awa ownership.[25] This rapid rate of sale showed the destructive effects of title individualisation. Te Ātiawa/Ngāti Awa leaders had held the tribal estate together until the partitions of 1890, which effectively removed all collective controls over the sale of land. Thus, Te Ātiawa/Ngāti Awa did not enter the twentieth century with a blank slate: they were starting on the back foot and the impacts of the rapid tenurial transformation of the previous decades continued to be felt.

As we discussed in chapter 4, North Island Māori were highly concerned at the loss of land by the 1890s. Te Ātiawa/Ngāti Awa ki Kāpiti joined with the many iwi who formed the Māori parliament (Kotahitanga), which sought full autonomy over all Māori affairs, including the land titling system and alienations, and a

24. Crown counsel, closing submissions (paper 3.3.60), pp 127–130
25. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition', 7 June 2018 (doc A203), pp 23, 25, 33, 39, 113–114

total halt to Crown and private purchasing. Faced with a massive protest movement that included many of the Crown's allies in the wars of the 1860s, the Liberal Government gave way on land matters but would not agree to a Māori body governing alongside the settler Parliament, even if both were under the Queen. The Crown and the Kotahitanga parliament negotiated an agreement in 1898–1900. One of the results was the Māori Lands Administration Act 1900, which was a compromise between the Crown and the rangatira of the Māori parliament, which had split on the question of abandoning its goal of autonomy at the national level.[26] As we describe in this section, the 1900 Act had a raft of protections for Māori; it was a high mark in the relationship between the two Treaty partners.

The Māori Lands Administration Act 1900, however, did not remain in place very long; by 1905 the Liberal Government had begun to undermine its core elements. It was repealed entirely in 1909, as was the native land legislation in force since 1894. The Native Land Act 1909 replaced the compromise agreement between the Crown and the Māori parliament, which had since disbanded on the strength of the 1900 reforms. The main features of the 1909 Act remained in place until 1936, by which time the vast majority of Te Ātiawa/Ngāti Awa's tribal estate was gone.

In this section of the chapter, we address two major issues raised by the Crown in its closing submissions. First, as summarised above in section 5.2.2, the Crown argued that its 'native land policies' in the nineteenth and much of the twentieth centuries supported the alienation of Māori land, and that its policies were intended in good faith although there may have been bad, unintended consequences. According to the Crown, the Tribunal should focus on whether 'consequences were foreseeable, and on the adequacy of the Crown's response to such consequences once identified'.[27] In this section, we consider the Māori Lands Administration Act 1900, which was the Crown's substantive response to the land grievances presented to it by Kotahitanga in the 1890s. We also examine the subsequent unravelling of the 1900 protections, and the Crown's ongoing responses to the threat of Māori landlessness.

Secondly, we address Crown counsel's submissions about protection mechanisms vis-à-vis private purchasing in the twentieth century. The Crown conceded that the 'cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless',[28] but it also submitted that its protection mechanisms against landlessness were adequate and that the blame did not lie with the Crown:

> The Crown is not responsible for the actions of private individuals. Mr Field's land purchases were undertaken in his personal capacity and not as a Member of Parliament. Dr Rigby agreed, when questioned by counsel for the Crown, that Mr

26. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008, vol 1, pp 366–368, 372–380, 381–384, 387–394
27. Crown counsel, closing submissions (paper 3.3.60), p 26
28. Crown counsel, closing submissions (paper 3.3.60), pp 23–24

Field's actions in relation to land purchasing and related matters were as a private individual.

The restrictions on land alienation contained in section 220 of the Native Land Court Act 1909 and preceding Native Land Court legislation were adequate protections. Dr Rigby's technical report highlights the protection against landlessness in section 220 of the Native Land Court Act 1909, however other protections included procedural protections and a requirement that the alienation is not contrary to equity or good faith or to the interests of the vendor.

The Crown is not responsible for the actions of the Native Land Court which was responsible for implementation of the law. Dr Rigby clarified that the issue was about the implementation of the law by the Native Land Court, not the law itself.

The Crown accepts it may have responsibility for its response to Court decisions, but only where issues are brought to its attention. There is no firm evidence to establish that the Crown was aware of any concerns with W H Field's purchasing activity . . .[29]

It is important for us to consider the legislative mechanisms in some depth to assess whether the Crown's arguments are correct. We do so in this section by addressing the key question: Were the Crown's legislative arrangements for Māori land adequate for its protection and the prevention of landlessness? The extent to which the protective mechanisms were effective on the ground at Waikanae is considered in later sections of this chapter.

5.4.2 The Māori land laws, 1900–04

5.4.2.1 Māori Lands Administration Act 1900

We discuss the Kotahitanga movement and the establishment of a Māori parliament in chapter 4. Wi Parata presented some of the Māori parliament's grievances to the Native Affairs Committee in 1893. He stressed the role of the native land laws in the loss of Māori land, especially the individualisation of title and the resultant destruction of community control over the alienation of land (see section 4.8.2). At that stage, the Waikanae leaders were still hopeful that the Crown would reform the native land laws and that colonisation would be of mutual benefit to both Māori and settlers.[30] By the late 1890s, the Crown had decided to negotiate with Kotahitanga over a proposed Bill. Wi Parata was one of numerous chiefs who called for the Government in 1898 to ban all Crown and private purchases of Māori land and to abolish the Native Land Court, after which Māori could devise their own Bill for the control of their lands and affairs.[31]

Following negotiations from 1898–1900, the Māori Lands Administration Act 1900 reflected four of the Māori parliament's main goals (to varying degrees):

29. Crown counsel, closing submissions (paper 3.3.60), pp 38–39
30. Tony Walzl, 'The Public and Political Life of Wiremu Te Kakakura Parata, 1871–1906', May 2019 (doc A216), pp 101–102
31. Walzl, The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106

- Māori land entitlements should be decided by Māori committees, not by the Native Land Court;
- no more Crown or private purchasing;
- all remaining Māori land should become a permanent reserve; and
- no more individual dealings in land – there should be a management structure to enable collective control of leasing, and Māori should have the right to choose whether or not to use their lands in the colonial economy by leasing.

The Act also reflected some of the Crown's principal objectives, as stated by Premier Richard Seddon and others at the time:

- Settlement must continue on a large scale but only by leasing – leasehold was an acceptable form of land tenure for the Liberals.
- The Native Land Court would continue to retain ultimate authority over the land titling process and individualisation of title.
- The alienation of Māori land could be controlled through regional boards, modelled on the land boards that dealt with Crown lands. The regional boards would be composed of Crown representatives and elected Māori representatives; this was the management structure offered by the Crown to replace individual dealings. The boards (called Māori Land Councils) would only have powers to lease and not sell.
- Māori should be protected from landlessness and retain sufficient land for their present and future needs, so as not to become a burden on the State.
- Settlement should continue but in a manner fair to both races and for the benefit of both.[32]

The Premier expressed some of these ideas in summing up the Crown's policy in Parliament in 1903:

> I have no hesitation in saying that, once the Natives understand the law [of 1900] and reap the advantages of settlement under the conditions provided in this law, you will find, as I said three years ago, that our legislation is a solution to the Native land difficulty. . . . [A]lthough the Natives are slow to move, once they are assured of their birthright, and that the land is for themselves and their children, they will do what is wanted in regard to settlement, and what is for the good of both races. Our policy will have that effect. Now, looking at the number of the Natives and the area of Native land remaining, I think members must come to the conclusion, as I have done, that it would be a manifest injustice to take more land from them under the old system. If that system were continued it would mean that we would have claims for land on behalf of landless Natives. You cannot allow them to be a burden upon the colony. In justice to them and what they have done for this country, and what we have received from them, the civilised world would be in arms against any unjust treatment of a noble race if we allow that race to be in the condition I have mentioned. If by roading and leasing their lands practically on the same terms as Crown lands, and seeing that

32. John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Washington: University of Washington Press, 1969), pp 98–111, 117–118

each Native has sufficient land to live upon, we can accomplish what is desired, I am sure that our efforts will be approved of by every well-wisher of both races.[33]

One of the biggest contests between the Crown and the Kotahitanga chiefs was on the question of compulsion: the Government preferred the compulsory vesting of all Māori land in the district so that it could be leased by the board/council, whereas Māori leaders wanted the vesting of land for leasing to be a voluntary act of the Māori landowners in a district. The latter viewpoint won in 1900. The Government introduced two Bills (one compulsory, one voluntary) and the voluntary Bill was progressed through Parliament as the Māori Lands Administration Act 1900.[34] All alienations were controlled by the new Act.[35] The Native Land Court Act 1894 and its amendments continued in force for other purposes, including the continued operation of the Native Land Court.

For our purposes, the key provisions related to reserves, leasing, and private purchasing, since the Crown did not purchase any of the Waikanae lands in the twentieth century. The main features of the 1900 legislation were:

- Six Māori Land Councils would be established, composed of a Crown-appointed president, up to three other people appointed by the Crown (one of whom had to be Māori), and up to three elected Māori representatives.[36] In practice there was a Māori majority on all the councils.[37] The Act empowered the Māori Land Councils to exercise various powers of the Native Land Court, including title determination (in conjunction with elected local papatupu committees).[38] The provision for papatupu committees was not relevant to Te Ātiawa/Ngāti Awa ki Kāpiti, however, as all their lands had passed through the court before 1900.
- The first responsibility of the Māori Land Councils would be 'with all convenient speed' to determine how much land each Māori man, woman, and child had for occupation and support, and to determine how much of that was required for their maintenance. Each individual would then receive a papakāinga certificate for that land, which would be absolutely inalienable, and would serve as proof that their other land could be leased.[39] In 1903, this provision was extended to allow the councils to set aside papakāinga reserves for hapū, whānau, or any group of two or more Māori, instead of providing papakāinga certificates for individuals.[40]

33. R J Seddon, 12 November 1903, NZPD, vol 127, pp 532–533
34. Donald Loveridge, *Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952* (Wellington: Waitangi Tribunal, 1996), pp 16–18
35. Māori Lands Administration Act 1900, s 22
36. Māori Lands Administration Act 1900, ss 5–6
37. Loveridge, *Maori Land Councils and Maori Land Boards*, pp 32–34
38. Māori Lands Administration Act 1900, ss 6, 9–20
39. Māori Lands Administration Act 1900, s 23
40. Māori Land Laws Amendment Act 1903, s 13

- Alienations were only to be conducted under the 1900 Act.[41] Any bona fide Crown or private purchases that were in progress at the time of its enactment could be completed.[42] Otherwise, Māori could transfer land in trust to a Māori Land Council on terms agreed by the owners and the council for leasing, cutting up, managing, or improving the land.[43] The council could reserve any part of the land transferred to it for the owners' occupation and support (over and above papakāinga reserves), such reserves to be inalienable.[44] A 1903 amendment made the councils responsible for deciding whether such reserves were necessary even if the owners did not ask for a reserve.[45] The council could also, at the owners' request, permanently reserve burial grounds, eel weirs, fishing grounds, areas for the protection of native birds, and fuel or timber resources for the future use of the owners. The councils would then lease the remaining land by public tendering, ensuring a rental at market value from the highest bidder.[46]

  These provisions were supposed to ensure that all the owners' present and future needs were protected by inalienable reserves before any more alienation occurred. These provisions were also intended to stop the 'debt trap' discussed in chapter 4 (see section 4.7.4). Under the 1900 Act, if the owners chose to vest their land in the boards, it would be leased by the board to the highest bidder. Leasing would therefore no longer involve a cycle of debts between individual owners and lessees, often resulting in the conversion of the lease to a purchase at a later date. A fair rental would also be ensured. If authorised by the owners, the council could borrow money on the security of the part of their vested land to be leased so as to pay off survey liens or the owners' bona fide debts.[47]
- For any land not vested in a council, no lease could occur without the council's consent.
- There was provision in the Māori Lands Administration Act 1900 to allow a limited amount of new private purchasing. The Act specified that it did not affect the alienation of land where titles had been fully individualised and were held by just one or two owners.[48] The Native Minister, James Carroll, later tried to limit the application of what was called the 'rule of two' by limiting it to partitions that already existed at the passage of the Act in 1900, so that future partitions would not free up land for sale no matter how

41. Māori Lands Administration Act 1900, s 22
42. Māori Lands Administration Act 1900, ss 35, 37
43. Māori Lands Administration Act 1900, ss 28, 31
44. Māori Lands Administration Act 1900, s 29
45. Māori Land Laws Amendment Act 1903, s 17(1)
46. Māori Lands Administration Act 1900, s 29(1)–(2)
47. Māori Lands Administration Act 1900, s 29(3)
48. Māori Lands Administration Act 1900, s 22; Māori Lands Administration Amendment Act 1901, s 4

individualised the title became. He was forced to compromise on this point to get his Bill through the Native Affairs Committee.[49]

The 'rule of two' was important for Te Ātiawa/Ngāti Awa ki Kāpiti because a number of Ngarara West blocks came under this category. As discussed in chapter 4, this was because of the operation of the Ngarara and Waipiro Further Investigation Act 1889, which empowered the court to cut out every individual interest on the block plan. The result in 1891 was that 36 of the 79 Ngarara West A sections were awarded to single owners, and 26 of the 41 sections of Ngarara West C were also awarded to single individuals.[50] Successions would eventually increase the number of owners in each block but as at 1900 the number of subdivisions that would have been vulnerable to the 'rule of two' was clearly significant.

- Under the Native Land Court Act 1894 and the Native Land Laws Amendment Act 1895, no private purchase of Māori land could take place without the prior approval of the Governor in Council and without confirmation from the Native Land Court.[51] This legislation was still in force but Kotahitanga leaders believed that they had won agreement to a complete halt of all private purchasing. In legal terms there was uncertainty as to whether any private purchases *could* still be made under the earlier legislation because the 1900 Act specified that alienations could only take place under its own provisions. The only allowance for private purchases in the 1900 Act was the completion of extant sales and alienations under the 'rule of two'. In 1903, however, the Government introduced a 'validating clause' to specify that nothing in the 1900 Act barred the operation of the relevant section in the previous legislation. This was a crucial amendment because it reopened the door for private purchasers to seek an order in council under the Native Land Laws Amendment Act 1895.[52]

  Carroll stated that the need for this 'validating clause' had arisen because of what he called 'doubts' as to whether the 1900 Act interfered with the ability of private purchasers to 'have lands exempted' from pre-emption under section 117 of the Native Land Court Act 1894 so that they could be alienated. 'Any doubt is removed here', said Carroll, 'because this clause expressly declares that it [the 1900 Act] does not affect the operation of that section.' According to the Minister's explanation in Parliament, orders in council that had been issued in the meantime were likewise validated by this 1903 amendment.[53] The member for Northern Māori, Hone Heke, objected to this amendment, arguing correctly that it violated Premier Seddon's

49. Māori Land Laws Amendment Bill 1903, no 165–1, cl 9; James Carroll, 12 November 1903, NZPD, vol 127, p 525.

50. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 25, 39

51. Section 4 of the Native Land Laws Amendment Act 1895 empowered the Governor in Council to exempt land from the operation of section 117 of the Native Land Court Act 1894.

52. James Carroll, 12 November 1903, NZPD, vol 127, p 525; Māori Land Laws Amendment Act 1903, s 16

53. James Carroll, 12 November 1903, NZPD, vol 127, p 525

agreement with the chiefs to stop all purchases of land.[54] Private purchasers, however, now had to meet some new requirements that did not apply in 1895: no order in council would be issued to authorise a private purchase without a recommendation from the Māori Land Council.[55] As before, purchases had to be confirmed by the Native Land Court against a set of protective criteria (see section 5.4.4.2 for the criteria). The Māori vendors also had to have papakāinga certificates (or proof that lands had been allocated in preparation for the issuing of a certificate) if the land was owned by more than two owners.[56]

- The District Land Registrar was not permitted to register a transfer of land by sale without proof of the vendors' papakāinga certificates (or council allocations pending the issuing of certificates).[57]
- If private purchases or leases did occur under the 1900 provisions, there was a further barrier designed to prevent the accumulation of too much land in the hands of individual Europeans, in line with the Liberals' policy of closer settlement. No purchaser could acquire Māori land without demonstrating to the Māori Land Council (or the Native Land Court) that the private buyer would not end up with more than 640 acres of first-class land in total or 2,000 acres of second-class land.[58] These aggregation limits were reflective of the earlier Land Act 1892, which the Liberals introduced to try to limit speculation and get small farmers on to the land. Dr Rigby pointed out that the 1900 Act did not impose aggregation limits on the amount of Māori land that could be leased. This was intended to encourage leasing and discourage purchasing.[59]

Thus, the Māori Lands Administration Act 1900 was designed to limit the alienation of Māori land to leasing with limited exceptions for private purchasing. Premier Seddon told Parliament in 1900 that the past 'safeguards intended by the legislature have not been sufficient to meet what was required', and the new Act would be a 'great improvement'. The Māori Lands Councils, he said, which were partly elected by Māori in the district, would have a 'better grasp, and will be in a position better to locate the land' for papakāinga reserves than 'any Commissioners under our present law'.[60] Both Māori leaders and the Crown saw elected Māori representation on the Māori Land Councils as a crucial point.

5.4.2.2 *The standards set by the 1900 legislation*

The 1900 legislation was a high point in the Crown's fulfilment of its obligations of active protection, and it arose as a result of negotiations and compromises between

54. Hone Heke, 12 November 1903, NZPD, vol 127, p 529
55. Māori Land Laws Amendment Act 1903, s 16
56. Māori Lands Administration Act 1900, s 23; Māori Lands Administration Amendment Act 1901, s 4
57. Māori Lands Administration Act 1900, s 25(4)–(6)
58. Māori Lands Administration Act 1900, s 26
59. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 272
60. R J Seddon, 12 October 1900, NZPD, vol 115, p 168

the Crown and Māori leaders. It set standards in terms of active protection which later legislation fell well short of. Key points included:

- Māori were represented on (and in practice formed a majority on) the main body for the administration of Māori land, a role from which they had previously been excluded.
- Māori committees could investigate titles and the Māori Land Councils could exercise some of the powers of the Native Land Court.
- The law required that all economic and cultural needs be met by the setting aside of various kinds of reserves *before* any alienation could occur. These included reserves for fishing and birding. The reserves would be decided by a body on which Māori were represented, and in conjunction with the wishes of the owners. As well as individual papakāinga reserves, inalienable reserves could also be set aside for hapū or other groups. The system relied on papakāinga certificates to prove that owners retained sufficient land to allow some to be alienated, rather than an inquiry after the fact. It is difficult to overstate the importance of this point. The proactive setting aside of reserves to meet all present and future needs before any alienation was far superior to later protections, which required a check at the end of a purchase process as to whether a vendor retained enough for his or her use or (later still) whether the vendor had a job.
- The alienation of Māori land was supposed to be by leasing only. The Crown had committed to no more purchases after the completion of those already in train. Private purchasing continued to be restricted (as it had been since the Crown reintroduced pre-emption in 1894) but it was not banned altogether. According to Donald Loveridge, '[f]or all practical purposes, new sales of Maori freehold land were suspended'.[61] Nonetheless, the 'rule of two' and the 1903 amendment began to unravel the total ban that the Māori parliament had sought in the 1890s.
- The new management structure provided by the Act – Māori Land Councils – gave a way to end individual dealings. The owners collectively decided whether to vest their land in a body which had Māori representation, and which would lease their land on their terms and by public tender for the highest possible rentals. This would ensure fair rents and cut through the 'debt trap'. Debts to private persons would no doubt continue, and Māori owners could still lease their lands directly so long as the land council confirmed the bona fides of the lease. But in theory the new system of leasing via the councils would put an end to the use of leases by settlers to leverage purchases. A crucial issue became: would the Crown provide Māori landowners with an alternative source of credit?

The Act was not without its flaws. Although Carroll tried to restrict the impact of the two-owner rule, for example, he was not successful (see above). Some Māori were reluctant to hand their land over to a new, untried Government body, even one on which they were represented, without any guarantee that they would ever

61. Loveridge, *Maori Land Councils and Maori Land Boards*, p 23

regain control of it.[62] This included Te Ātiawa/Ngāti Awa ki Kāpiti.[63] Also, according to historian Graham Butterworth, Carroll 'appears to have had to confine the number to seven Councils to coincide with the Native Land Court Districts'. This meant that the areas were too large and the land councils had to represent tribes who might have 'no common interests and who were even traditional enemies'.[64] The land councils were not, therefore, the kind of locally based bodies that might have provided more effective representation to Māori landowners and therefore won more support. Apirana Ngata thought the 1900 legislation was too much of a compromise between divergent Māori and Crown goals and therefore unworkable in practice.[65] Nonetheless, the Māori Lands Administration Act 1900 contained strong statutory protections, perhaps the strongest enacted prior to Te Ture Whenua Māori Act 1993 and certain provisions of the Māori Affairs Amendment Act 1974. Further, the Act reflected at least some key goals of Māori leaders following negotiations with the Kotahitanga parliament.

The 1900 Act thus contained important standards by which settlement could have continued with due regard to Māori interests, and we measure subsequent legislation by those standards. The question for Māori was whether the theoretical protections in the 1900 Act would become a reality.

5.4.3 Unravelling the agreement with the Māori parliament, 1905–07

The Māori Land Councils were not appointed until December 1901. They were under-funded and it took them some time to get started with their work.[66] The land which needed to be reserved for the future support of Te Ātiawa/Ngāti Awa had not been investigated by 1905. From the evidence available, no papakāinga certificates were issued for the Waikanae district. This requisite first step had not happened. Nor had any Te Ātiawa/Ngāti Awa owners vested land in the councils. The Government was aware that Māori would take some time to trust the new machinery and decide to vest their lands in the councils. There were signs of progress nationally in 1904, with 750,000 acres vested in the land councils. The Act was, as Liberal Minister J G Ward put it, 'worthy of a fair and reasonable trial'.[67] By 1905, however, the Liberal Government was no longer prepared to wait. The Crown's measure for the success of the Act was the large-scale transfer of Māori land to settlers through leasing and this had not happened so far. Premier Seddon faced pressure from the Opposition, the newspapers, and the settler electorate more generally, and also resistance from within his own party on the part of those who favoured freehold tenure.[68]

62. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 673–675, 680
63. Richard Boast, 'Ngati Raukawa and Affiliated Groups: Twentieth Century Land Alienation and Administration', March 2022 (doc A232), p 92
64. Graham Butterworth and Hepora Young, *Maori Affairs/Nga Take Maori* (Wellington: Iwi Transition Agency, 1990), p 62
65. Loveridge, *Maori Land Councils and Maori Land Boards*, p 18
66. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 672–680
67. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 680
68. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 676–680

James Carroll, who had replaced Seddon as Native Minister in 1899, decided that compulsory vesting would increase the pace of alienation without abandoning the core principle that no more land should be sold. He introduced a Bill in 1905 to give the Minister power to vest land compulsorily if (in the Minister's view) the owners did not need it for their own support.[69] It could then be leased: 'The whole aim of the Bill is confined to a system of leasing, and leasing only', he told the House when he introduced the Bill's second reading in October 1905.[70] But the Premier had decided by then to reintroduce Crown purchase. Clauses for that purpose were inserted in the Bill when it was in committee.[71]

As the Central North Island Tribunal put it: 'Ultimately, however, he [Carroll] was defeated in this initiative by his own party'.[72] The Tribunal explained:

> Carroll was in a difficult position within the Liberal Party, trying to encourage Maori to utilise the legislation to their own benefit, but attacked by the Opposition for keeping Maori in a state of 'tutelage', unable to make their own decisions. It was unfair, argued William Herries on behalf of the Opposition, to compel Maori to work through councils and boards, which they did not trust. Such criticisms made for easy political point-scoring, but put pressure on Carroll as he tried to stave off widespread settler demand for more Maori land, especially within the context of broader Liberal land policy. The Opposition's criticisms did not acknowledge the compromises that Maori leaders had made in giving up their parliament, in the hope that they might achieve control of their affairs and lands through the new councils. They did not acknowledge the extent of Maori suspicion of the land councils, and the failure of the Crown to put sustained effort into making them work. Nor did they acknowledge the title problems produced by the Native Land Court system, to which land councils and boards had been proposed as a solution. Such criticisms also arose from the long-held belief that Maori who held their land individually were more likely to sell.[73]

After its passage through Parliament, the relevant features of the Māori Land Settlement Act 1905 were:

- The Māori Land Councils were replaced with Māori Land Boards. Māori representation by election was abolished. The new, slimmed down boards would consist of three members appointed by the Crown, only one of whom had to be Māori.[74] Carroll tried to justify this as a cost-cutting measure but it had far-reaching implications, once again excluding Māori from the control of their lands.[75] The corporate mechanism that was supposed to put a stop to individual dealings would only work for Māori if they had sufficient representation and sufficient control over what happened to their lands.

69. Loveridge, *Maori Land Councils and Maori Land Boards*, pp 43–44
70. James Carroll, 13 October 1905, NZPD, vol 135, p 702
71. Māori Land Settlement Bill 1905, no 149–3, cl 20
72. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 681
73. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 681
74. Māori Land Settlement Act 1905, s 2
75. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 676–677

- Carroll's compulsory vesting for leasing measure was restricted to two districts – Tokerau and Tairawhiti. The boards could still reserve land for the 'use and occupation' of the owners, for papakāinga, for burial grounds, for eel weirs and fishing grounds, for birding areas, and areas for timber and fuel, before any alienation could occur. Leasing would be the only form of alienation for vested lands.[76] In 1906 the compulsory vesting provisions were extended to land in any district which was infested with 'noxious weeds' or which the Minister considered was not 'properly occupied' by its owners. In the latter case, the land could only be leased to Māori.[77] In 1907, the compulsory vesting provisions were extended again. The Native Land Settlement Act of that year provided that land recommended as 'surplus' by the Stout–Ngata commission, which was established to do a stocktake of remaining Māori land, would be vested in a Māori Land Board. Half would be *sold* and half leased.[78] The compulsory vesting provisions were becoming more extreme in a short period of time.
- All restrictions on the leasing of Māori land were removed. Māori could now lease any land, which reintroduced full individual dealings but for leasing only. The board had to confirm leases. The board had to be satisfied that the rent was adequate, that the lessors had papakāinga or that the rent would suffice for their support, and that the lease was for the benefit of the Māori lessors.[79] Owners could also continue to vest land in the board voluntarily (under the 1900 Act) and they could now apply to the board to lease their land without vesting it. The land would be leased by public tender and the lease could not exceed 50 years (including renewals).[80]
- The Governor could purchase land, except in the two districts trialling compulsory vesting, and could borrow up to £200,000 for that purpose. The Governor had to ascertain whether the sellers had enough land for their 'maintenance'. The standard per individual was 25 acres of first class land, 50 acres of second class land, or 100 acres of third class land. The Governor was not required to make the various kinds of reserves that the boards had to consider for vested lands.[81] In 1907, the Crown was empowered to purchase undivided, individual interests again.[82] This marked the full re-establishment of the 1894 system for purchasing Māori land, despite Seddon's earlier condemnation of it.
- The provisions for private purchasing remained the same as they were in the 1900 Act and its early amendments, which remained in force.

By 1907, Crown purchasing had been fully reintroduced and the Māori Land Councils had been turned into non-elective boards in which land could be

76. Māori Land Settlement Act 1905, s 8
77. Māori Land Settlement Act Amendment Act 1906, ss 3–4
78. Native Land Settlement Act 1907, ss 4–11
79. Māori Land Settlement Act 1905, s 16
80. Māori Land Settlement Act 1905, s 17
81. Māori Land Settlement Act 1905, ss 22–23
82. Māori Land Settlement Act Amendment Act 1907, s 3

compulsorily vested for sale. Only private purchasing remained restricted. It was clear that the 1900 agreement between the Crown and Kotahitanga was dead. Also, the native land laws were in a complete mess. The Native Land Court Act 1894 and its amendments remained in force. The 1900 Act and its amendments also remained in force. The legislation of 1905–07 had been imposed on top of both. All of this created a bewildering set of contradictory provisions which had become difficult to understand.[83] The Crown undertook a major overhaul of the legislation towards the end of the decade, resulting in the new Native Land Act 1909, which is covered in the next section.

As we discuss later in the chapter, 1,621 acres of the Ngarara West blocks were sold to private buyers from 1901 to 1909 (during the operation of the Māori Lands Administration Act 1900). This was a significant reduction in the rate of alienation. It amounted to 14 per cent of the Ngarara West lands remaining in Te Ātiawa/Ngāti Awa possession in 1900. Ironically, since Te Ātiawa/Ngāti Awa did not vest land in the land council or board for leasing, the most effective protection against individual dealings by way of sale turned out to be pre-emption. This was because the Crown did not want to buy any more land at Waikanae and the need for purchasers to get both Crown and land council/board consent for each purchase had slowed the rate of private purchasing.

5.4.4 The 1909 native land laws regime

5.4.4.1 The Native Land Act 1909 and its amendment in 1913

By 1909, as historian Donald Loveridge noted, 'the experiment of vesting lands in the Maori Land Boards to make them more accessible to settlers came more or less to an end'.[84] Dr Loveridge commented:

> By the time the [1909] Act came into force in 1910, the boards held almost three-quarters of a million acres in fee simple under the various categories of vesting which derived from the 1900 Act and its amendments, the 1907 Act and special-purpose legislation. The administration of these lands was, and would continue to be one of the boards' principal concerns, but the acreage added to their holdings of vested lands after 1910 was small. With the 1909 Act the sale and leasing of Maori lands by their owners, under the supervision of the Maori Land Boards, became the preferred solution to the problem of 'idle' Maori lands. This legislation put in place new systems which simplified and expedited the alienation of both vested and non-vested Maori lands, and over the next two decades the Maori Land Boards oversaw the sale of more than 2.3 million acres. This was a far cry indeed from the role envisaged for the Maori Land Councils during the debates which led to the 1900 Act.[85]

83. Loveridge, *Maori Land Councils and Maori Land Boards*, pp 75–78; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 268–269
84. Loveridge, *Maori Land Councils and Maori Land Boards*, p 75
85. Loveridge, *Maori Land Councils and Maori Land Boards*, p 75

The Prime Minister, Joseph Ward, assured Parliament in November 1909 that the Crown would purchase as much land as possible under the new legislation.[86] A draft of the Native Land Bill 1909 was 'scrutinised by two successive conferences of the judges of the Native Land Court, and the presidents of the Maori Land Boards',[87] but not by the national Māori leadership as in 1897–1900. Carroll may have hoped that alienation would be confined mainly to leasing but, if so, the Act was not designed to achieve that end. Nonetheless, the Minister intended that 'ample protection' would be provided for individuals against landlessness.[88] The Liberals lost office in 1912, replaced by the Reform Party under William Massey as Prime Minister and William Herries as his Native Minister. Herries had not in fact opposed the 1909 Act, given its concession to settler interests, and the Act had passed through the House with 'bipartisan support' and little debate.[89] The Reform Government amended the Act in 1913.[90] Some changes were made, as discussed below, in the direction of greater alienation and fewer protections, but the 1909 regime was not fundamentally altered in 1913. To a significant extent, it remained in place until the 1950s.

Under the 1909 legislative regime, the Māori Land Boards continued but their main role in most districts became the vetting of purchases and leases rather than the administration of vested land. For Te Ātiawa/Ngāti Awa, the only land vested in a board was the Parata Native Township (49 acres), which is discussed in the next chapter. The boards continued to consist of three Crown appointees (one of whom had to be Māori) until 1913, when the Reform Government changed the composition of the boards. From then on, the boards consisted of the district's Native Land Court judge and registrar.[91] The Native Minister, William Herries, stated that the amendment 'practically made the Native Land Court and the Maori Land Board the same' but 'we will maintain the term "Boards", under which the Judge can sit either as a Court or a Board'.[92]

Carroll, now in Opposition, protested this change and the removal of the Māori member. It was a 'universal principle', he said, that 'there should be representation on any Board dealing with the interests and property of those concerned.' He also pointed out that the Māori member was being removed to take away 'a check, perhaps against unfair dealing; because he was a discretionary unit that might examine and study transactions between Maoris and Europeans that came before the Board for confirmation'.[93] Herries retorted that the Māori member of

86. Loveridge, *Maori Land Councils and Maori Land Boards*, p 86
87. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 685
88. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct: 2006), vol 2, p 858
89. Loveridge, *Maori Land Councils and Maori Land Boards*, p 79
90. Native Land Act Amendment Act 1913
91. Native Land Act 1909, s 64; Native Land Amendment Act 1913, s 23
92. William Herries, 28 November 1913, NZPD, vol 167, p 385 (Loveridge, *Maori Land Councils and Maori Land Boards*, p 126)
93. James Carroll, 9 December 1913, NZPD, vol 167, p 837 (Loveridge, *Maori Land Councils and Maori Land Boards*, p 126)

the board did not represent the owners (they were no longer elected), to which Carroll responded that the solution was to ensure that the boards had Māori members who did represent the Māori owners, not to remove the Māori members altogether. The abolition of Māori representation on the boards, he said, was a 'grave injustice'.[94]

Herries' amendments empowered the judge to exercise court powers when sitting in the board, and board powers when sitting in the court.[95] In practice, control of the administration and alienation of Māori land was now placed in the hands of the Native Land Court judges.

Private purchasing was once again allowed with very few constraints. This allowed the rapid alienation of Waikanae lands over the next two decades (discussed below). Subject to the provisions of the 1909 Act, any Māori owner could alienate land or an interest in land 'in the same manner as a European', and Māori land could be alienated 'as if it was European land'. All restrictions on alienation, both those placed by the court on titles and those imposed by any Act, were removed en masse.[96] This included the papakāinga reserves created under the 1900 Act (which were supposed to have been absolutely inalienable), which would now simply become alienable Māori freehold land. 'Papakāinga' was no longer a category of land in the 1909 Act.

Where there were more than 10 owners and there was no incorporation, land could only be sold by: (i) a resolution passed at a meeting of assembled owners, a new system created in 1909; or (ii) with the prior consent of the board.[97] This system of one-off meetings was in effect the main structure for the owners' collective action apart from the ability to form an incorporation.[98] The papatupu committees of the 1900 Act were abolished by the repeal of that Act, and no alternative block committees were established (except for incorporations). The Native Minister, James Carroll, described the meeting of owners system as 'reinstating runanga and community decision-making for individualised land titles'.[99] But the quorum for a meeting of assembled owners was set at five, regardless of how many owners there were in a block. Those five owners were empowered by the law to sell or lease the land, so long as the resolution was supported by a majority of the shares represented at the meeting. Any owner who was present could sign a memorial of dissent, which could result in their land being cut out, but this only applied to owners who attended the meeting (in person or by proxy).[100] The quorum requirements made the system extremely damaging for Māori. This was shown for Te

94. James Carroll, 9 December 1913, NZPD, vol 167, p 837; Loveridge, *Maori Land Councils and Maori Land Boards*, pp 126–127
95. Native Land Amendment Act 1913, s 27(1)
96. Native Land Act 1909, s 207
97. Native Land Act 1909, s 209
98. Native Land Act 1909, ss 209, 316–318, 346
99. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 426
100. Native Land Act 1909, ss 342(5), 343–344

Ātiawa/Ngāti Awa in the alienation of Ngarara West A14B1, the Kārewarewa urupā block.[101]

All alienations (including for land owned by 10 or fewer owners) had to be confirmed by the board. The board had to satisfy itself of a number of matters (set out in full below in section 5.4.4.3). These included that the transaction was not contrary to equity or good faith, that no vendor would become 'landless within the meaning of this Act',[102] and that the price or rent was adequate. Adequacy was to be assessed by reference to Government valuation, which set a standard missing from previous legislation, and the board could require a fresh Government valuation for any transaction. The board also had to be satisfied that no private purchaser was acquiring more land than the maximum allowed under the Act. For the purpose of confirming alienations, the board was deemed to be a court of record and could exercise certain powers of the Native Land Court.[103] There was no right of appeal from the board's decisions. In 1913, the Crown exempted itself from the board confirmation system.[104]

The landlessness protections were weakened by the Reform Government in 1913. The Native Land Amendment Act 1913 gave the board power to confirm an alienation despite the landlessness provisions if: (i) the land being alienated was unlikely to be a 'material means of support' to the individual vendor; or (ii) the individual vendor was 'qualified to perform some avocation, trade, or profession, or is otherwise sufficiently provided with a means of livelihood'.[105] The Liberal Native Minister, James Carroll, had refused to make a similar amendment in 1909, being well aware of the importance for Māori of retaining ancestral land.[106]

The lack of a corporate management structure was circumvented by making the board the agent of the owners to execute the lease or purchase deed. Otherwise, every single owner would have had to sign the deed, and – especially given the quorum arrangements for meetings of owners – it was often the case that owners did not even know that their land was being sold. The 1909 Act provided that every instrument of alienation executed by the board could be registered under the Land Transfer Act as if it had been lawfully executed by all the owners.[107]

The boards no longer had a proactive role in establishing inalienable reserves before any alienations could occur, and there was no longer a provision for hapū or individual papakāinga reserves. Board inquiries as to sufficient land were transaction-specific and only occurred at the confirmation stage for alienations; in other words, they were after the fact rather than the proactive identification

101. See Waitangi Tribunal, *The Kārewarewa Urupā Report* (Wellington: Waitangi Tribunal, 2020), pp 17–23.

102. A 'landless Native' was defined as 'a Native whose total beneficial interests in Native freehold land . . . are insufficient for his adequate maintenance'.

103. Native Land Act 1909, ss 217, 220, 223, 225, 349

104. Native Land Act 1913, s 109

105. Native Land Amendment Act 1913, s 91; Native Land Amendment and Native Land Claims Adjustment Act 1915, s 7

106. William Herries, 15 December 1909, NZPD, vol 148, p 1104

107. Native Land Act 1909, s 356

of reserves for a range of purposes as under the 1900 Act. The Native Land Act 1909 did create a new category of reserves called 'Native Reservations'. The board could now recommend such reservations to the Crown for the common use of the owners, including for burial grounds, fishing grounds, and a number of other purposes. This section of the Act came in part 13 (alienations) and applied to land brought before the board for confirmations at the end of a purchase process, but could also apply to any land vested in the board, the Public Trustee, an incorporation, or any trustees. The native reservation would be created by an order in council.[108] Apart from these specific kinds of native reservations (and provisions for minors), a trust mechanism was not available to Māori owners for them to manage their lands by their own block trustees until the Māori Affairs Act 1953.[109] As is well known, the section 438 trusts and their successors under Te Ture Whenua Māori Act have proven very popular as a corporate structure for the management of multiply owned Māori land.

The various compulsory vesting powers from previous Acts were mostly removed, except for compulsory vesting in the case of 'noxious weeds' and rates.[110]

When the 1909 regime was updated by a new Native Land Act in 1931, which repealed the Native Land Act 1909 and the Native Land Amendment Act 1913, the key features listed above were substantially carried over to the 1931 Act.[111] Many also survived in the Māori Affairs Act 1953.

5.4.4.2 *The standards set by the 1909 legislation and its 1913 amendment*

Māori owners were disempowered and protections were weaker under the standards set in 1909 compared to those set in 1900. This reflected the unravelling of the agreement with Kotahitanga in 1905–07. It also reflected a determination to obtain as much Māori land for settlement as possible, as quickly as possible, at virtually any cost to the interests of Māori. Māori were disempowered and standards were weaker in the following ways:

- there was no negotiation with Māori leaders of the regime or of Māori representation within it, and the agreement with Kotahitanga chiefs in 1900 was abrogated;
- there was no negotiation of appropriate levels of protection with Māori leaders;
- there was no representation of Māori owners (or of Māori at all after 1913) in the Māori Land Boards, the crucial bodies that controlled and administered alienations;
- there was no restriction of alienation to leasing only;
- no effective management mechanism was provided for the owners (save incorporations, which were problematic for a number of reasons[112]) – the

108. Native Land Act 1909, s 232
109. Māori Affairs Act 1953, s 438
110. James Carroll, 15 December 1909, NZPD, vol 148, p 1102
111. See Native Land Act 1931, Part 3 (composition and function of the boards); Part 13 (alienations); and Part 18 (powers of assembled owners).
112. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 777–781

meetings of assembled owners were one-off and limited to certain decisions, the quorum requirement was extremely low, and land owned by 10 or fewer owners could be dealt with freely by individuals so long as the board confirmed alienations;
- there was no more role for Māori committees in title decisions;
- there were no more inalienable papakāinga reserves for either hapū or individuals;
- the protections against landlessness were weaker – all previous restrictions on alienation were removed en masse, there was no requirement to set land aside for papakāinga reserves before land could be leased or sold, and there was no requirement for land retention at all in certain cases (from 1913), but, perhaps most importantly, the prohibition on Crown purchasing and (most) private purchasing was removed; and
- the protections for Crown purchasing were even weaker – the Crown could buy undivided interests, bypassing meetings of assembled owners and board confirmation, but this particular change was not relevant to Te Ātiawa/Ngāti Awa ki Kāpiti.

5.4.4.3 *The 1909 protections in the process to confirm alienations*

The 1909 regime did have some important protections for Māori vendors and for the prevention of landlessness. It provided a process for board confirmation that was lacking from the 1900 Act. The Crown had not included specific criteria for confirmation in the Māori Lands Administration Act 1900. For land with more than two owners, no lease or sale was supposed to occur under that Act unless the vendors already had a papakāinga certificate, and the district land registrar could not register a transfer without proof of such a certificate. The protection against landlessness thus came *before* any alienation, and the whole regime was based on the fundamental premise that there would be very few or no sales. As noted above, however, 1903 legislation clarified that private purchasers could still obtain land by applying for an exemption to pre-emption under the 1895 legislation; it was up to the Crown to enforce its own policy when deciding whether to grant exemptions (see above). Also, when Crown purchasing was reintroduced in 1905, board confirmation was not required.[113]

A number of points should be made or reiterated here before explaining the details of the purchase process under the 1909 regime, which applied to most of the alienations covered in this chapter. First, the Native Land Act 1909 was designed to facilitate the alienation of land for settlement rather than the empowerment of Māori owners to act collectively or the protection of Māori interests. The clearest proof of this lies in the removal of all previous restrictions on alienation and in the quorum requirements for a meeting of assembled owners. If the latter had truly been designed to act as a rūnanga (as the Minister stated in 1909) and to protect Māori interests, then the quorum would have been made at the very least a majority of owners rather than just five owners in all cases. Also, the Crown

113. Māori Land Settlement Act 1905, s 20

would not have been empowered in 1913 to bypass meetings of owners altogether and purchase undivided individual interests.

Secondly, the legislation was intended to guard against invalid transactions. These had been a major problem in the nineteenth century and had necessitated the establishment of a Validation Court in 1893.[114] A large part of the board's confirmation process was therefore designed to ensure that all transactions were valid. The criteria for this are set out below and were similar to those used (unsuccessfully) in the nineteenth century. The board system was also designed to ensure that alienations authorised by a meeting of assembled owners were valid, no matter how few owners attended and agreed to the sale. As noted above, the legislation made the board the agent of the owners for executing alienations. The Act stated that the instrument of alienation would be registered '*as if it had been lawfully executed by all of the owners or their trustees*, and as if those owners or trustees had been fully competent in that behalf'. (Emphasis added.)[115] Not only did this ensure the validity of transactions, but it facilitated alienation significantly for private purchasers; the pursuit of every individual signature for a deed was sometimes a protracted and difficult task in the nineteenth century.

Thirdly, the legislation was intended to prevent Māori landlessness. This was partly to protect Māori interests and partly because the Crown feared that landless Māori would become a 'burden on the State' (as it was referred to at the time). The Crown recently had to provide emergency reserves in the South Island (the South Island Landless Natives Act 1906);[116] it did not want to have to provide support for landless Māori in the North Island as well. The 1900 Act had required both an inquiry and the setting aside of inalienable papakāinga reserves before any alienation could occur. That was a far stronger protection. The board's check at the end of a transaction was more constrained, it was confined to individuals, and it did not make remaining land inalienable. The landlessness requirement was weakened further in 1913 as discussed above in section 5.4.4.1.

For land with 10 or fewer owners, private purchasers could deal with the owners directly and the only involvement of the board was at the end, when confirmation was required.[117]

For more than 10 owners, a private purchaser had to apply in writing to the board to call a meeting of assembled owners.[118] Before calling a meeting to consider the proposed sale or lease, the board had to consider whether the alienation was one that could lawfully be made and that it was not contrary to the public interest or the interests of the owners.[119] How exactly the latter point was to be

114. For a discussion of the Validation Court, see Richard Boast, 'Ngati Raukawa: Custom, Colonisation and the Crown, 1820–1900, December 2018 (doc A215), ch 18.

115. Native Land Act 1909, s 356(10)

116. For South Island 'landless natives' and the 1906 Act, see Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 658–669; Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: GP Publications, 1991), vol 3, pp 979–1000.

117. Native Land Act 1909, ss 209, 217, 370(2)(c)

118. Native Land Act 1909, ss 207, 220, 356(1)

119. Native Land Act 1909, s 356(3)

determined without an inquiry or consulting the owners is not clear. At this point the board had two pathways available to it. If the board considered that a meeting of assembled owners was not necessary, having regard to the number of owners, the ease of getting them all together, and the interests of the public and the owners, then the board could consent to the alienation going ahead without a meeting. It would still have to confirm the alienation.[120] Otherwise the board called a meeting of assembled owners to consider and vote on an advertised resolution.

Some of the main points about the procedure at a meeting of owners have been discussed earlier but we reiterate here that any dissentient who attended in person or proxy could sign a memorial of dissent; otherwise, all owners were bound by the resolution unless it failed to secure board confirmation. Lack of notice was specifically covered in the Act: no meeting or resolution could be 'invalidated or otherwise affected by the circumstance that any owner has not in fact received notice of the holding of that meeting'.[121]

The statutory criteria for the board to confirm a sale or lease were:

- for all land transacted without a meeting of assembled owners (either because it had 10 or fewer owners or because the board had waived a meeting), the instrument of alienation had been duly executed – this meant that the deed had to be witnessed by certain persons such as a judge or a Māori Land Board member, and the deed had to be translated and its contents explained by a licensed interpreter if the vendor could not understand English;
- the alienation was not 'contrary to equity or good faith, or to the interests of the Natives alienating';
- no 'Native will by reason of the alienation become landless within the meaning of this Act' – exceptions were introduced in 1913 for situations where the board considered that land being alienated would not provide for the vendor's support or where the vendor had a profession;
- the consideration (purchase payment or rent) was 'adequate';
- for sales, that the payment had actually been paid or 'sufficiently secured';
- the private purchaser was not accumulating more land than was allowed by the Act;
- the alienation was not in breach of any trust; and
- the alienation was not prohibited by law.[122]

The board could confirm, disallow, or postpone confirmation. Postponement allowed time for the interests of dissentients (described above) or the interests of those who would be rendered landless to be cut out of the land to be sold by partition.[123] The board could then confirm the resolution for the residue of the land.[124]

120. Native Land Act 1909, s 209(3)–(6)
121. Native Land Act 1909, s 341
122. Native Land Act 1909, s 220; Native Land Amendment Act 1913, s 109
123. Native Land Act 1909, ss 348, 349(1)–(2)
124. Native Land Act 1909, ss 348(2), 349(3)

In the Native Land Act 1931, which replaced the 1909 Act, the criteria for confirmation were virtually identical to those established in 1909 (as amended in 1913).[125]

Some of these protections had in fact been in the statute book for many years already. Trust commissioners acting under the Native Lands Frauds Prevention Acts were supposed to have guarded against landlessness since 1870. The 'equity or good conscience' requirement had also been in force since 1870.[126] The trust commissioners' obligations were assumed by the Native Land Court in 1894. Under the Native Land Court Act 1894, the court could only confirm an alienation if it met the following criteria, which were very similar to most of the 1909 criteria:

- the alienation was not prohibited by law;
- the alienation was not contrary to equity or good conscience;
- the alienation would not breach any trust to which the land was subject;
- the alienation would not breach any restriction against alienation (all of which were cancelled en masse in 1909);
- the payment was not partly or wholly made up of alcohol or weapons;
- the payment had actually been made;
- each vendor retained sufficient land or, in the case of 'half-castes', had other means of support; and
- that the deed had been duly witnessed and interpreted.[127]

There were some new protections in 1909. These included the requirement that the adequacy of the price or rent be assessed by the board. This particular requirement was tied to Government valuation, which was now made a standard for adequacy (a definite improvement, as we stated above). There was also a new power for the Minister to set aside land for various communal purposes as Native Reservations (first introduced as such in the 1900 Act). This could only be done by the Minister, however, on the recommendation of the board or court; it was not something that tribal leaders or communities could seek directly from the Minister.

Most of the 1909 protections, however, were not novel. Those confirmation criteria had already failed as a means of protection in the nineteenth century. This was partly because the Crown was largely exempt from them, and partly because the requirements were interpreted narrowly and the trust commissioners – responsible for confirmations from 1870 to 1894 – were under-resourced and ineffective.[128] Also, any protective mechanism like the trust commissioners or later the Māori Land Boards, which operated without Māori members and in the absence of consultation with the owners, was always likely to be less effective in the protection of owners' interests.

As Premier Seddon said in the debate on the Māori Lands Administration Bill 1900: the 'safeguards intended by the Legislature [in the nineteenth century] have

125. Native Land Act 1931, ss 273(1), 277(1)
126. Native Lands Frauds Prevention Act 1870, ss 4, 5; Native Lands Frauds Prevention Act 1881, ss 5(1), 6
127. Native Land Court Act 1894, s 53
128. See, for example, Waitangi Tribunal, *Hauraki Report*, vol 2, pp 703–709

not been sufficient to meet what was required'. He went on to add that the 1900 Bill would provide a 'great improvement' because of the system of a Māori Land Council setting aside inalienable papakāinga reserves prior to any alienation (leasing only). The Māori Land Councils, he said, 'who are to be partly elected and partly nominated, will have a better grasp, and will be in a position better to locate the land in these papakaingas, than would any Commissioners [referring to the trust commissioners] under our present law'.[129] Seddon put great weight on this system as the way to ensure the retention of sufficient land. In speaking of the Māori Land Administration Bill 1899, which had similar papakāinga requirements, the Premier said that the first priority must be to 'set apart sufficient for the Natives to cultivate [before leasing]; and not only for those at present holding the lands, but for future augmentation of the number of Natives'.[130] The Crown was not willing, however, to consider farming needs for the modern economy – significant development assistance was not made available to Māori landowners until Apirana Ngata became Native Minister and began his Māori land development schemes at the end of the 1920s.

5.4.4.4 *Conclusion*

We have already set out our view on the abandonment of the 1900 system above. It was one of the Crown's acknowledged duties to ensure sufficient land was reserved for present and future needs. This was an obligation that the Crown had accepted since the 1840s (see chapter 3). Most of the protections in the 1909 regime had already been tried in the nineteenth century and had failed, as Seddon admitted.[131] As set out in section 5.4.4.2, the protections in the 1900 system were stronger than those provided in 1909, especially since the papakāinga reserves were supposed to have worked in tandem with the leasing of Māori land and no more sales.

The different protections in the statutory regimes of 1894, 1900, and 1909 are complex but it was necessary to explore them in some detail in this section of the chapter in order to assess two key Crown arguments in this phase of the inquiry. The first of these arguments was that the Crown's 'native land policies' in the nineteenth and much of the twentieth centuries supported the alienation of Māori land, and that these good-faith policies may have had unintended bad consequences. According to Crown counsel, the Tribunal should focus on whether 'consequences were foreseeable, and on the adequacy of the Crown's response to such consequences once identified'.[132] The Crown's second argument was that the 'restrictions on land alienation' in section 220 of the Native Land Act 1909 and 'preceding Native Land Court legislation were adequate protections'. Crown counsel stressed the 'protection against landlessness in section 220 of the Native Land Court Act 1909' and other protections, including 'procedural protections and a requirement that the alienation is not contrary to equity or good faith or to the

129. Richard Seddon, 12 October 1900, NZPD, vol 115, pp 167–168
130. Richard Seddon, 5 October 1899, NZPD, vol 110, p 287
131. Richard Seddon, 12 October 1900, NZPD, vol 115, pp 167–168
132. Crown counsel, closing submissions (paper 3.3.60), p 26

interests of the vendor'. The Crown concluded that 'the issue was about the implementation of the law by the Native Land Court, not the law itself'.[133]

From the evidence discussed in this section, it is clear to us that:

- The Crown foresaw in 1900 the consequences of uncontrolled land alienation for Māori under individualised titles, including the likelihood of complete landlessness if Crown and private purchasing were to continue. The Crown was aware at that time that the protections included in the Native Land Court Act 1894 were insufficient, and that any protection mechanisms must include representation of Māori owners and community leaders in their decision-making.
- The unravelling of the agreement with Kotahitanga in 1905–07 saw the complete dismantling of the 1900 regime by 1909, and a reversion to the lesser protections of the Native Land Court Act 1894, albeit with some improvements.

We conclude that the protections in the Native Land Act 1909 and its successor, the Native Land Act 1931, were weak when compared to the regime established in 1900. Further, Māori were not represented in the decision-making of the relevant protection mechanisms, the Māori Land Boards and the Native/Māori Land Court. Also, we conclude that the Crown was fully aware of the likely consequences of the resumption of purchasing and the abolition of the level of protection established by negotiation in 1900. Individual decision-makers within the Māori Land Boards might be more or less conscientious, and might be well or poorly resourced, but the statutory standards they had to meet were comparatively weak in 1909 and were weakened further in 1913.

Nonetheless, the 1909 regime did provide the protections set out above in section 5.4.4.3. The next question to address in this chapter is: how effective were they in practice for Te Ātiawa/Ngāti Awa ki Kāpiti? We consider that question in the following sections of this chapter.

5.5 Overview of Land Loss in the Twentieth Century

5.5.1 Introduction

In this section, we provide a brief overview of land loss in the remaining land blocks held by Te Ātiawa/Ngāti Awa ki Kāpiti at the beginning of the twentieth century. These blocks were: Ngarara West A; Ngarara West B; Ngarara West C; Muaupoko; and Kukutauaki (see map 7). The rate and extent of alienation paints a stark picture in terms of the Crown's Treaty obligations. The original acreages of the five blocks were as follows:

- Ngarara West A – 6,300 acres;
- Ngarara West B – 1,534 acres;
- Ngarara West C – 21,879 acres;
- Muaupoko – 2,619 acres; and
- Kukutauaki – 651 acres.

133. Crown counsel, closing submissions (paper 3.3.60), p 39

Year	Total area		
	acres	roods	perches
1900	550	2	35
1901	30	0	0
1904	9	2	23
1905	372	3	17.8
1906	135	2	37.5
1907	349	0	31
1908	405	2	25.7
1909	708	3	29
1910	181	3	20.1
1911	99	0	0
1912	378	0	2.2
1913	365	0	21.8
1914	46	0	0
1916	1,123	1	12
1917	4	3	27
1918	805		8
1919	95	3	15
1920	175	2	31.6
1921	679	2	0
1922	594	2	23
1923	522	1	19.4
1924	38	3	22.6
1925	20	0	4
1927	99	0	0
1930	367	0	0
1931	22	1	1.1
1932	8	0	0
1933	4	0	0
1934	65	0	0
1936	9	1	10
1940	6	1	0.4

Table 7: Private purchases by year, 1900–40.

The Rau-o-te-rangi Block

Rau-o-te-rangi was a 28-acre block located inside Ngarara West A (see map 7). A certificate of title was issued for this block in May 1892, a year after the division of Ngarara West A into 79 blocks by the Native Land Court in 1891, acting under the Ngarara and Waipiro Further Investigation Act 1889. The block was awarded to three individuals: Harata Teretiu; Hamuera Teretiu; and Mere Makirangi. It was partitioned between 1908 and 1910, and most of the block had been sold by 1931. The remaining nine-acre section was sold in 1943.[1] We have no information about how or why this block was created after the whole of Ngarara West A had already been divided into multiple blocks (Ngarara West A1–A79).

Tony Walzl stated in his report that the children of John Nicol and Kahe Te Rauoterangi were 'granted a block of land by Ngatiawa named Rauoterangi at Waikanae'. According to Mr Walzl's research, a plan of that land was prepared in 1852.[2] Wakahuia Carkeek's book, *The Kapiti Coast: Maori History and Place Names*, stated that Rauoterangi was the name of a 'small block of land at Waikanae situated

1. Walghan, 'Block Research Narratives' (doc A203), pp 134–136
2. Walzl, 'Ngatiawa' (doc A194), p 98

A great deal of alienation had already occurred in the nineteenth century. In the period from 1891 to the end of 1900, 73 per cent of Ngarara West C was sold to the Crown and private purchasers. Almost 40 per cent of Ngarara West A was sold to private purchasers in the same time period. The full details are discussed in chapter 4. By the end of 1900, however, the smaller Ngarara West B and Kukutauaki blocks remained intact. Most of the Muaupoko block was sold in the 1870s and 1880s. Only 12.5 per cent of the Muaupoko block remained in Māori ownership by 1900. These figures would have been frozen as at 1900 if the Kotahitanga Māori parliament had succeeded in obtaining a Government moratorium on all Crown and private purchases, with the remainder to be leased, farmed by its owners, or retained for customary purposes such as fishing and birding. Te Ātiawa/Ngāti Awa ki Kāpiti supported Kotahitanga's goals and, in 1898, Wi Parata stressed publicly that all Māori in the country wanted the Crown to legislate to abolish purchases of Māori land (see chapter 4).[134]

In this section, we provide a brief overview of alienation in the twentieth century with a focus on the first three decades. The great majority of the remaining lands of Te Ātiawa/Ngāti Awa ki Kāpiti had been lost by 1925 (see table 7).

134. *Evening Post*, 5 May 1898; Walzl, 'The Public and Political Life of Wi Te Kakakura Parata' (doc A216), p 106

between Kohekohe road and Te Moana road, and almost bisected by Kowhai Grove, which runs through the centre of it'. The Awamutu Stream formed the north-eastern boundary of the block 'a little to the west of the main highway at Waikanae'. This piece of land was 'set aside by the Government not long after Wiremu Kingi's return to Waitara [in 1848], for the descendants of John Nicol and his wife Te Rauoterangi after whom the block is named'.[3] Kahe Te Rauoterangi was also known as 'Betty Nicol'. The composite survey map for Ngarara West subdivisions produced in 1892 labelled the 'Rau-o-te-rangi' block as 'Nicol's Special Grant' (see map 13 in chapter 8). Te Rauoterangi, who signed the Treaty of Waitangi in 1840, is the subject of discussion in earlier chapters. She was the daughter of Te Matoha, a rangatira of Ngāti Toa and Ngāti Mutunga, and Hautonga of Ngāti Mutunga.[4]

It is unclear what relationship the grantees in 1892 had to the children of Jock Nicol and Te Rauoterangi (who included Heni Te Rau and Mere Pomare), or whether the block named 'Rau-o-te-rangi' in 1892 is the same as the piece of land set aside in 1852.

3. Wakahuia Carkeek, *The Kapiti Coast: Maori History and Place Names* (Wellington: AH & AW Reed, 1965) (doc A114), pp 111, 140
4. Transcript 4.1.10, pp 169–171

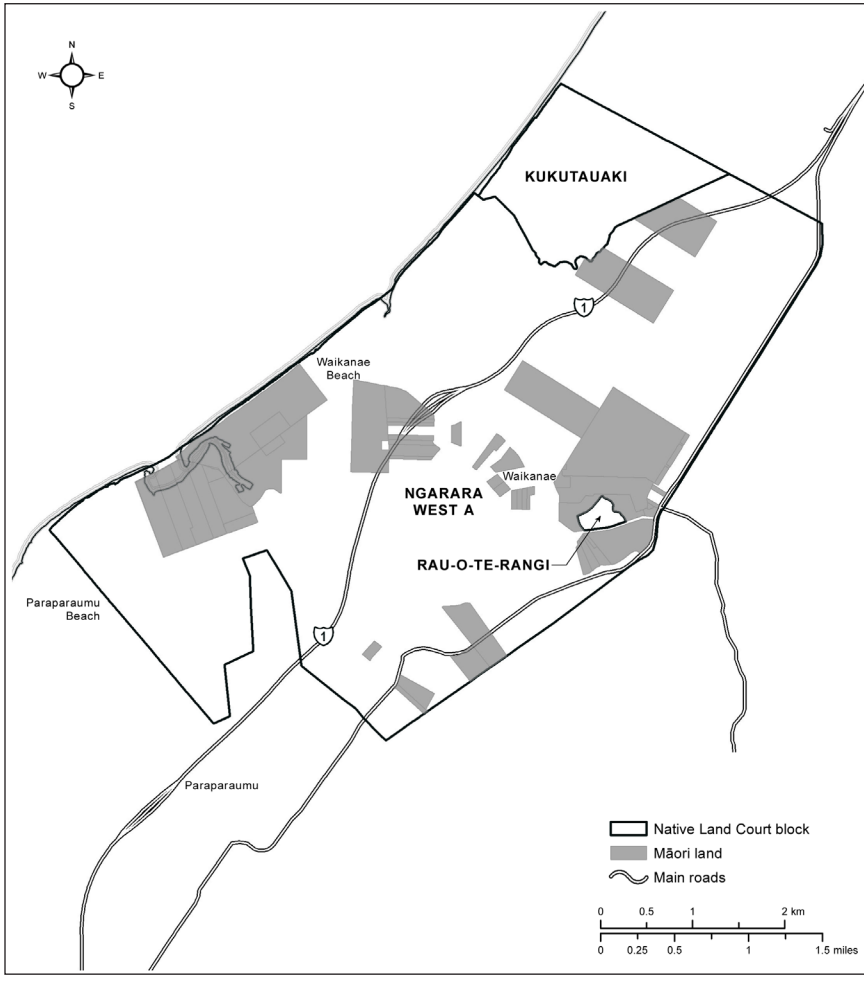
5.5.2 Ngarara West (6,300 acres)

5.5.2.1 Ngarara West A

The Ngarara West A block covered a coastal area stretching from Paraparaumu Beach and Otaihanga, north to Kukutauaki. Ngarara West A accounted for Te Ātiawa/Ngāti Awa's flattest, most fertile land. It was divided into 79 sections as a result of Native Land Court hearings in 1887 and 1890–91. As we discussed in chapter 4, the Field, Elder, and Morison families purchased a number of these sections in the 1890s. These private purchases were concentrated north of Paraparaumu Beach; around Otaihanga (on both sides of the railway line) and the area towards Waikanae Beach, just back from the coast.[135]

In 1900–25, purchasing patterns were largely localised in the same areas (Ngarara West A37, A38, A41, A45). By 1901, when the Māori Lands Administration Act took effect in the Waikanae district, Te Ātiawa/Ngāti Awa owners retained just over 60 per cent of Ngarara West A. This figure was reduced to less than 20 per cent by 1925. This was a dramatic loss of their best land for farming and horticulture. With little land left in either the A or the C block by 1925, the rate of purchasing slowed between 1925 and 1950 as owners struggled to maintain a foothold in their ancestral lands. The remaining land in Māori ownership was largely confined to an area south of Waikanae Beach and an area near Whakarongotai Marae.

135. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 26



Map 7: Ngarara West A land alienations, 1925.

Those interests were reduced to virtually nothing following the partitioning of Ngarara West A78 and the development of the Waikanae township in the 1960s and 1970s.[136] Additionally, between 1967 and 1972, several Ngarara West A sections were subject to compulsory Europeanisation of title under provisions of the Māori Affairs Amendment Act 1967. By 1975, there were just a few scattered fragments of Māori land left in Ngarara West A.[137]

Today, only 28 acres of land remains in Te Ātiawa/Ngāti Awa ownership.[138]

136. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 31
137. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 31
138. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 31

5.5.2.2 *Ngarara West B (1,536 acres)*

Ngarara West B alienations will be discussed in more detail in chapter 7, where we explore the context of the public works takings in the mid-twentieth century for Paraparaumu Aerodrome. Here, we note that Ngarara West B was the smallest of the three Ngarara blocks. It was claimed by (and awarded to) Puketapu individuals in the partitioning of Ngarara West in 1887. Located to the west of the railway, the block extends north along the coastal flats from the Paraparaumu area. By 1900, Ngarara West B had been partitioned into 10 subdivisions.[139] Nine of the 10 original subdivisions were awarded to sole owners. While Te Ātiawa/Ngāti Awa maintained ownership of the entire block until 1900, by 1925, almost half the area had been acquired by private purchasers.[140] Much of the remaining Māori land was taken for an aerodrome in 1939–54 (259 acres of land was taken), which became known as the Paraparaumu Aerodrome and later the Kapiti Coast Airport (see chapter 7).[141]

By 1950, about one-third of the block remained in Te Ātiawa/Ngāti Awa ownership. Soon after, however, the remaining Ngarara West B land was subdivided and sold to meet the demand for suburban sections near the Paraparaumu township. Additionally, 56.75 acres of Ngarara West B was compulsorily Europeanised from 1967 to 1972. As a result, only 13.9 per cent of the original block remained in Te Ātiawa/Ngāti Awa ownership by 1975.[142] The majority of Ngarara West B comprises the modern-day Paraparaumu township.

5.5.2.3 *Ngarara West C (21,879 acres)*

Ngarara West C mostly consisted of the forested hills east of the modern Waikanae township. Although much of the land was steep, some of it was suitable for pastoral farming. Most individual owners had been awarded subdivisions in both the A and C blocks in 1891 so as to take advantage of the different terrains and resources available in each (see chapter 4). Almost three-quarters of Ngarara West C was sold in the 1890s.[143] In the period between 1900 and 1925, concerted purchasing efforts by the Field and Elder families reduced Te Ātiawa/Ngāti Awa interests to just 15 per cent of the block's original area. There were also alienations in the land set aside for the Parata township, which will be discussed in chapter 6.[144]

Today, 2,486 acres (11.4 per cent) of Ngarara C land is recorded as Māori land.[145]

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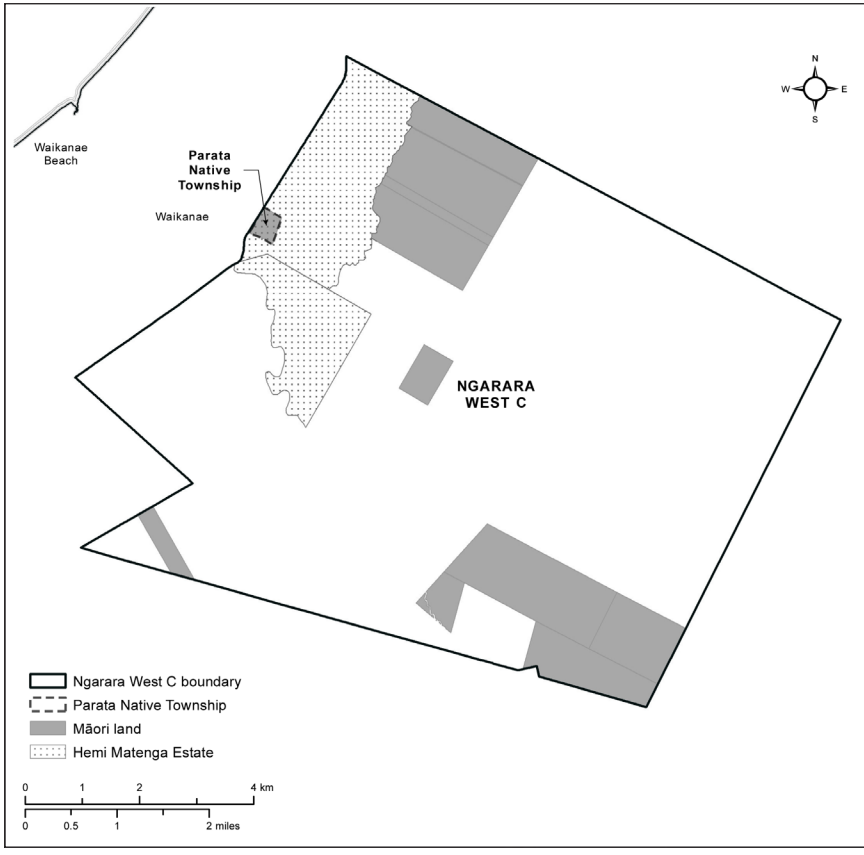
139. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 23
140. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 33
141. H Bassett and R Kay, 'Public Works Issues', November 2018 (doc A211), p 378
142. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 35, 37. See also Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 26–27.
143. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 39
144. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 39–41; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 27–28
145. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 41



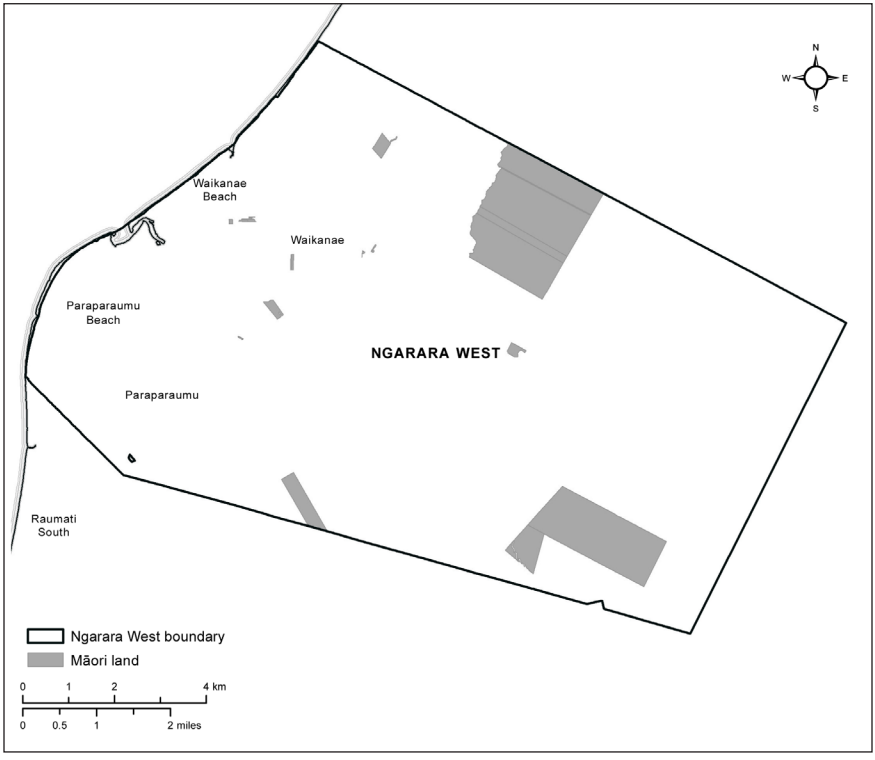
Map 8: Ngarara West c land alienations, 1925.

5.5.3 Muaupoko block (2,619 acres)

The Native Land Court awarded the Muaupoko block to 10 individuals of the Otaraua hapū in 1873. As discussed in chapter 4, 87.5 per cent of the Muaupoko block had already been alienated from Te Ātiawa/Ngāti Awa ownership by 1890 as a result of Crown and private purchases. Between 1900 and 1926, private purchasing by the Hadfield and Field families, in particular, reduced Māori ownership of the Muaupoko block to just 6 per cent. By 1975, none of the land in the Muaupoko block remained in Māori ownership.

5.5.4 Kukutauaki block (651 acres)

The Native Land Court awarded Kukutauaki 1 to Wi Parata and other members of his whānau in 1874 due to their relationship to the chief Te Pehi Kupe, who was held to have conquered and occupied that relatively small piece for his own. This land was used for pastoral farming but members of the wider Te Ātiawa/Ngāti Awa iwi continued to visit and take eels from the block in the period before it



Map 9: Remaining Māori land in the Ngarara block, 2018.

was partitioned and sold (see chapter 4). Following a partition in September 1897, Kukutauaki 1A (49a 2r) was sold to W H Field two years later. By 1909, the majority of the remaining portion, Kukutauaki 1B (601a 2r 10p), had also been purchased by W H Field. The last portion of 1B was sold privately to Alexander Campion in July 1913. Māori ownership in the Kukutauaki block ended in 1913.[146]

5.5.5 The impacts of land loss

As a result of widespread land loss, Te Ātiawa/Ngāti Awa could not sustain themselves long-term in their own rohe. It was already too late in the late 1920s for them to benefit from Sir Apirana Ngata's land development schemes. They retained too little land by that time to make farm development schemes a realistic option.[147] Owners clung to small remaining pieces of land in Ngarara West A and B where

146. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 47, 61–62; see also Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 28–29.

147. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 272

they could do so, but the multiplication of owners with each generation made it increasingly difficult to live on and use the remnant sections. Claimant counsel cited the evidence of Miria Pomare, who stated that 'the iwi of Whakarongotai and Waikanae have become strangers in our own land and robbed of our historical presence as rangatira of this region.'[148] Counsel submitted that the losses had left Te Ātiawa/Ngāti Awa

> landless in their own rohe, their traditional way of life undermined and their resources gravely depleted. Rarely has dispossession and environmental degradation so swiftly and dramatically taken place alongside and as a consequence of suburban development [at Waikanae and Paraparaumu] and the quiet accumulation of wealth by Pākehā settlers.[149]

Hauangi Kiwha, daughter of Tata Parata, explained that 'whanau had lost a lot of land to Pakeha buyers', so that Waikanae was 'becoming a place for Pakeha', especially as a place for 'traders and business people who lived in Wellington to come and retire'. Wi Parata's nineteenth-century vision of a strong and prosperous tribal community, living at Waikanae and taking advantage of the railway for economic development, had not come to pass.[150] In addition to the loss of land, there were also few job opportunities for Māori at Waikanae by the mid-twentieth century:

> There was a mill. There was also fishing and farming. The Webbers had a fish shop. However, the farmers often used to employ other settlers on the farms and people would not want to farm on land that had once been their own. . . . So, people moved away for work and could not afford to move back. During this period the Department of Māori affairs were offering apprenticeships in the city. This was an additional pull. Also, the local Māori often sent their children away to church schools, which would be outside the immediate area, in order to help them survive and prosper in the Pākehā world.[151]

Mass urbanisation had many causes, of course, but land loss was certainly a key factor for Te Ātiawa/Ngāti Awa ki Kāpiti. People became increasingly distant from their marae, previously the heart of the community, and with it their culture. André Baker told us:

> Movement into urban spaces meant that tangata whenua were divorced from their Marae – family get togethers stopped being at the marae and occurred in the urban environments. Those in urban areas would gravitate toward each other. This drift not

148. Transcript 4.1.10, p 181 (claimant counsel (Jones), closing submissions (paper 3.3.49), p 6)
149. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 6
150. Hauangi Kiwha, brief of evidence, 30 July 2018 (doc E7), pp 4–5
151. Hauangi Kiwha, brief of evidence (doc E7), p 5

only dislocated people from their culture, it had the flow on effect that those who were at home maintaining the ahi kā had to do everything.[152]

The loss of land, especially the last pieces that remained in Māori ownership as the twentieth century progressed, was devastating to whānau and to their wider community. Claimant Rawhiti Higgott explained:

> Separating people from their land threatens not only their physical existence, but also their identity. It is the proof of our link with the ancestors of our past, and with the generations yet to come. It is our assurance that we shall forever continue to exist as a whanau, hapu, iwi, for as long as the whenua shall last.[153]

Ben Ngaia identified many impacts of land loss, over and above the obvious economic consequences, in his report for court proceedings over the land of Patricia Grace, a notable New Zealand writer. Ms Grace sought to protect her father's piece of land at Tuku Rakau, 5,770 square metres, as a Māori reservation (Ngarara West A25B2A). She wanted to preserve it for future generations, in the context of a proposed taking for the Kāpiti expressway.[154] According to Mr Ngaia, 'the last remaining portion' of the land owned by Wi Parata 'rests with Patricia Grace'.[155] He described the impacts of the loss of so much land at Waikanae:

- Without the land, the Whakapapa connections are severed.
- If the land is no longer in the ownership of the traditional custodians, there is no meaningful opportunity to express Kaitiakitanga or Guardianship, to its fullest and most appropriate potential, the expression of cultural values and principles.
- Without the land, there is no opportunity to express Manaakitanga, or Social Relationships and Mutual Obligation. Te Ati Awa ki Whakarongotai people have expressed Manaakitanga throughout the course of their relationships within the Waikanae community to this day. It is due to this Manaakitanga that Te Ati Awa ki Whakarongotai have primarily become a landless people, with but a meagre portion of land left.[156]

In addition, Mr Ngaia stated that the traditional way of life and communal living standards had declined as a result of landlessness, and that it was 'because of

152. Cherie Seamark and André Baker, joint brief of evidence, 23 January 2019 (doc F13), p 45
153. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 64
154. See Benjamin Ngaia, 'Report on the Cultural and Historical Significance of Ngarara West A25B2A: Prepared for purposes associated with legal proceedings taken by Mrs Patricia Grace', 8 November 2013 (Ben Ngaia, papers in support of brief of evidence (doc E3(a))); Patricia Frances Grace, amended brief of evidence, 20 August 2018 (doc E11(a)).
155. Benjamin Ngaia, 'Report on Cultural and Historical Significance of Ngārara West A25B2A', p 13 (Ben Ngaia, papers in support of brief of evidence (doc E3(a)), p [67])
156. Benjamin Ngaia, 'Report on Cultural and Historical Significance of Ngārara West A25B2A', p 14 (Ben Ngaia, papers in support of brief of evidence (doc E3(a)), p [68])

landlessness that the principle of Kotahitanga, or Unity, has been violated and continues to be so to this day'.[157]

We saw evidence of all these consequences at our hearings.

The Crown conceded in this inquiry:

> The Crown concedes that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[158]

We turn next to consider the question of how and why private purchasers were able to obtain so much land at Waikanae in the early decades of the twentieth century, and the role which Crown acts or omissions played in that process.

5.6 How and Why did Private Purchasing Result in Te Ātiawa / Ngāti Awa Landlessness?

5.6.1 Introduction

In this section of the chapter, we address two of the key issues set out in section 5.3:

- How and why was so much of the remaining land of Te Ātiawa/Ngāti Awa ki Kāpiti sold to private purchasers in the first three decades of the twentieth century?
- Did W H Field, a major private purchaser in the district, abuse his public position as a member of Parliament to the detriment of Te Ātiawa/Ngāti Awa?

Most of the remaining land of Te Ātiawa/Ngāti Awa as at 1900 was alienated by private purchasing in the first three decades of the twentieth century. Understanding the private acquisition of property by purchase and lease is, therefore, essential to assessing Te Ātiawa/Ngāti Awa land dispossession. While it is not possible to consider every private purchase or lease in the twentieth century, claimants and technical witnesses have identified several local individuals and families as playing leading roles in the purchasing of Māori land. This section examines these major purchasers and their activities to illustrate the trends characterising private alienation of Māori land in the Waikanae district. We examine the main reasons why Māori sold so much of their remaining land. In particular, we consider the Crown's native land title system and whether it provided an even playing field as between Māori vendors and private purchasers. We later consider

157. Benjamin Ngaia, 'Report on Cultural and Historical Significance of Ngārara West A25B2A', p 14 (Ben Ngaia, papers in support of brief of evidence (doc E3(a)), p [68])

158. Crown counsel, closing submissions (paper 3.3.60), pp 23–24

whether the Crown complied with its Treaty and statutory obligations to ensure Māori retained sufficient land for present and future needs (see section 5.9).

5.6.2 What systemic factors were involved in the sale of Māori land to private purchasers in the early twentieth century?

Due mostly to the detailed research of Dr Barry Rigby, it is possible to reconstruct the system by which private purchasers were able to obtain so much Māori land so quickly despite the wish of Māori collectively to retain their lands. We have already discussed the litigation of 1886–91 in chapter 4, which resulted in the cutting up of Ngarara West into multiple sections in 1891, many of which had just one or two owners. According to the claimants, the result of this litigation was 'the fragmentation and individualisation of title into small sections', some of which were uneconomic because they were too small for viable farms.[159] Also, it was alleged that individual owners found it difficult to develop their sections due to a number of factors, especially a lack of finance. The claimants highlighted the disparity between the ability of Māori and Pākehā owners to obtain cheap credit, with the result that purchasers were the main source of credit for Māori and could trap individual owners in a cycle of debt which led to the alienation of their lands.[160] Claimant counsel submitted:

> In particular, the [Rigby] report set out how W H Field encouraged Hira Parata and others to incur significant debts to him by which he encouraged leverage to persuade them to sell land. Further, how he used his position as a Member of Parliament to ensure that lines of credit remained open to him, which were not available to his Te Ātiawa debtors. The report also details how it was that the Field family were apparently able to evade the anti-aggregation laws which would have placed a limit on their freehold acquisitions.[161]

Crown counsel conceded that the individualisation of title made Māori land 'more susceptible to fragmentation, alienation, and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa ki Kāpiti.'[162] This concession is important and highly relevant to why so much land was lost so quickly in the Waikanae district in the first three decades of the twentieth century. The removal of tribal controls and the individualisation of title meant that land was sold rapidly from 1891 to 1925. In relation to private purchasing, however, the Crown disclaimed any responsibility for the actions of private individuals. According to the Crown, Dr Rigby found no evidence that the Crown was aware of problems with the purchases of W H Field (or any other individual), and

159. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 20
160. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 20–21
161. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 21
162. Crown counsel, closing submissions (paper 3.3.60), p 29

the Crown's provision of protections in the native land laws met its Treaty responsibilities towards Māori.[163]

The parties therefore agree that individualisation of title and the lack of any provision for tribal control of alienations were key factors in the loss of Māori land. We concur. The evidence shows these points very clearly. The Crown does not accept, however, that it had any responsibility for the system of private purchasing, other than the protective criteria that had to be met before the Māori Land Board could confirm a purchase.

Essentially, the evidence of Dr Rigby and the claimants shows that there was a system of private purchasing at Waikanae which involved a number of features common to many, possibly most, purchases:

- the access of purchasers to cheaper credit from reputable institutions and the ability to refinance their debts (neither of which were readily available to Māori);
- the lending of money by purchasers to Māori at higher interest rates than charged by financial institutions;
- the use of leasing to obtain a foothold in blocks and the use of rents as advances towards a purchase; and
- the sale of land for debt for immediate needs (including debts to storekeepers) rather than the accumulation of capital for development.

Other relevant factors included the number of absentee owners, many of whom were resident at Parihaka or in the several territories to which Te Ātiawa/Ngāti Awa migrated in the nineteenth century (see chapter 4). The degree of absenteeism made land more vulnerable to sale.[164] Also, the loss of access to customary resources made individuals more dependent on cash for the purchase of goods. By the 1910s, the degree of land loss had led to clashes between local settlers and Māori over access to fisheries, the use of bush resources on settler-owned land, and the taking of wood for firewood.[165]

5.6.3 The system of private purchasing in action at Waikanae

Dr Rigby's report concentrated on the activities of some of the main purchasers at Waikanae, especially the Field family and the Elder family. We have already discussed their activities in the 1890s in chapter 4, describing the ways in which they (and others) purchased a considerable amount of land following the Ngarara West rehearing in 1891. In this section we focus as much as possible on the period after 1900, although there may be some unavoidable overlaps.

The Field family consisted of William Hughes Field, his wife Isobel, his brothers, and one of his sisters-in-law, Hana Field of the Otaraua hapū. W H Field was a Wellington-based lawyer with the firm Stafford, Treadwell, and Field, which

163. Crown counsel, closing submissions (paper 3.3.60), pp 38–40
164. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 279
165. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 343–345

was heavily involved in the Ngarara West litigation of 1887–91. W H Field likely began practising native land law representing his sister-in-law, Hannah.[166] The Elder family included Field's main Pākehā rivals, Henry Richardson Elder and his long-time lawyer, supporter, and brother-in-law, Charles Morison.[167] Unlike W H Field, Elder did not have a close family connection to Te Ātiawa/Ngāti Awa, nor could he correspond in Māori. However, C B Morison, had a close professional association with Inia Tuhata, who contested Wi Parata's authority at Waikanae in the 1880s and 1890s. Morison represented the Tuhata whānau in their petition to Parliament, protesting against the outcome of the 1887 partition of Ngarara West. Morison, an authority on commercial law, also represented Tuhata's supporters during the 1889 Ngarara commission (see chapter 4). In 1912, Morison became a King's Counsel.[168] Field and Morison increased the debts owed them by acting as lawyers for their clients in the Native Land Court.

In order to finance acquisitions of Māori land, W H Field secured much of his credit from the London-based New Zealand Loan and Mercantile Agency Company (NZL), allied with the Bank of New Zealand.[169] He also obtained financial assistance from the Public Trustee. His law firm acted for both the Public Trustee and the NZL from 1895 to 1906;[170] his close professional relationship with the Public Trustee also enabled him to facilitate loans on behalf of Māori debtors, and monitor their repayments.[171] It is important to note that access to these sources of finance would otherwise have been beyond the reach of most Māori landowners. Field stood as guarantor, for example, for Natanahira Parata's loans, and he also acted as both accountant and lawyer for Natanahira. He did this in the expectation of support from the Parata whānau against his Pākehā competitors, and to obtain land through a mix of direct loans, leases, and facilitating access to other large loans.[172] Te Ātiawa/Ngāti Awa owners frequently solicited W H Field for cash advances and loans directly.[173] Moreover, W H Field 'seldom paid more than six percent interest' but he regularly charged his Te Ātiawa/Ngāti Awa clients 10 per cent interest. Given the dearth of other finance available to them, they had little choice but to accept the higher interest rates charged by private lenders.[174]

166. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 264, 273–274
167. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 303, 308
168. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 328
169. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 270
170. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 285; see also transcript 4.1.18, p 608.
171. Transcript 4.1.18, p 607
172. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 284, 291, 297–298, 301
173. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 278
174. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 404

Te Ātiawa/Ngāti Awa leaders remained opposed to land sales, even when they had to sell land themselves. Wi Parata lived mostly at Parihaka from 1900 until his death in 1906, and he maintained a strong opposition to any sales during those years. Field struggled to buy land in 1903–05 but after Wi Parata's death in September 1906, he completed 15 new purchases totalling 595 acres by January 1909.[175] Even Inia Tuhata, who had battled so hard to secure his land in the 1880s and 1890s, had to sell land. He leased Ngarara West C8 (240 acres) to Field, living as much as possible on the rent, and moved away to the Chatham Islands in 1903.[176] Tuhata's coastal A2 block (310 acres) was then sold to Henry Elder and Henry Barber in 1905.[177] Inia Tuhata had been in debt to Field since the early 1890s, and Field had applied significant 'repayment pressure' to him and his relatives, including his aunt Heni Te Rau.[178] The pressure on individual owners was so great that Private Pahia Ropata, Corporal Tutere Ropata, and Private Herehere Ropata sold land in December 1914 and January 1915 as they waited in camp, on the eve of departure to fight for their country in the First World War.[179]

As noted above, Te Ātiawa/Ngāti Awa owners were in such a position that they often had to solicit cash advances from the Field and Elder families. The Field brothers often purchased land from many of these debtors during the 1890s. Dr Rigby noted that Māori woman in particular were W H Field's most reliable clients.[180] Ngarongoa Eruini, for example, faced repaying inherited debts, tangi expenses for her late husband, Hoani Tamati, and also had to accumulate store debts to feed her children. She was one of many who tried to escape her debts to one settler by going to another for money. She sold land to C B Morison, which reduced her debt to Field from £126 to £81. She also leased parts of her land to Elder, while allowing Field to take the rents. Other owners also had to assign their rents to pay debt, even if it left them nothing else to live upon. Ngarongoa even sought financial assistance from her neighbour, H S Hadfield, trying to escape Field's grasp on her lands.[181] Field wrote to her angrily: 'Perhaps you can get him to pay off your debts and provide food and clothing for you and your children as I have done.'[182] This showed the degree to which landowners became indebted

175. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 312–313

176. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 313

177. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 102

178. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 281, 284

179. Rawhiti Higgott, brief of evidence (doc F3), pp 7–8; Director-General, LINZ, to Secretary, New Zealand Māori Council, 18 July 1984 (Tutere Parata, papers in support of brief of evidence (doc F2(a)), p [23]). This land was located on Kāpiti Island and was sold to the Crown. Kāpiti Island matters will be dealt with in a later volume of this report.

180. Transcript 4.1.18, p 607

181. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 314–315

182. W H Field to Ngarongoa Eruini, 26 September 1904 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 315)

and eventually had to sell or lease land they wanted to retain in order to pay for immediate needs. It was very difficult for the individual owners to amass capital in order to develop their land. And, in the meantime, the debts continued to grow because of the interest rates. Ngarongoa's debt to Field had risen to £99 by 1910, even though he agreed (unusually) to lower her interest from 10 per cent to eight per cent.[183] By 1917 Ngarongoa owed Field more than £958. This increased debt resulted in further sales – some of it was turned into a deposit by Field for the purchase of part of A58.[184]

One of the tactics used by private purchasers was to take advantage of debts to storekeepers. W H Field acted as an accountant for Alex Leslie, the owner of the Waikanae general store, where it appears Māori would also run up debts on the Field account. For example, Matai Kahawai, who received modest rental incomes, owed £124 in grocery debts to W H Field, on which he had to pay ten per cent interest.[185] Kahawai sold his share of A22 to Field for £50 to pay off debt.[186] Tongaiti, an elderly male lessor, found himself in a similar situation. W H Field wrote to Alex Leslie: 'Old Tonga[iti] has been in today worrying me to pay your account . . . [of] about £10. I believe he owes me nearly £20, and I have as security an order [IOU] on his rent which is about £20 a year.'[187]

According to Dr Rigby, this correspondence shows W H Field collaborating with the local store owner to extract debts from Te Ātiawa/Ngāti Awa. This relationship reportedly continued with the new owners when the Waikanae Co-operative purchased the general store in 1905.[188]

Tangi expenses featured in many of W H Field's client accounts and often contributed to the indebtedness of Te Ātiawa/Ngāti Awa.[189] Dr Rigby explained that W H Field took advantage of the customary imperative to exhibit generosity on such occasions:

> I think it's the continuation of customary obligations such as, you know, tangi, you know, it's an enormous drain on the finances of the whānau, and the only ready source of cash in town was William Field, who is extracting it from his sources of credit particularly New Zealand Loan and the Public Trustee but he also has other sources. I think that Māori are just, you know, having to provide for their whānau and having

183. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 325
184. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 334
185. Matai Kahawai account, 15 Dec 1904 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 313–314)
186. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 331
187. Field to Leslie, 10 Nov 1903 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 314
188. Maclean, 'Waikanae', 2010, pp 56–57; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 314
189. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 302

> to provide in cash, because by the turn of the century 1900 this has become a cash economy here.[190]

Leasing played a significant part in the alienation of Māori land at Waikanae in the twentieth century. Leasing was a double-edged sword for Māori. On the one hand, it enabled them to make an income out of land that they could not develop for farming themselves. On the other hand, it removed that land from their use and control, sometimes for many decades. Lessees often used their leases as a means to bring about purchases. As we noted in chapter 4, Norman Elder described the process in this way:

> Rent does not seem to have been necessarily paid periodically; it could accumulate with the occupier to be drawn on when wanted, so that he became essentially a banker. When overdrawn, payouts soon developed into advance instalments towards the eventual purchase of the freehold.[191]

C B Morison always included a purchase option in the leases he negotiated on behalf of Elder, so as 'to allow the conversion of leasehold to freehold title, should the opportunity arise'.[192] Field noted that there was not 'the same encouragement [for settler lessees] to improve' the land with a lease.[193] But it was the preference by far of Te Ātiawa/Ngāti Awa owners collectively to lease instead of sell.[194] It was too easy for rents to turn into purchase advances, however, due to the cash-strapped situation faced by many of Te Ātiawa/Ngāti Awa, especially to pay for tangi expenses.[195]

Tamihana Te Karu, for example, obtained an advance of four years' rent from Field in 1895. He was being sued at the time in the Magistrates' Court for another debt, which he tried to satisfy by selling a horse and cow. Field extracted sales of land from Tamihana in 1897 as his financial situation worsened. By 1900, he was forced to agree to convert another lease (his share of Ngarara West 24B) into a sale but the court refused its consent, because he would have only retained 20 acres. Tamihana Te Karu, staunch ally of Wi Parata, had been the second-largest Ngarara landowner after the 1891 hearing, with over 2,200 acres. By 1900 he was on the verge of landlessness. Bruce Stirling, in his report on Ngarara West A24 for the

190. Transcript 4.1.18, p 645
191. Norman Elder, 'Waimahoe', vol 31, p 18 (C & J Maclean, *Waikanae*, p 76)
192. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 317
193. Field to J W Chapple, 10 September 1903 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 312)
194. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 312–313
195. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 313

Takamore trustees, noted that Field was suing debtors in the magistrates' court; the threat of this could sometimes induce owners to alienate.[196]

W H Field negotiated his most significant long-term lease from Wi Parata in 1900, leasing Kukutauaki pt 1B (237 acres) for £59 per year. Field arranged a special £1,400 mortgage to finance this lease. He subsequently purchased over 63 per cent (383 acres) of Kukutauaki 1B from Wi Parata's son, Winara Parata, in 1909. Leasing arrangements such as these appear to demonstrate Wi Parata's advocacy for leasing, rather than outright alienation of Māori land. He remained a significant obstacle to W H Field's large-scale purchasing. As noted above, Wi Parata's death was followed by a 'burst' of 15 purchases by W H Field totalling 595 acres between 1907 and 1909.[197]

Natanahira (Hira) Parata became indebted to the Field family during the 1890s. Dr Rigby noted that W H Field considered Hira hopelessly improvident. Nevertheless, he encouraged Hira's free spending.[198] Field appeared to apply less pressure on the Parata family to pay arrears than other Māori debtors, probably because he wanted their support in his contest against Morison and Elder. Hira Parata was beginning to assume full management of Parata family assets.[199] By May 1899, this strategy appeared to have been successful, as evident in the recorded transfers of 1,273 acres of Parata property to W H Field, in a combination of leases and purchases (namely Ngarara West A6 and Ngarara West A73).[200] Hira's debts to Field also rose – from £142 in April 1899, to over £267 in November 1900. By 1902, Hira's debt to Field reached £500.[201] In May that year, Hira retained the services of a Wellington law firm to challenge the accuracy of W H Field's accounts – Field had acted as Hira's lawyer and accountant up to this point. W H Field reportedly regarded Hira's action as a flagrant attempt 'to evade payment of what he justly owes me'.[202] The absence of correspondence concerning the case suggests legal action did not eventuate.[203] According to Dr Rigby, Field's main goal was to 'win control over Hira's valuable Ngarara West A78 township land'. 'By 1916', he said, 'Field used complex NZL and Public Trustee mortgage arrangements with Hira to acquire the key township lots'.[204]

196. Bruce Stirling, 'Takamore Wahi Tapu: A Block History of Ngārara West A24B and A24C', pp 27–29 (Benjamin Ngaia, papers in support of brief of evidence (doc E3(f)), pp [128]–[130])
197. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), p 115
198. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 291
199. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 290–292
200. Field to Hira Parata, 29, 30 May 1899; Hira Parata to Field, 1 Jun 1899 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 284)
201. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 291
202. Field to Moorhouse & Hadfield, 23 May 1902 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 297)
203. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 297–298
204. Barry Rigby, summary of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land', January 2019 (doc A214(b)), p 5

The nature of some of Field's leases are difficult to document, however, as they were typically informal and he often failed to register them.[205] As a result, few appear in the list of leases in Walghan's 'Block Research Narratives Report'. One known lease that does not appear in that report is Ngarara West C8. Between 1898 and 1906, W H Field reportedly paid £214 in rent for it to Inia Tuhata.[206] Bruce Stirling provided an example of Field negotiating a lease outside of the Waikanae district, which Field said was an 'invalid document' but the lessor (Kahu Tatara) would not 'go behind it'.[207] Given this example, it is not surprising that some of his leases were informal.

It is not possible to say how far Te Ātiawa/Ngāti Awa vendors actually benefited from sales and the prices paid, due to the extent of 'trading land for debt'. Ema Tini of Otaraua and her husband, Enoka Hohepa, were prominent in the litigation that took place in 1887–91, and had favoured use of the Native Land Court to partition Ngarara West. They had struggled hard to obtain their share of the tribal estate (see chapter 4). Their children, however, could not hold onto their lands, and it is doubtful that they received a penny from the eventual sale:

> The Enokas owned approximately 520 acres at Otaihanga, south of the river. They also owned land at Wairarapa and at Waiwhetu. Ematini's daughter, Ani, lived with her husband Hector Love, at Waiwhetu. Field leased only about 20 acres of the Enoka Otaihanga land, but he made regular cash advances to the whānau. He then followed these advances with regular repayment demands. Typically, his February 1903 letter concluded 'Could you not let me have some of your Wairarapa rent[?]'. By 1904 Enoka whānau debts recorded by W H Field remained at a manageable £118, but five years later they would have to alienate most of their Ngārara West land to meet other more pressing debt obligations.[208]

One of the witnesses in this inquiry, Tutere Parata, told us he was aware W H Field would give loans to Māori who could not pay them back. When the Māori debtors defaulted, Mr Parata said, W H Field would gain ownership of their interests in land.[209] Typically, it seems local Māori were not in a position to borrow money to finance commercial agricultural operations but rather their needs were to engage in subsistence farming so they could feed their own families.[210] Hira Parata seems to have been a rare exception to this trend, having sufficient land and

205. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 299
206. Inia Tuhata account, 22 April 1903 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 313)
207. Field to Beauchamp, 11 September 1895; Beauchamp to Field, 18 September 1895 (Stirling, 'Takamore Wahi Tapu', p 29 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [130]))
208. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 299–300
209. Tutere Paraone Parata, brief of evidence, 17 January 2019 (doc F2), p 12
210. Transcript 4.1.18, p 645

access to finance to develop some of the whānau land for pastoral farming.[211] He maintained large amounts of debt, using the annual sale of wool to repay his creditors. Field facilitated loans from NZL by acting as Hira Parata's guarantor. When the annual wool clip fell short of the requisite payments, then land had to be sold or leased, although the dairy units leased from Hira enabled his debt level to rise significantly. Field helped to persuade the Public Trustee to increase Hira's loans to £9,000 in 1914.[212] NZL did provide some farm supplies on credit. Dr Rigby gave the example of Isobel Field obtaining feed and fencing material through NZL for the Eruini whānau.[213] Most owners, however, were not able to obtain finance to develop their lands. Also, the individualisation of title had left some owners with sections that were too small for viable pastoral farms, while others had their interests scattered across a number of sections (see chapter 4). Some of the bush land in Ngarara West C was too marginal for farming, which was one the reasons why more land was sold in the C blocks rather than the A blocks.[214] All of these factors inhibited development.

As more land was alienated by way of sale, the development opportunities for Māori correspondingly declined. One such notable opportunity was the establishment of the Waikanae Beach settlement (called Waimeha township at the time) by W H Field in the 1920s. Moves were made all along the Kāpiti coast to develop seaside resorts in the early twentieth century: beachfront subdivisions for that purpose were made at Paekākāriki in 1906, Raumati in 1909, Ōtaki Beach in 1919, and then at Paraparaumu and Waikanae. Waikanae historians Chris and Joan Maclean commented: 'As a big Waikanae landowner, W H Field was ideally placed to take advantage of this trend.'[215] By the early 1920s, Field owned 'much of the land north of the Waikanae River, including the beachfront'.[216] This was no accident. From 1912 to 1924, Field sought to secure a combination of leasehold and freehold acquisitions along Beach Road to the sea, so that he could subdivide and establish a Pākehā beachfront community. According to Dr Rigby, this plan was concealed from local Māori so that they could not try to block it and take advantage of the beachfront land themselves. Field employed a land acquisition strategy so 'well disguised' that it was not immediately apparent to Te Ātiawa/Ngāti Awa because it was concealed in many small dealings:

> Firstly, he did not begin his drive at the main road north, and follow a clear westward progression in his transactions. The two key A78 lots at the corner of the main road and Beach Road, became the site of the Waikanae sale yards. Field acquired these

211. Rigby, answers to questions in writing (doc A214(f)), p 8
212. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 284, 291, 335
213. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 301
214. Rigby, answers to questions in writing (doc A214(f)), p 6; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 266
215. C & J Maclean, *Waikanae*, p 88
216. C & J Maclean, *Waikanae*, p 88

lots only by fits and starts between 1909 and 1916. Likewise, Field began picking off quite small sections further along Beach Road in a patch-work sort of way well before 1916.[217]

Field even resorted to secret dealings: in attempting to purchase A26 (40 acres) from Hona Kohiwi, who lived at Parihaka, Field instructed his agent never to mention his name as the potential buyer, and to ensure that no news of his negotiations reach Waikanae and alert resident owners.[218] These kinds of secret and piecemeal dealings could not have occurred if there had been some appropriate mechanism in the law to provide for collective authority over land.

Much like earlier acquisitions, correspondence between W H Field and local Māori reveal that many had to trade land to either reduce or pay off debts in the period 1912 to 1924. Dr Rigby gave examples of this involving Matai Kahawai, Ngaruatapuke (aka Mrs Jerry Edwin), Whakarau Te Kotua, Pina Tamihana, Mahia Hawea, Horomona Parata, Ngarongoa Eruini, Amapiri Tuku, the Ngapaki whānau, and Ruru Tutai.[219]

By 1923, Field was ready to establish his seaside resort. He had planted maram grass to stabilise the sand dunes and had diverted the Waimeha Stream.[220] The beachfront township was the culmination of a series of strategic acquisitions. In terms of the actual land on which it was situated, he acquired the main 76-acre A14C section as a result of survey costs. Additionally, he acquired the 17½-acre A76A as a result of survey liens. These liens resulted from the intensive Ngarara West survey activity associated with repeated partitions, particularly on the Waikanae coastal plain. Surveyor A P Mason applied for these liens in May 1906, motivating the Native Land Court to partition Ngarara West A14 and A76 to satisfy unpaid survey charges. W H Field seemingly acquired only Ngarara West A76B (also 17½-acres) directly from Te Ātiawa/Ngāti Awa in December 1908. His acquisition of a third, Ngarara West A24B section (of 17½ acres) arose from an 1899 lease negotiated by W N Cruickshank. Finally in 1903, Field acquired A37 from W A Chapple, who had previously purchased it from Paretawhara in 1900.[221]

The success of the acquisition and onsale of beachfront land appears to have relied heavily on W H Field's access to credit and insider knowledge of local property holdings. In 1923, 108 residential sections were sold at public auction. Field continued to acquire adjacent beachside sections.[222] While the particulars of

217. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 329
218. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 329
219. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 331–334
220. C & J Maclean, *Waikanae*, pp 86–91
221. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 349
222. Field to C T Smith, 14 Mar 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 348–351)

alienation remain unclear, it seems that he was ultimately successful as a further 72 sections adjacent to the township were auctioned in 1925.[223] This was the first comprehensive subdivision scheme at Waikanae,[224] and Te Ātiawa/Ngāti Awa did not profit from it at all.

5.6.4 Te Atiawa/Ngāti Awa concerns about W H Field's purchasing activity

During our hearings, Tutere Parata, witness for the Ngarara West A14B1 Block Claim (Wai 1945), provided us with a letter written by Tata Winaara Parata in 1918. The letter criticised W H Field's purchasing patterns and requested the Minister of Justice, Thomas Wilford, to appoint a royal commission into his dealings. We have reproduced the letter:

> Urgent
> The Hon T M Wilford
> Minister for Justice
> Wellington
>
> Waikanae 5 Dec 1918
>
> I am writing to you as the Minister for Justice on behalf of the Maoris of Waikanae. Mr W H Field MP has acquired a large amount of their lands at different times and they are not at all satisfied with some of the man's transactions, they have been asked by him to sign certain papers for advances made without the presence of a licensed interpreter [and] the next thing they know was that they had lost their properties.
>
> Some of my other relations state that they thought they were signing a lease to him which they afterwards found was a sale. Some of the signatures were for stuff supplied to different tangis by Mr Field.
>
> A Royal commission was appointed to go into the dealings of Europeans with the Maori Rangi Kerehoma and as Minister of Justice would you appoint a commissioner to go into the dealings of this Member of Parliament with the natives of this district. If the dealings have been above board he has nothing to fear. The necessary evidence can be got here. I trust this matter will be brought up before the closing of the present session. Thanking you in anticipation of an early reply.
>
> Yours Faithfully, T W Parata.[225]

We asked Tutere Parata how he came into possession of this letter. He explained that he 'probably got it from a relation,'[226] having collected many papers over the last few decades. Crown counsel submitted there is no evidence confirming

223. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 349
224. C & J Maclean, *Waikanae*, p 91
225. Tutere Paraone Parata, brief of evidence, 17 January 2019 (doc F2(a)), pp 31–32
226. Transcript 4.1.18, p 103

whether the letter was actually sent or received.[227] Further, Crown counsel asked Dr Rigby if he encountered any evidence of tangata whenua engaging the Crown concerning W H Field's accumulation of land. Dr Rigby stated that he was unaware of the letter appended to Tutere Parata's brief and that, to his knowledge, W H Field was never the subject to any official investigation.[228]

There is no doubt as to the authenticity of the letter. Moira Cooke and Tracey Henare, who provided evidence at a subsequent hearing, also found a copy of the letter in Parata whānau papers that had been recently inherited from the Cooke estate.[229] They, however, believed that the letter was written by Tohuroa (Tom) Parata.[230] The precedent referred to in the letter, the royal commission 'into the dealings of Europeans with the Maori Rangi Kerehoma', reported in April 1918. Its focus was the dealings between Rangi Kerehoma and an agent of the Public Trustee, which resulted in the serious defrauding of Kerehoma.[231]

We agree that there is no evidence before this Tribunal that the letter was received by the Minister of Justice in 1918. This may be due to the focus of research for this phase of the inquiry, the destruction of records in the Hope Gibbons fire of 1952 (which destroyed a lot of Government records), or for some other reason. Certainly, no royal commission was convened as requested by Tata Winaara Parata in 1918. The letter does, however, show that Te Ātiawa/Ngāti Awa were very aware of the flaws in the private purchasing system and had attempted to raise them with the Crown. The letter also alleged blatant abuses of process. We are reminded of the lease to Kahu Tatara, which Field himself said was an 'invalid document' but that it did not matter because Kahu would not 'go behind it'.[232] In addition to that example, Bruce Stirling provided another example in which Field said of a transaction in Wellington that, after the lease was signed, he 'went along the street looking for a JP' to verify it.[233] Such documents had to be interpreted and signed in the presence of a justice of the peace or equivalent to be valid.[234]

Aside from allegations of abuses, Tata Winaara Parata's letter to the Minister also raised the key issue of the sales of Māori land to pay debt arising from tangi (among other things). This was a crucial problem for Te Atiawa/Ngāti Awa, and they were deeply disturbed by the loss of so much land and in such a way. Moira Cooke and Tracey Henare provided us with a typescript letter to a newspaper

227. Crown counsel, closing submissions (paper 3.3.60), pp 39–40

228. Transcript 4.1.18, pp 622–623

229. The private collection of Waikuhura Tere Patricia Cooke, 2018: Moira Cooke and Tracey Henare, papers in support of brief of evidence (doc F35(f)), p 1.

230. T W Parata to Minister of Justice, 5 December 1918 (Moira Cooke and Tracey Henare, papers in support of brief of evidence (doc F35(f)), pp 31–32). The signature could be either T W or T H Parata.

231. See 'Rangi Kerehoma Commission: Report of Commissioner', 26 April 1918, AJHR 1918, G-7.

232. Field to Beauchamp, 11 September 1895; Beauchamp to Field, 18 September 1895 (Stirling, 'Takamore Wahi Tapu', p 29 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [130]))

233. Field to Beauchamp, 11 September 1895 (Stirling, 'Takamore Wahi Tapu', p 29 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [130]))

234. Stirling, 'Takamore Wahi Tapu', p 29 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [130])

editor. This letter responded to Field's allegations to the police about drunkeness at a tangi in 1916. Field accused Hira Parata and his guests of consuming inordinate amounts of alcohol at an occasion at which a child died, and of wasting their rents on the purchase of alcohol. Te Ātiawa/Ngāti Awa denied these accusations, and Field 'resented Tuhuroa Parata's public criticism that Field had over-reacted to this incident'.[235] This 'public criticism' may have included the draft letter to the newspaper provided by Ms Cooke and Ms Henare. In it, the unnamed author, presumably Tohuroa Parata, stated:

> It is nearly 2000 years ago that Judas Iscariot posed as a disciple of Christ. He betrayed his Master with a kiss and sold Him for 30 pieces of silver. Mr Field greets us with a cultivated smile and a slamming shake of the hands and a familiar Hello. For what? Yea! [?] answers, 'Land, Land, More land'. Mr Field states that we improvidently sell stock and goods and often the family cow to purchase drink. I would ask Mr Field a pertinent question. How many cows goods and land has he purchased from us on such occasions [tangi]? It is strange that it has taken Mr Field so many years to find out our failings and shortcomings. No! Not until he has acquired thousands of acres of our land, and he still continues to acquire land. In whose name? Not in his own.[236]

The final line in the quotation above refers to the practice of Field and other purchasers of evading anti-aggregation requirements. They did so by purchasing land in the names of relatives and taking out leases as well as outright purchases. The anti-aggregation issue will be discussed further below.

There were other public indications about what was happening at Waikanae. In 1912 Henry Walton, for example, denounced the land grab that was occurring at Waikanae in a letter to the *Dominion*.[237]

5.6.5 What could the Crown have done to ameliorate the system of private purchasing?

According to Crown counsel, there is no evidence that the Crown was aware of any specific Te Ātiawa/Ngāti Awa complaints about private purchasing at Waikanae.[238] This may well be correct, especially if the 1918 letter to the Minister of Justice was never actually received by the Crown. On the other hand, the Crown was certainly aware at the time of Māori complaint in general about purchasing and land loss. Crown counsel also submitted that the Crown was not, in any case, responsible for the actions of private purchasers.[239] We agree with this submission in terms of the individual actions of particular purchasers, but the Crown *was* responsible for

235. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 336
236. Unnamed author to the editor, draft, [1916] (Cooke and Henare, papers in support of brief of evidence (doc F35(f)), p 33)
237. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 330
238. Crown counsel, closing submissions (paper 3.3.60), pp 39–40
239. Crown counsel, closing submissions (paper 3.3.60), p 38

setting the policy and legislative framework in which private purchasing of Māori land occurred. The Crown's decision in 1909, as embodied in the Native Land Act of that year, was for Māori Land Boards to conduct a series of checks at the end of a purchase to confirm whether it met statutory requirements, such as whether the price was sufficient or the vendor would be rendered landless. We have set out those protections in section 5.4.4, and will discuss how they worked in practice in section 5.7 below. Apart from those protections at the confirmation stage, the question must be asked: What could the Crown have done to ameliorate the system of private purchase to provide a more level playing field as between Māori vendors and settler purchasers, and to protect Māori interests while still allowing for a reasonable degree and pace of settlement?

The solution adopted in negotiation with Kotahitanga in 1898–1900 was to stop all purchasing (in theory) and progress settlement by widescale leasing instead. Māori favoured leasing, and they would be secured with inalienable reserves for cultivation and access to customary resources, while also having an opportunity to amass capital from rentals for development. The Crown had abandoned this solution by 1905, as discussed in section 5.4. Once the Native Minister, James Carroll, had lost that battle, he appointed a royal commission to consult with Māori and determine how much land they could safely alienate.[240] The mandate of the commissioners, Chief Justice Robert Stout and Apirana Ngata, was to

> report how the Native lands which are unoccupied or not profitably occupied 'can best be utilised and settled in the interests of the Native owners and the public good'; how, after making provision for the use and maintenance of the Maori owners and their descendants, the surplus, if any, may be made available for settlement by Europeans, 'on what terms and conditions, by what modes of disposition, in what areas, and with what safeguards to prevent the subsequent aggregation of such areas in European hands'; and, further, to report as to 'how the existing institutions established amongst Natives and the existing systems of dealing with Native lands can best be utilised or adapted for the purposes aforesaid, and to what extent or in what manner they should be modified.'[241]

The commission did not investigate the Waikanae district but Dr Rigby has pointed to the relevance of the recommendations in its 1907 general report.[242] He stated:

> The Stout–Ngata commission apparently believed that the Crown's enforcement of anti-aggregation standards would protect Māori against excessive Pākehā private purchasing. On the other hand, it foresaw the need to consolidate Māori land interests,

240. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, pp 854–855
241. AJHR 1907, G-1C, p 1
242. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 265, 268–269, 271–272

and for the Crown to assist Māori in providing the necessary capital for land development. Of course, the succeeding Reform government did little in this regard. Only when the Liberals returned to power in 1928 was Apirana Ngata as Native Minister able to initiate state-funded Māori land consolidation and development. By then Te Ātiawa/Ngāti Awa ki Kapiti retained so little of their original land recorded in the 1892 Ngarara map, SO 13444, that they could not benefit from Ngata's long overdue assistance on behalf of the Crown.[243]

These particular recommendations – consolidation of owners' scattered interests and the provision of State development finance – were crucial measures for ameliorating the private purchasing system. They were intended in part to reverse the effects of individualisation of title while turning the 'settlement' debate on its head, advancing the proposition that the Crown should treat *Māori* as settlers on their ancestral land, providing Māori with the same benefits and advantages as it did to new settlers. This would require the provision of both State development finance – the commission considered this the most important of its recommendations – and access to agricultural training. The commission outlined in some detail all the assistance that the Crown already provided to settlers, including secure titles and the provision of cheap development loans. At the same time, the commission recommended the reservation of sufficient land for individual, family, and tribal papakāinga. The commission also recommended no more direct dealings between Māori and settlers for either purchases or leases: Māori land should be sold or leased, according to its owners' preferences, by public auction. The Māori Land Boards would act as the agent of the owners in auctioning land for sale or lease.[244]

These recommendations would obtain for the owners the highest market price or rent while, at the same time, preventing the cycle of indebtedness to individual purchasers and the conversion of leases to purchases. On the premise that, in 1907, some Te Ātiawa/Ngāti Awa owners still retained sufficient land for their occupation and subsistence (to become papakāinga reserves) and enough land left to develop a viable farm with State assistance, then the passage of time could have seen the Stout–Ngata recommendations result in the retention and development of much of the land that was still left. By 1907, however, many owners already lacked sufficient land or were caught in the debt trap – and most owners were landless or virtually so by the late 1920s. According to Dr Rigby, the trustees appointed by the wills of Hemi Matenga and Hira Parata 'controlled much of what remained in Maori ownership' by 1925; in other words, most of the owners apart from the beneficiaries of those two estates (members of the Parata whānau) were landless or virtually so by then.[245] This was reflected in the smaller amounts of

243. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 272

244. AJHR 1907, G-1C, pp 13–18

245. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 372, 374–375

money that could be pursued for rates in the 1920s because of the 'smaller holdings' of the remaining owners.[246]

In answer to the question as to what the Crown could have done at the time to ameliorate the system of private purchase: it could have reformed the purchase system; enabled owners to sell or lease their lands by auction through independent boards; enabled owners to set aside inalienable papakāinga reserves for individuals, whānau, and tribes; assisted owners to consolidate scattered interests for viable farms if that was their wish; and provided development assistance and cheap State finance for farm development.

None of these recommendations of the Stout–Ngata commission were carried out at the time, even though the Crown was well aware of the problems faced by Māori in accessing capital to develop land, and the inequitable situation that this created between Māori and Europeans. The Crown's solution was that Māori should sell some land to obtain capital to develop the rest, a solution that had already been tried and mostly failed in the nineteenth century. The Liberal Native Minister, James Carroll, addressed this issue in 1910 when discussing the Native Townships Bill (his statements in Parliament about that Bill are cited in chapter 6). Carroll told the House:

> At present the law makes due provision for safeguarding the Natives and their possessions. I am against general free trade in Native lands. I am one of those who has always held with the principle that the more we conserve their lands the better it will be for them and future generations, but there are circumstances which arise at times in connection with their possessions, and with the drift of civilisation and the development of the country, which make it of benefit and advantage to them to sell some of their lands, so that the proceeds may be utilised for the benefit of other areas which they own. The Natives are looking forward now to assistance from the Government whereby they can improve their lands; but, owing to the nature of their titles, they find a great deal of difficulty in obtaining advances from the Advances to Settlers Office or other institutions for that purpose, and they are severely handicapped in comparison with Europeans. Consequently, their only course, in my opinion, is to realise on some of their possessions, and with the proceeds therefrom carry out the work of improving, stocking, and so forth their remaining possessions. Whenever a Maori evinces a desire that way he should be assisted and encouraged, and it is the duty of the Government to help in every respect where he cannot get assistance through other channels.[247]

The Crown, however, did not begin to provide development assistance to Māori in any significant way until the late 1920s onwards, when Apirana Ngata introduced his farm development schemes. Dr Rigby pointed out: 'By then Te Ātiawa/Ngāti Awa ki Kapiti retained so little of their original land recorded in the 1892

246. Suzanne Woodley, summary of 'Local Government Issues', 3 September 2018 (doc A193(a)), pp 5–6
247. James Carroll, 11 October 1910, NZPD, vol 152, p 333

Ngarara map . . . that they could not benefit from Ngata's long overdue assistance on behalf of the Crown.'[248] To a large extent, the more substantial (and suitable) land holdings that remained by then were tied up in the Hemi Matenga Estate (as we discuss in chapters 6 and 9). We will examine the farm development schemes that eventuated in a later volume of this report.

One final point needs to be mentioned. For the legislation covered in this chapter, all of the principal Acts from 1894 onwards included mortgages in the definition of 'alienation'. This meant that the Native Land Court or Māori Land Boards had the responsibility of confirming the equity of mortgages, as they did for purchases. This protection was strengthened in 1909: section 230 of the Native Land Act 1909 required the board or court to obtain the approval of the Governor in Council (essentially the Crown) before confirming a mortgage. This presumably was a response to the debt trap that had formed a significant part of excessive land loss in the period up to 1909. Dr Rigby noted that the responsibility for prior approval shifted from the Governor in Council to the Native Minister in 1929, and that the Minister's 'scrutiny' of mortgages remained in place until 1953.[249]

5.6.6 Did W H Field use his public position to further his acquisition of Māori land?

The final question we have to consider, before dealing with the protective mechanisms, is the issue of whether W H Field used (or abused) his position as a member of Parliament in his private efforts to acquire Māori land. W H Field was elected a member of Parliament for the Ōtaki seat in 1900, succeeding his late brother Harry in a by-election. With the exception of one three-year term, he held the seat from 1900 to 1935. He was a Government member as part of the Liberal Government in 1900–08 but left the party in 1908 over the Liberals' favouring of the leasehold tenure. He was therefore elected as an independent member in 1908. Field was defeated in the 1911 election but he was again returned to Parliament in 1914, this time as a member of the Reform party. He was once again a Government member.[250] For much of his time in Parliament, therefore, Field was a member of the Government.

Based on Dr Rigby's report, the claimants argued that Field 'used his position as a Member of Parliament to ensure that lines of credit remained open to him, which were not available to his Te Ātiawa debtors'.[251] Crown counsel submitted:

> The Crown is not responsible for the actions of private individuals. Mr Field's land purchases were undertaken in his personal capacity and not as a Member of Parliament. Dr Rigby agreed, when questioned by counsel for the Crown, that Mr

248. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 272
249. Rigby, answers to questions in writing (doc A214(f)), p 5
250. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 326–327
251. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 21

Year	Sales		
	acres	roods	perches
1901	30	0	0
1904	9	2	23
1905	372	3	17.8
1906	135	2	37.5
1907	349	0	31
1908	405	2	25.7
1909	708	3	29

Table 8: Private purchases, 1901–09.

Field's actions in relation to land purchasing and related matters were as a private individual.[252]

Dr Rigby defined the question as: 'Did W H Field exploit his public position for private gain?' His answer to this question was 'yes', based on his conclusion that Field could use his 'public position to obtain inside information' about Te Ātiawa/Ngāti Awa landownership and official land information such as survey maps. He also developed 'multiple private-public parternships' by entering into private deals with officials he dealt with, such as becoming co-mortgagee with a Land and Survey Department official or obtaining a private loan from an official at the State Advances Office. Dr Rigby suggested that Field had 'inside influence' at the Public Trustee, and 'took full advantage of his public position' by negotiating favourable repayment terms with the Trustee.[253]

In our view, this issue may be swiftly disposed of, since the evidence does not show with any certainty that Field's position as a member of Parliament was in any way central to the matters raised by the claimants and Dr Rigby. According to other evidence from Dr Rigby, Field's relationship with NZL and the Public Trustee was forged initially through his law firm, which acted for these entities.[254] There is no evidence that Field used his position as a member of Parliament to obtain better repayment terms. Field certainly lobbied Ministers and the Premier to influence the Government to act in a way that favoured his interests, as demonstrated in various letters and telegrams. From the examples we have before us, he was mostly unsuccessful. The only evidence we have of his lobbying the Government

252. Crown counsel, closing submissions (paper 3.3.60), pp 38–39
253. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 400, 404–405
254. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 405

in respect of his purchasing interests was with regard to Kāpiti Island, where he failed to bring about the change he sought in Crown policy.[255] Field did not act as a Crown agent in his purchasing activities, and, in our view, there is no issue here which the Tribunal needs to determine.

5.7 How Effective Were the Crown's Protection Mechanisms in Practice?

In section 5.4 above, we set out some of the key features of twentieth-century legislation and protection mechanisms. We concentrated on the legislation in the first three decades of the century because most of the land remaining as at 1900 had been sold by 1925. Te Ātiawa/Ngāti Awa holdings were reduced from 60 to 20 per cent in Ngarara West A by 1925, and from 27 to 15 per cent in Ngarara West C. In the smaller blocks, Māori land had been reduced from 12.5 to 6 per cent of the Muaupoko block by 1925. Almost all of Kukutauaki was still in Māori ownership in 1900; it was all gone by 1913. Puketapu individuals and whānau still retained about 50 per cent of Ngarara West B in 1925 but this was a comparatively small area (824 acres).[256]

5.7.1 The 1900 legislative regime

The Māori Lands Administration Act 1900 was brought into operation in the Waikanae district in 1901. As noted in section 5.5, Te Ātiawa/Ngāti Awa owners had already lost three-quarters of Ngarara West C by then, as well as about 40 per cent of the smaller Ngarara West A block. They did not choose to vest land in the Māori Land Council. We have no information as to the reasons for this choice. Possibly, like most other Māori, they were hesitant to surrender control of their lands to the new body and wanted time to see how this experiment would work. We note that a recent report by Professor Richard Boast, filed after the close of the Te Ātiawa/Ngāti Awa hearings, referred to a meeting between the Premier and southern North Island tribes in 1901. Te Ātiawa/Ngāti Awa and the other iwi asked that 'their lands should be exempted from the operation of the 1900 Act'. The Premier responded that it was up to them whether they brought their lands under the Act (and vested land in the Māori Land Council).[257] Premier Seddon, however, 'repeatedly voiced his own impatience' that Māori were slow to vest land in the councils, and was already preparing for a major shift in Crown policy by 1905.[258]

The election/appointment of the Māori Land Council was not completed until December 1901. In the years 1901–04, when the Crown supported the 1900 agreement with Kotahitanga and its resolve to end land purchasing, only 39 acres of Te

255. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 294–295, 303–304, 309–310, 322–323
256. Walghan Partners, 'Block Research Narratives' (doc 203), p 33
257. Boast, 'Ngati Raukawa and Affiliated Groups: Twentieth Century Land' (doc A232), p 92
258. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 678–679

Ātiawa/Ngāti Awa land were sold. If there were more than two owners in a piece of land, the purchaser had to obtain an order in council, a recommendation from the Māori Land Council, and a papakāinga certificate (or equivalent) for each purchase, and confirmation from the Native Land Court. These sales were small: 21 acres of Ngarara West A24 and nine acres of Ngarara West A in 1901. These two sales may have been commenced before the 1900 Act took effect and therefore were probably not subject to its provisions. According to the figures provided by Mr Walzl, no purchases were approved by the Crown in 1902 or 1903 and only two sales (constituting nine acres) in 1904.[259] There may have been other factors involved but, given the steady sale of land before and after these years, it appears that the constraints on purchasing sought by Māori leaders nationally (and at Waikanae) were working during the period in which the Crown continued to support them.

As we discussed in section 5.4, James Carroll lost the battle in 1905 to retain Government support for the restrictions on purchasing of Māori land. This change of heart on the part of the Crown seems to be reflected in the amount of land approved for sale by order in council in the years 1905–09 (see table 7), after which the 1900 regime was abolished altogether. Because private purchasing was not banned altogether, a great deal depended on the willingness of the Crown to not grant orders in council for purchases to go ahead. Also, this increased rate of sales coincided with the replacement of the Māori Land Councils in 1905 by the Māori Land Boards. The councils had a Māori majority and a component of elected Māori members, whereas the boards had a Pākehā majority, a Māori member appointed by the Crown, and no elected Māori members. This change may have influenced the significant increase in sales in the years 1905–09. There may have been other factors involved but the operation of the 1900 regime was not investigated by Dr Rigby in his twentieth-century lands report. We have no evidence as to how the Māori Lands Administration Act 1900 operated on the ground at Waikanae, other than to note the alienation patterns and the lack of papakāinga certificates for this part of the inquiry district.

The so-called 'rule of two', which allowed Māori land owned by one or two individuals to be sold as if it were European land, was likely an influential factor in sales at Waikanae (see section 5.4.2). Although an exemption from Crown preemption was still needed via an order in council, there was no requirement for a papakāinga certificate or for Māori Land Council (later board) involvement. Eleven of the blocks purchased from 1901 to 1909 had one owner when title was decided in 1891, and one block had two owners (Ngarara West A7, which had been awarded to Ema Tini of Otaraua and her husband Enoka Hohepa). It is possible that there had been some successions since 1891 but none of these 12 blocks had been further subdivided. For example, Ngarara West A2 (310 acres), Ngarara West A35 (40 acres), and Ngarara West A36 (265 acres) were certainly still in sole ownership at the time of their respective sales in 1905 and 1907, and thus exempt from the 1900 protections.

259. Walghan Partners, 'Block Research Narratives' (doc 203), p 114

In addition to its direct protections, the Māori Lands Administration Act 1900 prohibited a purchaser from owning more than 640 acres of first-class, or 2,000 acres of second-class land. Generally, flat land valued at more than £1 an acre was considered first-class while less arable, hilly land valued at less than £1 an acre was categorised as second or third class.[260] The Stout–Ngata commission reported that the enforcement of anti-aggregation standards would help protect Māori against excessive private purchasing.[261] These anti-aggregation controls did not work to restrict purchases in practice, at least at Waikanae, partly because leases were exempt from the controls under section 26 of the 1900 Act. A combination of leases and the on-sale of land enabled purchasers to exceed the aggregation limits and continue to speculate in land. By 1900, both W H Field and Elder were already in breach of the new anti-aggregation limits, and, as we have seen in the previous section, Field continued to acquire significant amounts of land after 1900.[262] According to Dr Rigby, the Crown's inadequate enforcement of its statutory protections 'disaggregate[ted] the Te Ātiawa/Ngāti Awa ki Kapiti estate almost to the point of extinction.'[263]

5.7.2 The 1909 legislative regime

5.7.2.1 Māori Land Board implementation of protections: Native Land Court judges

Our view, as set out in section 5.4.4, is that the degree of protection in the Native Land Act 1909, especially as amended by the Native Land Amendment Act 1913, was significantly lower than that provided in the 1900 legislation. This was because the specific protections against landlessness were weaker, there were no requirements for the reservation of land for papakāinga and resource-use prior to alienation, there was no restriction of alienation to leasing, and the protections were implemented by a body on which the owners (and tribal leaders in general) were no longer represented. We did not agree with the Crown's submission, therefore, which was based on Dr Rigby's evidence, that the problem was 'the implementation of the law by the Native Land Court, not the law itself'.[264] But it is important nonetheless to examine the effectiveness of the Māori Land Boards in practice in the implementation of statutory protections. The experience of Te Ātiawa/Ngāti Awa suggests that the system fell down even further in its practical implementation.

From 1913, the Māori Land Boards were virtually identical with the Native Land Court. The boards consisted of the judge and registrar of the district, and the

260. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 271
261. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti Twentieth Century Land' (doc A214), p 272
262. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 271–272, 299, 362
263. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 354
264. Crown counsel, closing submissions (paper 3.3.60), p 39

judge could decide matters whether sitting as the court or the board.[265] As noted, Dr Rigby argued that exessive land loss at Waikanae did not arise from the legislation but rather from the poor implementation of the legislative protections by individual judges:

> The Crown's attempts to comply with the statutory obligations set out in the Native Land Act 1909 appear to have fallen short of what the Waitangi Tribunal describes as active protection. The efforts of NLC/DMLB Judges Gilfedder and Shepherd stand in stark contrast to Judge Harvey's conscientious monitoring of Crown compliance. Gilfedder served as the Ikaroa NLC/DMLB Judge and President from 1910 until 1933. Harvey succeeded him in 1933 and served until Shepherd replaced him in 1939. During his six years of service in the Ikaroa District Judge Harvey sought to mitigate the consequences of the rampant alienation of Te Atiawa/Ngāti Awa ki Kapiti land. During the first half of the twentieth century the Crown enacted sufficient safeguards against Māori landlessness. The 183-page Native Land Act, 1931 added to protective provisions in the 110-page Native Land Act 1909. Both appeared adequate in seeking to safeguard Māori against landlessness. The problem was not in the legislation, but in the Crown's failure to implement it.[266]

In respect of this evidence, Crown counsel submitted: 'The Crown is not responsible for the actions of the Native Land Court which was responsible for the implementation of the law.'[267]

Māori Land Boards had various administrative functions but section 225 of the Native Land Act 1909 made it clear that the boards' confirmation of alienations was a judicial function:

> In the hearing and determination of an application for confirmation the Board shall be deemed to constitute a Court of record, and shall have the same powers of hearing evidence and of summoning witnesses as are possessed by the Native Land Court; and all the provisions of this Act and of Rules of Court with respect to evidence and witnesses (including the penal provisions thereof) shall, so far as applicable, and with all necessary modifications, extend to a Maori Land Board accordingly.

The same provision was repeated in section 283 of the Native Land Act 1931, which repealed and replaced the 1909 Act.

We agree with the Crown, therefore, that decisions of the board or court on confirmation were not acts of the Crown or on behalf of the Crown.

Judge Gilfedder, who chaired the board in the crucial period for this chapter (1910–33) kept only 'sketchy' records of confirmations, and we do not have a great

265. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 364–365
266. Rigby, summary of 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214(b)), p 11
267. Crown counsel, closing submissions (paper 3.3.60), p 39

deal of evidence as to how the Ikaroa board was deciding applications. Nor is there evidence of any particular complaints to the Crown about the board's performance in terms of Waikanae confirmations.[268] With those caveats, we need to consider the question of how effective the protection mechanisms were at Waikanae in practice.

Bruce Stirling, in his report for the Takamore trustees, argued that the intent of the 1909 legislation was to facilitate alienation. He also suggested that the landlessness protection in the Act was weak, since the board only had to 'ascertain that any vendor was not being rendered *entirely* landless, so land was alienated without any inquiry into the *sufficiency* of other land'. (Emphasis added.)[269] Mr Stirling quoted the history of the Native Land Court by Professor David Williams to the effect that 'even that duty was not rigorously applied'.[270] He added:

> The available literature indicates that such inquiries were little more than rubber-stamping exercises and that under the reign of the Maori Land Boards, up to approximately 1930, more Maori land was alienated than had been possible over the previous three decades up to 1909 . . .[271]

Mr Stirling gave as an example the board's confirmation of the 1910 sale of Tamihana Te Karu's share of A24B, which rendered him landless apart from his share in the two-acre Takamore urupā block.[272] Dr Rigby took a similar view in respect of the board's role in confirming mortgages and in advising the Native Minister on the confirmation of mortgages:

> Approval records improved after 1909, but these approvals usually followed what resembled a pro-forma District Maori Land Board investigation into the circumstances surrounding mortgages. The Native Department in 1916 asked the Board to provide details of Hira Parata's parlous financial state. Judge Gilfedder still recommended an increase in his mortgages from £7000 to £10,300. At the same time, Gilfedder deplored Hira's 'wanton extravagance'.[273]

Dr Rigby also gave the example of C41, lot 4 (452 acres), which the Monk brothers purchased from Winara Parata in 1922. The board confirmed the sale at the price of £1,050, which was well below the Government valuation and which Judge

268. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 367–371. Gilfedder was replaced as president of the board by Judge John Harvey in 1933.

269. Stirling, 'Takamore Wahi Tapu', p 32 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [133])

270. D V Williams, *'Te Kooti Tango Whenua': The Native Land Court, 1864–1909* (Wellington: Bridget Williams Ltd, 1998), p 215 (Stirling, 'Takamore Wahi Tapu', p 32 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [133]))

271. Stirling, 'Takamore Wahi Tapu', p 31 (Ngaia, papers in support of brief of evidence (doc E3(f)), p [132])

272. Stirling, 'Takamore Wahi Tapu', pp 27–28, 30, 32 (Ngaia, papers in support of brief of evidence (doc E3(f)), pp [128]–[129], [130], [133])

273. Rigby, answers to questions in writing (doc A214(f)), p 5

Year	Sales		
	acres	roods	perches
1905	372	3	17.8
1906	135	2	37.5
1907	349a or 31p		
1908	405	2	25.7
1909	708	3	29
1910	181	3	20.1
1911	99	0	0
1912	378a or 2.2p		
1913	365a or 21.8		
1914	46		
1916	1123	2	12
1917	4	3	27
1918	805a or 8p		
1919	95	3	15
1920	175	2	31.6
1921	679	2	0
1922	594	3	18
1923	522	1	19.4
1924	38	3	22.6
1925	20a or 4p		
1927	99	0	0
1930	367	0	0
1931	22	1	1.1
1932	8	0	0
1933	4	0	0
1934	65	0	0
1936	9	1	10
1940	6	1	0.4

Table 9: Sales by date, 1905–40.

Gilfedder himself described as 'ridiculously low'. Gilfedder also confirmed the purchase even though he judged that it would render Winara Parata landless.[274] By

274. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 389

Year	Sales (acres roods perches)
1940	6a 1r 0.4p
1942	5a 3r 11p
1947	88a 3r 19p
1948	9a 1r 20p
1949	147a 2r 36.1p

Table 10: Sales by date, 1940–49.

1922, the board was entitled to confirm alienations even though the vendor would become landless. Government valuation was a statutory minimum for Crown purchases but merely a guide for the confirmation of private purchases.[275]

As noted above, Judge Gilfedder presided over the board during the key period of alienation covered in this chapter. His successor in 1933, Judge John Harvey, was more rigorous in his scrutiny of confirmation applications. Dr Rigby gave the example of Ngarara West 77C. Harvey refused to confirm its transfer from Amo Hona to Geoffrey Field in September 1935 because Field failed to provide a recent Government valuation or purchase price information. When Hona renewed his transfer application in December 1936, Judge Harvey again refused because, in Judge Harvey's view, he had 'no good reason for selling'.[276]

Another example included the vexed issue of the Hemi Matenga estate. Its trustees wanted to sell land and maximise the estate's income for its beneficiaries. The principal beneficiaries, the children and grandchildren of Wi Parata, opposed any sales of the estate's lands. In 1938, one of the trustees, a Nelson businessman called Thomas Neale, sought confirmation of a sale of 146 acres along Reikorangi Road (part of Ngarara West C23). Harvey declined this application on the grounds that it would not have been allowed if the vendor were a Māori individual, and the beneficiaries were opposed to the sale. Harvey also relied on section 46 of the Native Land Amendment Act 1936, which extended the power of confirmation to transactions by all trustees rather than the original 1931 restriction to trustees for those under disability.[277]

According to Dr Rigby's analysis, Judge George Shepherd succeeded Harvey and presided over the board from 1939 to 1943. His approach to confirmation was less stringent than that of his predecessor. We have the example of Tata Parata's sale of 13 acres in 1941, which would leave him with only 1a 1r 7p, but Shepherd relied on the fact that Tata would eventually inherit a share of the financial proceeds of the

275. Native Land Act 1909, ss 223, 372; Native Land Amendment Act 1913, s 91, amending s 220 (1909)

276. Confirmation refusal A77C, 3 Sep 1935, (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 374

277. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 368, 374–375; Native Land Act 1931, s 264; Native Land Amendment Act 1936, s 46

Hemi Matenga estate. Tata Parata was apparently a willing seller who wanted to use the proceeds to buy a house in Wellington.[278]

5.7.2.2 *Māori Land Board implementation of protections: staffing*

According to Dr Rigby, the Native Land Court and Māori Land Board bureaucracy was 'grossly understaffed', which contributed to its inability to 'police alienation activity effectively'. Complex commercial transactions occurred, he said, 'well beyond the courtroom' and the court/board had 'no real ability to scrutinise' them or to determine the sufficiency of land left to Māori after transactions.[279] He also observed that the understaffing issue was one reason for poor record keeping, which makes it difficult to analyse the actions of the court and board today.[280] The evidence available to us relates to the Liberal period prior to the First World War, which shows that the court and boards were understaffed in terms of both judges and court staff, and had large backlogs during that time.[281] We have no evidence on staffing issues after 1914.[282] The process of confirming alienations could be protracted and 'cumbersome'. Dr Rigby gave examples of two-and-a-half years and five years for confirmations.[283]

We have seen no evidence, however, that the staff played a role in the actual scrutiny of alienations for the confirmation process. This was a judicial process which was carried out in a public hearing, whether the court or the board was determining the matter. We have no information as to whether the registrar or other staff carried out any investigating outside of the courtroom. Dr Rigby did not provide any indication of such a role for the court/board administration.

In our view, therefore, the understaffing of the court's administration would not have contributed in any material way to the implementation of statutory protections, apart from the cited examples of delays and poor record keeping.

5.7.2.3 *Māori Land Board implementation of protections: rates of alienation*

The claimants argued that the degree of alienation at Waikanae demonstrated that the Crown's chosen protection mechanism was ineffective, regardless of whether the confirmations were a judicial or administrative function.[284] There was certainly rapid alienation of the remaining Waikanae lands from 1905 onwards, with the legislative changes in 1909 doing little or nothing to arrest it (see table 9). The court/board system concerned itself only with the land held by each individual at

278. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 377–378. This sale is not recorded in the lists of alienations in Walghan's 'Block Research Narratives'.
279. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 363; see also transcript 4.1.18, p 642.
280. Transcript 4.1.18, p 619
281. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 268–269
282. Transcript 4.1.18, pp 656–657
283. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 365–366
284. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 21–22

the time of a proposed transaction. It no longer had the responsibility conferred by the 1900 Act to reserve individual, whānau, or tribal papakāinga and resource-use areas. Dr Rigby noted that the court/board did not keep a running record of how much Māori land was left in the Waikanae district or calculate the cumulative effect of the sales that it confirmed.[285]

Table 9 shows that, by the late 1920s and 1930s, the rate of alienation by sale had dropped dramatically.[286] This was probably due to the relatively small amount of land remaining by that time. It does seem from the available evidence that there were fewer sales and therefore fewer applications for confirmation in those years, rather than a fundamental change in the board's operation. According to Dr Rigby's report, however, the tenure of Judge Harvey for part of the 1930s did result in a more stringent approach to confirmations.[287]

The trend of limited sales continued in the 1940s (see table 10). There were nine sales of land in that decade, all of them from the remnants of the Ngarara West A block. The largest sales were of 88 acres to a member of the Field family in 1947 and 93 acres to Eric Weggery in 1949. Apart from this one purchase, the Fields no longer featured in private purchasing.[288]

5.7.2.4 *Conclusion on Māori Land Board implementation of protections*

In our view, the rate of land loss up to 1925 makes it clear that the board/court system did not provide effective protection for the lands of Te Ātiawa/Ngāti Awa ki Kāpiti. While Dr Rigby attributes blame to Judge Gilfedder, it is our view that the statutory protections should have been stronger. Government valuation could and should have been a statutory minimum for the assessment of prices (as it was for Crown purchases). Much stronger land retention protections could and should have been included. Also, as the Stout–Ngata commission recommended in 1907, cheap State finance for land development was urgently required but the Crown did not provide it.

5.8 Rating and the Compulsory Vesting of Te Ātiawa / Ngāti Awa Land for Sale

5.8.1 Introduction

Rating was an important grievance for the claimants. As the twentieth century progressed, the need to pay rates became a growing problem for Te Ātiawa/Ngāti Awa landowners. The Crown was aware of the problems facing Māori and the reasons why they struggled to pay rates, as the documentation in this inquiry demonstrates (see below). The claimants provided us with examples of the role that rates – and the prospect of future rates – played in the alienation of

285. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 378
286. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 114–116
287. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), pp 370–375
288. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition' (doc A203), pp 116–117

land. A number of claimants told us that their parents and grandparents established Kaitawa Developments in the 1950s to create a commercial subdivision at Waikanae. This attempt was forced on the owners, we were told, as a result of pressure from rates. It failed because of a number of difficulties that arose, leaving the land undeveloped and eventually the owners had to sell – rates arrears played an important part in these sales.[289] Even where land was not sold because of rates, the threat of having to sell could hang over whānau for decades.

Tutere Parata, the grandson of Natanahira Parata, explained the multiple dimensions of the rating problem. These included the levying of rates on non-revenue producing Māori land that could not even be accessed by its owners:

> We were and continue to be plagued with rates. I recall my mother being frantic in her 60's and upset by rates notices that came. These were overdue notices that threatened the loss of her land. She was on the Widow's benefit, and when she reached a particular age, this switched over to elderly benefit [superannuation].
>
> There was obviously some kind of confusion, but the distress this caused her, at such an old age, was unforgettable. The fear of losing even more land and livelihood was at the forefront of this fear and distress. This was not isolated, I even recall land in Pukerua Bay being confiscated for unpaid rates. . . .
>
> The blocks of land, Ngarara West C1, 2, 3 and part of 4 remains in Maori ownership, held by the descendants of Wi Te Kakakura. This land is part of the catchment area for Waikanae river and this is the main water supply for whole of Kapiti Coast. The Council charged us for use of that water, and we have had to pay rates on that Maori owned land, despite not even being able to access it.[290]

According to Apihaka Tamati-Mullen Mack, Māori objections to the rating legislation were ignored by the Crown.[291]

The parties have raised some general issues about rating, including whether Māori should have had to pay rates at all and the current rating regime, but wider issues will be dealt with later in the inquiry after hearing all evidence and submissions. In this section of the chapter, we are concerned with two aspects of the historical rating regime which were of particular importance to the remaining Te Ātiawa/Ngāti Awa land in the twentieth century: the Crown's power to exempt Māori land from rates under the Rating Act 1925 and the role and powers of the Crown in the compulsory vesting of land in the Māori Trustee for sale. In both cases, our focus is on the acts or omissions of the Crown. Although Crown counsel submitted that the Crown's role was restricted to establishing a Treaty-consistent framework to be implemented by local authorities, the Crown played a key role in both of these facets of the rating regime.

289. Manu Parata, brief of evidence, 30 July 2018 (doc E6), p 4; Reina Solomon, Te Raukura Solomon, and Hohepa Potini, 8 May 2019 (doc F47(a)), pp 13–15
290. Tutere Parata, brief of evidence (doc F2), p 13
291. Apihaka Tamati-Mullen Mack, brief of evidence, 10 May 2019 (doc F42(b)), pp 53–54

In this inquiry, the Crown acknowledged that, 'in some cases, Māori-owned land which had accrued rate arrears has been the subject of forced sale for the recovery of those arrears'. The Crown also accepted that 'historically, in certain cases, Māori land with rates in arrears could be subject to charging orders, vested in the Māori Trustee or managed by a receiver, and, potentially leased or (in exceptional circumstances) sold to pay for the arrears'. But, in the Crown's view, the rating regime 'attempted to balance fairly the burdens and advantages that accrued from the development of local infrastructure in regions'. Forced sale was a 'last step' and it was 'not taken lightly'. Perhaps reflecting that point, the Crown submitted that the statutory scheme for rating always included 'special considerations to mitigate hardship'.[292] This was a reference to the power to exempt land or classes of land from payment of rates. We discuss the legislative provisions for exemptions in section 5.8.2.

In respect of 'forced sales', the Crown submitted that the Crown's policy has generally been 'not to permit sale of Māori land for the non-payment of rates'. In making this submission, the Crown relied on the inclusion in rating laws of a Ministerial veto. The Native Minister (later Minister of Māori Affairs) had to consent to the forced sale of Māori land for payment of rating arrears. The Crown relied on a report by Tom Bennion, produced for the Waitangi Tribunal in the Rangahaua Whanui research series, to argue that the Ministerial veto was an effective protection against forced sales of Māori land.[293] We discuss these legislative provisions below as well.

5.8.2 Rating legislation: exemptions and compulsory vesting for sale

5.8.2.1 Proactive protection for Māori land: exemptions

The proactive protection for Māori land in the relevant rating laws has been the provision for exemption from payment of rates in certain circumstances. Suzanne Woodley, the technical witness for local government matters, explained that a key issue for rating legislation was the lack of compulsion for councils to implement exemptions for non-revenue producing Māori land, or exemptions for Māori owners of ancestral land whose circumstances prevented them from paying:

> Unlike customary Māori land, which has automatically been exempted from rates since 1910 . . . [,] the legislation governing the rating of Māori freehold land has not ever allowed for the automatic exemption of non-revenue producing Māori freehold land. Instead, exemption provisions have required the permission of agencies or officials. The provisions are also general or undefined, meaning non-revenue producing Māori land has not been a specific exemption category.[294]

292. Crown counsel, closing submissions (paper 3.3.60), p 126
293. Crown counsel, closing submissions (paper 3.3.60), p 126; Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 50, 61, 63
294. Suzanne Woodley, answers to questions in writing, 16 November 2018 (doc A193(e)), pp 2–3

Relevant Legislative Provisions for this Chapter: Exemptions

Sections 103 and 104 of the Rating Act 1925 (with 1926 amendments in italics) stated:

103. In addition to the exceptions from the definition of the term 'rateable property' as defined in section two of this Act [unoccupied Crown land, schools, churches etc] the following classes of Native land shall be exempt from liability to rates, namely:—

(a) Customary land:
(b) Native land, not exceeding five acres in any case, occupied by any Native burial-ground:
(c) Native land, not exceeding five acres in any case, on which a church or Native meeting-house is erected.

104. (1) *On the recommendation of the Native Minister, or of the Chairman of a local authority, or of a Commissioner of Crown Lands, or of a Judge or Commissioner of the Native Land Court,* The Governor-General may from time to time, by Order in Council, exempt any Native land liable to rates from all or any specified part of such rates, and such Order in Council may apply either to any specified land on account of the indigent circumstances of the occupiers or for any other special reason, or to any specified class of lands.

(2) No such exemption shall affect any rate theretofore made by any local authority.

(2) *Where any rate theretofore made by any local authority in respect of the land so exempted remains unpaid the Native Minister may, by warrant under his hand, release such land from payment of the whole or any part of such rate. The local authority is hereby authorised to write such rate off accordingly, and to remove from the rate-book any property which may be exempted from rating under this section.*

(3) Any such exemption may be at any time varied or cancelled by Order in Council.

(4) All similar exemptions heretofore granted by the Governor-General in Council and in force at the passing of this Act shall continue in full force and effect, and may be varied or cancelled by Order in Council under this Act.

Section 104 of the Rating Act 1967 stated:

149. Māori freehold land may be exempted by Order in Council—

(1) The Governor-General may from time to time, by Order in Council made on the recommendation of the Māori Land Court with the consent of the local authority in whose district the land is situated, exempt any Māori freehold

land liable to rates from all or any specified part of those rates. Every such order may apply either to any specified land or to any specified class of lands.

(2) Where any rate made and levied by any local authority before the commencement of any such order in respect of the land so exempted remains unpaid, the order may release the land from payment of the whole or any part of the rate, and the local authority may write off the rate accordingly.

(3) Any such exemption may be at any time varied or cancelled by Order in Council.

For the legislation relevant to this section of the chapter, Ms Woodley observed that the only category of Māori land specifically exempt from rating was land set aside for marae and urupā. Otherwise, the situation remained unsatisfactory:

> While the Native Land Rating Act 1924, which was then incorporated into the Rating Act 1925, introduced provisions to exempt marae and burial grounds (five acres maximum), section 104 of the 1925 Act continued the provision whereby the Governor General could from 'time to time, by Order in Council', exempt any Māori land from rates 'on account of the indigent circumstances of the occupiers or for any other special reason, or to any specified class of lands'. The Rating Act 1967 (section 149) also allowed for the exemption of 'specified land or to any specified class of lands' by Order in Council by the Governor General though this legislation specified that such exemptions were 'on the recommendation of the Māori Land Court' and 'with the consent of the [relevant] local authority'.[295]

The exemption sections in the Rating Act 1925 had been transferred from the Native Land Rating Act 1924, which had been inspired by the recommendations of a parliamentary committee. This committee expected that the Native Land Court would investigate and identify land suitable for exemption, and advised the Minister accordingly. The report stated:

> The court is probably the best tribunal for ascertaining and advising the Native Minister what lands, if any, should be exempted from rates. It would have complete information as to the ownership and occupation of kaingas, and the reserves to be set aside for meeting-houses, burial places, and the like. It could also ascertain, and note for exemption and special treatment, the lands unfit for settlement and the lands that the owners should be encouraged to retain in forest for water-conservation and forestry purposes. In regard to lands communally held and partially occupied, it could

295. Woodley, answers to questions in writing (doc A193(e)), p 3

> ascertain with sufficient accuracy for all practical purposes those who are occupying, the extent of their occupation, and apportion their liability for rates.[296]

The Native Land Court was not given this wide-ranging role in respect of rating in the Rating Act 1925. Sir Apirana Ngata was successful, however, in obtaining an amendment to section 104 of the 1925 Act through section 34 of the Native Land Amendment and Native Land Claims Adjustment Act 1926. This Act provided for the Native Minister, commissioners of Crown Lands (Lands Department officials), a local council chair, or a Native Land Court judge to recommend exemptions to the Governor-General. It also empowered the Governor-General to write off any unpaid rates that had already accumulated on lands thus exempted. Any exempted lands were to be removed permanently from the rating rolls. This amendment was intended to allow the Native Department to investigate Māori lands and ascertain what land should be made exempt from rating. According to Suzanne Woodley's report, there is no evidence of these new powers having been exercised in the Waikanae district.[297] This part of the 1926 Act remained in force when the rest of the Act was repealed by the Native Land Act 1931.[298]

Following the passage of the Rating Act 1925, there was a hui of Māori leaders at Foxton in January 1928 to discuss issues of common concern. Those who attended included Sir Maui Pomare (a Minister and the member of the Executive Council 'representing the Native Race'), Sir Apirana Ngata (member for Eastern Māori), and two Waikanae representatives: Hira Parata and his son Tohuroa Parata. At the time, Ngata was arguing 'the need for Maori to be on a level playing field with Pakeha before Maori land was rated in the same way as European land'. Lack of access to finance for land development was known to be a key issue for Māori land and the non-payment of rates. The 1928 conference of rangatira was therefore deeply concerned about rating.[299] They called for the enactment of special legislation to exempt certain classes of Māori land from rating, including all unoccupied (and therefore non-revenue producing) Māori land. Where rates had already been levied against such land, the chiefs wanted the legislation to provide for the Native Land Court to determine whether such lands could in fact be 'profitably utilised' before making any charging orders.'[300]

The conference's resolutions were not acted upon by the Crown. A few years later, in 1933, the Crown appointed a Native Rates Committee to look into why councils were having so much trouble collecting rates on unleased Māori land. The committee found that very little had been done to exempt Māori land that had no rateable value, despite the provision for this in the Act (section 104 of the Rating Act 1925). The committee recommended that the Native Department should take action in conjunction with the Valuation Department and local councils to ensure

296. Joseph Gordon Coates, 1 November 1924, NZPD, vol 205, p 1052 (Bennion, *Maori and Rating Law*, pp 47–48). Coates, as Minister of Native Affairs, read parts of the report to the House.
297. Woodley, 'Local Government Issues' (doc A193), p 53
298. Native Land Act 1931, schedule
299. Woodley, 'Local Government Issues' (doc A193), p 54
300. Woodley, 'Local Government Issues' (doc A193), p 55; *Manawatu Herald*, 5 January 1928

'much wider use' of this provision.[301] Even though the Native Land Amendment and Native Land Claims Adjustment Act 1926 allowed it to be carried out, this recommendation was not acted upon.[302]

The key point for this section of the chapter is that it was the Crown, not local authorities, which had the power to exempt specific land or classes of land, and this power was not used proactively by investigating and identifying lands suitable for exemption (as the 1926 amendment authorised and the 1933 committee had recommended). The Crown's power was altered in the 1960s with the introduction of the Rating Act 1967. Section 149 of this Act introduced two qualifiers on the Crown's authority to exempt Māori land from rating: a specific Māori Land Court recommendation was needed before land could be exempted by the Crown; and the consent of local authorities was also needed before the Crown could exempt land from rating.

For completeness' sake, we note that the exemptions' provisions remained largely the same until 2002, when the Crown introduced significant changes. The Local Government (Rating) Act 2002 required the Māori Land Court to assess 'whether the land is capable of producing an income that would enable the payment of rates on the land in the future' before the court could make a rates charging order. Also, the Local Government Act 2002 (a separate Act) required local authorities to prepare a 'policy on the remission and postponement of rates on Māori freehold land'.[303] The eleventh schedule to the Act set out matters to be considered when developing this policy. These included 'supporting the use of the land by the owners for traditional purposes', 'recognising and supporting the relationship of Māori and their culture and traditions with their ancestral lands', 'avoiding further alienation of Māori freehold land', and 'facilitating any wish of the owners to develop the land for economic use'.[304]

5.8.2.2 *Reactive protection for Māori land: charging orders, compulsory vesting, the Māori Land Court, and the Ministerial veto*

The relevant rating legislation for this chapter (the 1925 and 1967 Acts) provided a variety of tools for councils to use for the recovery of unpaid rates. Māori land that was leased to settlers was usually rate-paying: the settler 'occupier' usually paid the rates.[305] One of the councils' options was to remit some or all of the rates.[306] Rates on Māori land would sometimes be written off when they could not be collected.[307] Alternatively, under section 108 of the Rating Act 1925, councils could apply

301. Woodley, 'Local Government Issues' (doc A193), p 58; AJHR 1933, G-11, p 2
302. Woodley, 'Local Government Issues' (doc A193), p 59
303. Woodley, answers to questions in writing (doc A193(e)), p 3; Local Government (Rating) Act 2002, s 108(3); Local Government Act 2002, ss 102(4), 108
304. Woodley, answers to questions in writing (doc A193(e)), pp 3–4; Local Government Act 2002, schedule 11
305. Woodley, 'Local Government Issues' (doc A193), p 131
306. Rating Act 1925, s 113(1)
307. See, for example, Woodley, 'Local Government Issues' (doc A193), pp 63, 319, 335, 351–352, 379, 410, 473, 734, 744, 844.

to the Native Land Court for a charging order. The court would hold a hearing and any objectors could make any of the 'defences open to an ordinary ratepayer'. If there were 'special circumstances arising from hardship or indigency', the court could remit part or all the rates. If the court was satisfied that 'the rates are payable', it could make a charging order for both the rates and the costs of obtaining the order. The charge would then remain registered against the land until it could be paid (often by future purchasers). The court could also appoint a receiver. If a receivership was ordered, the receiver could lease the land for up to 21 years. Receivers were usually the Māori Land Board or the Native (later Māori) Trustee, but the county clerk could also act as a receiver in the 1950s.[308]

Section 109 of the Rating Act 1925 gave the extreme option of a compulsory sale of Māori land to pay rates arrears. One year after a charging order had been made, the court could make a further order vesting the land in the Native (later Māori) Trustee for sale. Such an order could be made on the report of the receiver or if the court decided that it was not 'expedient' to appoint a receiver. The Native Trustee could then sell all or just part of the land on such terms or conditions as the trustee thought fit. After payment of the rates and the Native Trustee's costs, the residue (if any) would be paid to the owners. Section 109(1) provided, however, that the consent of the Native Minister was required before any land could be vested for sale.[309]

The power to sell land compulsorily for rates was extended in 1953 by section 438 of the Māori Affairs Act 1953. The principal Act (the Rating Act 1925) was repealed by the Rating Act 1967. The new legislation altered the vesting powers significantly:

- First, the power to appoint a receiver was abolished. If a charging order had not been paid within six months (instead of a year), the local authority was empowered to apply to the court for a vesting order, but one of the matters the court now had to consider was whether the vesting would be contrary to the owners' interests. Also, since receiverships had been abolished, the vesting order could be for leasing instead of selling the land or parts of the land.
- Secondly, the Minister's consent for a vesting was no longer required. The Ministerial veto, relied on as a protective measure, was thus removed.
- Thirdly, whenever the court made a charging order, it was now required to consider the future use of the land and whether rates would be able to be paid in the future. If the court was satisfied that the alienation of the land by lease or sale would not be contrary to the owners' interests, and would facilitate future payment of rates, the court would make an order vesting the land or part of it in a trustee to lease or sell. The vehicle for the trust would be section 438 of the Māori Affairs Act 1953 (the new section 438 that had been substituted by the Māori Affairs Amendment Act 1967).
- Fourthly, section 155 also empowered the court to issue a second trust order that would require the trustee to sell to one of the owners or to another Māori if a commensurate offer was received.

308. Rating Act 1925, s 108; Woodley, 'Local Government Issues' (doc A193), p 51
309. Woodley, 'Local Government Issues' (doc A193), pp 51–52

- Fifthly, the court was empowered to cancel the vesting order if an owner could convince the court within two months that the rates had been paid and could be paid in future.[310]

We are not examining the features of this legislation and its development in any detail at this point, since we will receive further evidence and submissions on rating in the later phases of this inquiry. We simply make two general points at this stage.

First, the Turanga Tribunal found that the option of appointing a receiver to lease Māori land in order to pay off charging orders (discussed above) appeared 'understandable' in theory.[311] This was only, however, so long as the appointment of a receiver was carried out carefully and in conjunction with the use of the exemption provisions. Some non-revenue producing land was not suitable for leasing and the exemption option could have been used in such cases rather than appointing a receiver or vesting the land for sale. According to Ms Woodley, who made a thorough study of the issue in this district, the charging order mechanism was routinely applied without careful protection of the interests of Māori owners:

> It was typical for Court information to be cursory with often just the name of the block and amount of the charging order recorded in the minutes. It was typical too for little or no assessment to be made as to whether the land could realistically produce sufficient income to pay the rates levied or [to] the circumstances of the owners. Court minutes also show that when these applications were considered by the Court it was rare for the Māori owners to be in attendance. It was assumed as well that the rates had been levied to the correct person. This was despite ongoing issues with the accuracy of the valuation rolls for Māori land with entries not always accurately reflecting partitioning, successions or alienations. This inaccuracy extended to the Hutt county applying for a charging order on a Ngarara West block appellation in the 1940s that did not exist. Rates charging orders stayed on the land until they were paid. This was regardless of whether the land had been revenue producing at the time the charging order or orders were made.[312]

Our second general point is that the compulsory sale of Māori land for the payment of rates arrears was never a reasonable option under any circumstances, even if used as a last resort. The 1967 requirement that the court consider whether compulsory vesting was contrary to the owners' interests was not a substitution for the owners' free and informed consent. Ms Woodley observed that the Minister of Māori Affairs in the relevant period in which vesting was used at Waikanae (the 1960s) was Ralph Hannan. He routinely signed his assent to vestings for sale.[313] Furthermore, the Crown divested itself of the ability to protect Māori land from

310. Rating Act 1967, s 155; Woodley, 'Local Government Issues' (doc A193), pp 67–68
311. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 653
312. Woodley, summary of 'Local Government Issues' (doc A193(a)), p 7
313. Woodley, 'Local Government Issues' (doc A193), pp 61–62

forced sale in 1967 when it should have abolished the power to sell Māori land compulsorily for rates arrears altogether. This was not done until the enactment of the Rating Powers Act 1988.

We turn next to consider the exercise of compulsory vesting of Māori land for rates arrears in the Waikanae district. Ms Woodley did not find any exemptions of land from rating under the 1925 or 1967 Acts in that district, so that is not an issue we can take further.

5.8.3 The context of compulsory vesting in the Waikanae district

The core Te Ātiawa/Ngāti Awa lands by the mid-twentieth century were the remnants of the Ngarara West block. Until the reorganisation of local government in 1989, these lands were split between two counties. To the north, the Horowhenua County Council exercised authority as far south as the Waikanae River. The township of Waikanae was therefore located in that county. To the south of the Waikanae River, the Hutt County Council had jurisdiction.[314] Māori were poorly represented if at all in local government, which was slanted in terms of greater representation of the wealthier European residents. Many Māori voters were excluded entirely before 1944 because of how the franchise was defined. After 1944, the franchise still favoured wealthier landowners who had extra votes. Māori did not, therefore, have a lot of influence in county councils for much of the twentieth century when decisions about rates remission and applications for vesting orders were made.[315]

While the ratings debts borne by Te Ātiawa/Ngāti Awa over time cannot be precisely quantified, the Horowhenua County Council evidently considered rating arrears on Māori land an important issue. Throughout the first half of the twentieth century, the council complained regularly about Māori non-payment of rates. This was despite such non-payments by Māori making up a relatively small percentage of the council's total loss of ratings income. This particular county council was charging rates on uninhabited blocks covered entirely in bushland as early as the late nineteenth century.[316]

The Horowhenua County Council increasingly used charging orders, receiverships, and even vesting orders in the 1950s and 1960s to recover rates arrears – and this tool was sometimes manipulated to acquire land for the council which it might otherwise not have been able to purchase. Between 1963 and 1975, the county council obtained 72 orders from the Māori Land Court, compulsorily vesting Māori land for the purpose of sale. Of these, 59 sections were actually sold. Ms Woodley advised that 13 orders affected Ngarara West blocks. Nine of the sections, comprising nine and a half acres, were compulsorily sold. A further three were vested back in their owners but sold within several years.[317]

It might be asked: how significant was the issue if compulsory vesting only involved such a small amount of land? In the claimants' view, it was very

314. Woodley, 'Local Government Issues' (doc A193), pp 453, 661
315. Woodley, summary of 'Local Government Issues' (doc A193(a)), p 4
316. Woodley, 'Local Government Issues' (doc A193), pp 481, 596, 599
317. Woodley, summary of 'Local Government Issues' (doc A193(a)), pp 8–9

significant. There was little Māori land left in the Waikanae district by the 1960s and every rood, perch, and acre was considered valuable as the last remaining turangawaewae of Te Ātiawa/Ngāti Awa ki Kāpiti.[318]

A number of factors made it harder for owners to pay rates on Māori land than on European land. The native land title system was in disarray by the 1960s. The Crown introduced mechanisms to reduce the number of multiple owners in titles in 1953 and 1967 but the owners of many blocks were paralysed to use their lands because of multiple ownership, titles were not up to date, many owners had scattered across the country in search of work, and the land was often marginal or without proper access. Behind the relatively few compulsory vestings, therefore, other sales were rates-driven. It is impossible to know how much land was sold because the owners could not use their lands to produce revenue and could not otherwise pay – or even could not be found to pay – the rates. But we know that it was a factor in sales nonetheless.

Part of Ngarara West B7 2C, for example, was alienated to the Crown by T T Ropata, a returned serviceman, in 1954 because of rates arrears. When the proposed alienation was delayed, it emerged that the owner's urgency to sell arose partly because of pressure from rates. The land was undeveloped and did not produce any revenue but it had accumulated over £300 in rates arrears, and the council had threatened court action to recover the money.[319]

Suzanne Woodley provided the example of Ngarara West B1 3B4. This piece of land was about seven acres located up in the hills overlooking Paraparaumu. It was undeveloped and there was no access until the early 1970s, so the owners could not go to or use this land. It was partitioned out in 1959 with 10 owners, and it is not clear whether rates were remitted earlier but there were six years' accumulated rates by the time the Hutt council decided to buy it in 1973 for a water supply scheme. The council could not locate most of the owners and so applied to the court to have it vested in the Māori Trustee for sale under section 438 of the Māori Affairs Act 1953 (that is, not for rates, although rates were a factor in the sale). When the court sat in 1973, it was discovered that six of the 10 owners had died without successions, but there were estate trustees for two of them. Of the other four, three were prepared to sell and one could not be contacted, although it later turned out that there was some confusion as to who the owners actually were. The court did not arrange successions so that the full ownership of the block could be consulted – this was often done afterwards when payment had to be distributed. Instead, the land was vested in the Māori Trustee with no owners present at the hearing. The rates arrears were deducted from the purchase price but the trustee had great difficulty finding and paying the "vendors".[320]

318. Rawhiti Higgott, brief of evidence (doc F3), p 80; Wai 1628 statement of claim, 1 September 2008 (paper 1.1.58), p [1]

319. Commissioner of Works to District Commissioner of Works, 22 July 1954 (H Bassett and R Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5412))

320. Woodley, 'Local Government Issues' (doc A193), pp 735–742

This example showed the way in which the small, surviving pockets of Ngarara West land and their scattered, multiple owners were vulnerable to accumulating rates and the actions of the council, the court, and the Māori Trustee. Ms Woodley pointed out that Ngarara West B1 3B4 was undeveloped land, which lacked access and ought not to have been attracting rates in the first place. It could, as discussed above, have been exempted under section 104 of the Rating Act 1925. Ms Woodley also noted that the council could have zoned this land for water supply and leased it from the owners so that they retained the mana of their ancestral land.[321] Some owners did agree to sell in this instance but the problems shown here of the Māori land title system, lack of development, and absentee owners were common features in compulsory vestings as well. Charging orders were in fact pursued without any thorough assessment of the circumstances of land blocks or owners.[322]

The Horowhenua county, the second largest in this inquiry district, applied for more receivership orders than any other in the inquiry district.[323] It did so partly to facilitate alienation of Māori land, including through private sales to Pākehā buyers. Indeed, as Ms Woodley noted, the Horowhenua council held the 'view that the non-payment of rates on Maori land was "solved" by selling it', and this attitude persisted into the 1960s and beyond.[324] She said the council pursued rates 'vigorously[,] particularly in the 1960s and early 1970s', when it was concurrently pursuing its development of the Waikanae town centre.[325] Some small but important pieces of Māori land fell victim to the town development, as we discuss further below and in chapter 9.

In terms of the central government context for compulsory vestings, the decision to approve or veto vesting orders lay with the Minister of Māori Affairs. He was advised on whether or not to approve the vesting by his officials, including reports from the local district officers and the advice of the Secretary for Māori Affairs. The Minister also had power under the Rating Act 1925 and its amendments to recommend rating exemptions to the Governor General for gazetting. These were functions of the Minister and his department.

At the same time, under the Māori Trustee Act 1953, the Māori Trust Office and the Department of Māori Affairs were fully integrated. The Māori Trustee was both an officer of the Māori Affairs Department and a corporation sole with his own seal, who exercised various statutory powers and functions. All Māori affairs staff were officers of the Māori Trust Office. The Māori Trustee could delegate any functions or powers to those officers.[326] During the time period covered in this part of the chapter, the Māori Trustee was Jock McEwen, who was also the Secretary for Māori Affairs and therefore head of the department. District officers had multiple functions and carried out work for the Māori Trustee as part of their duties. The district officers were closest to Māori communities on the ground and

321. Woodley, 'Local Government Issues' (doc A193), pp 737, 742
322. Woodley, 'Local Government Issues' (doc A193), pp 478–479, 600
323. Woodley, 'Local Government Issues' (doc A193), p 51
324. Woodley, 'Local Government Issues' (doc A193), p 597
325. Woodley, 'Local Government Issues' (doc A193), p 456
326. Māori Trustee Act 1953, ss 3–4, 6, 9

were sometimes torn between carrying out departmental policies and protecting Māori interests, as we see in the next sections.

5.8.4 The compulsory vesting of Ngarara West A3C blocks for sale

We heard detailed evidence about a series of Ngarara West A3C subdivisions (Ngarara West A3C1–A3C16) on Te Moana Road. In 1953, the various Māori owners joined a number of undeveloped blocks (Ngarara West A3B2, A3C, A3D1, A3D2, and A3E) for housing sites. These blocks were partitioned into 16 sections comprising a collective area of 18 acres 2 roods 13.8 perches. The actual housing sites comprised 4 acres 2 roods 8.8 perches on the northern portion of the blocks. The balance, known as Ngarara West A3C Residue, was available for 'later consideration', of which nine acres was said to be 'wasted area and valueless'. Despite the owners' intention to subdivide the land for housing, they were unable to afford the costs of development, which included constructing a road through the block (approximately 15 metres) to access each section. Meanwhile, from the time of partition, the area was accumulating rates. Eventually, seven of the original 16 sections were vested in the Māori Trustee for sale.[327]

In August 1964, James Howard Flowers, a rates collector for the Horowhenua County Council, told the Māori Land Court at a vesting hearing that no rates had been paid in respect to Ngarara West A3C5, A3C6, A3C11, A3C13, A3C14, A3C15, and A3C16. Further, as far as he was aware, none of the owners lived in the Waikanae district. Flowers also explained that a 'number of owners' wished to sell their interests, despite not identifying exactly who or where these individuals were located.[328] We asked Ms Woodley whether the various owners of the Ngarara West A3C subdivisions were present at the 1964 vesting hearing. She noted that the relevant minutes did not specify if the owners were in attendance; certainly, none of them spoke. Further, there was no evidence intimating the council had contacted the owners, aside from Flowers' comment that he understood some of the owners wished to sell.[329]

Flowers went on to explain that 8 acres 2 roods 11 perches of Ngarara West A3C residue was compulsorily taken previously via proclamation by the Manawatu Catchment Board and compensation paid. Flowers told the Māori Affairs district officer that the A3C residue balance (five acres 30.68 perches) was also subject to various receiverships and rate charging orders. The compensation payment for the taking had been used to pay these arrears. According to Ms Woodley, all the money that could have been used to develop the land was paid as rates to the council, which had however provided few services. Flowers also told the court that

327. Woodley, 'Local Government Issues' (doc A193), pp 519–520; see also Woodley, summary of 'Local Government Issues' (doc A193(a)), p 11.

328. Otaki Minute Book 71, 3 August 1964, p 77 (Woodley, 'Local Government Issues' (doc A193), p 519

329. Woodley, 'Answers to questions in writing' (doc A193(e)), p 2

the rates for 1964–65 would be charged a month after the hearing, amounting to £50.[330]

Flowers advocated for the Māori Trustee to complete the housing subdivision and build the road before the vested land was sold. In his view, the proceeds of the sale should go to the owners. Flowers added it was 'desirable a subdivision should be made of the [A3C] Residue when considering the disposal of the sections subject to 109 orders as in most, if not all cases the owners had shares in the residue'. Flowers predicted the cost of roading was approximately £280 per chain (about 20 metres). The present road reserve was, he said, approximately 60 feet (18 metres), while the roading of the balance area was 40 feet (12 metres). Flowers commented that, should the subdivision eventuate, the roading cost would be reflected in an increase of the value of the sections.[331]

In May 1965, the section 109 orders for the various Ngarara West A3C blocks were put to the Minister of Māori Affairs for approval. The district officer attached a recommendation that the orders should be approved. The officials at the Māori Affairs head office did not query why the owners' plans for a housing subdivision had not advanced or whether the rates may have been too high. There was also no evidence that officials ever considered exempting the land from rates.[332] According to the Deputy Secretary for Māori Affairs, the court had been told that when owners could be located, they were 'generally in favour of sale as leases would not return sufficient to meet the annual rates'.[333] The fact that the rates exceeded the leasing capacity of the land was not considered grounds for exemption. The Minister accepted the department's recommendation and signed the order on 4 May 1965.

The example of the Ngarara West A3C blocks suggests that compulsory sales were not inevitable, even though the court had made an order and the Minister had approved it. Following the Minister's approval, the Māori Affairs district officer reported that the usual step was taken of notifying all owners that the Māori Trustee would go ahead with the sale if they could not arrange with the council to pay the rates.[334] In this instance the district officer attempted to contact the owners in February 1966, nine months after the Minister had approved vesting for sale. The question must be asked: Why was this 'usual step' not taken prior to the vesting order or prior to the department's recommendation that the Minister approve the vesting? All the owners 'for whom addresses are held' were now notified that, if they had not made an arrangement to pay the arrears, current rates, and future

330. Otaki Minute Book 71, 3 August 1964, p 77 (Woodley, 'Local Government Issues' (doc A193), pp 519–520, 606

331. Otaki Minute Book 65, 9 November 1953, pp 130–135 (Woodley, 'Local Government Issues' (doc A193), p 520

332. Woodley, 'Local Government Issues' (doc A193), p 521

333. Deputy Secretary, Department of Maori Affairs, to Minister of Maori Affairs, 3 May 1965 (Woodley, 'Local Government Issues' (doc A193), p 521)

334. Assistant district officer to head office, Māori Affairs, 31 January 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 61)

rates by 1 March 1966, the Māori Trustee would have 'no option' but to carry out the court's order and proceed with the sale.[335]

Only the owners of two sections, Ngarara West A3C13 and A3C16, said they were in a position to comply and pay the rates arrears, although not all owners had been contacted. The vesting order for the A3C13 block was cancelled in July 1966, after payment of arrears and an application to the court to cancel the vesting order. The A3C13 block had to be sold privately soon after, however, which Ms Woodley considered was due to the pressure of rating. Although the owners of A3C16 had responded that the rates arrears would be paid, this was in fact not possible for them and this block remained vested in the Māori Trustee.[336]

Following the 'usual step' of contacting the owners, the Ngarara West A3C5, A3C6, A3C11, A3C14, A3C15, and A3C16 blocks were put out for sale by tender. This resulted in only one offer at a price that was well below Government valuation. It then became apparent that this land, with no road access, was not going to be easy to sell in its undeveloped state.[337] The Māori Trustee hired a valuer to investigate these blocks and the residue block, which he found to be 'in a rough overgrown state'. The only access was by a track from Te Moana Road.[338] The valuer suggested two options. First, the Māori Trustee could develop the land (including the residue) to complete the owners' original intentions of a housing subdivision, which would involve roading, survey, engineering, and legal costs. This investment would result in a substantial profit over and above the intial outlay. The valuer commented: 'Residential land here [at Waikanae] is in short supply and keen demand.'[339] The second option was to offer the blocks and the residue block for auction as a single lot, with a reserve price of £7,000. The valuer was sure that it would sell for much more than this, leaving the risks and costs of the subdivision to the buyer rather than the Māori Trustee.[340]

The district officer contacted the owners to see if they would agree to the vesting of the A3C residue in the Māori Trustee, since this was necessary for both of the valuer's options. The owners refused to agree to losing this piece of their land as well, and the Māori Trustee's second attempt to sell the vested land failed because the purchaser would not buy it without the adjoining residue block. By the beginning of 1967, the district officer was convinced that the land could not be sold without the residue, mainly because there was no road access. On the other hand, the Māori Trustee did not want to take on the work and costs of developing the land for the housing subdivision. The district officer therefore reported to head

335. Assistant district officer to head office, Māori Affairs, 21 February 1966 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 54)

336. Woodley, 'Local Government Issues' (doc A193), pp 522–523

337. Woodley, 'Local Government Issues' (doc A193), p 523

338. R A Fougere to Māori Trustee, 3 November 1966 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 60)

339. R A Fougere to Māori Trustee, 3 November 1966 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 60)

340. R A Fougere to Māori Trustee, 3 November 1966 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 60)

office that he would apply to the court to cancel the vesting order unless there were any objections.[341]

The district officer's decision provoked a debate at the Māori Affairs head office about the role of the Māori Trustee: did the Māori Trustee have trustee obligations to the (former) owners once land was vested for sale under section 109 of the Rating Act? This debate was crucial for our purposes because it showed the basis on which the legislation required the Māori Trustee to act and the nature of the 'trust' undertaken by the trustee under the terms of section 109.

According to the Māori Affairs Department's office solicitor, the legislation was quite clear on these points. The Māori Trustee was not a trustee for the former owners when selling the land but would, under section 109, become a trustee of the proceeds of the sale once the land was sold. The Māori Trustee, he said, was therefore entitled under the law to sell the land 'by public auction at "knockdown" or low prices'; the only statutory requirement was for the price to cover the trustee's costs and the outstanding rates. It was of 'no concern to the Maori Trustee if a person buys the lands "for subdivision at a substantial profit to himself"'. If the former owners did not want the lands to be sold to a speculator, 'let them go to the auction sale and bid' to buy back the land. The Māori Trustee was 'not bound to be in any way solicitous' regarding their interests. The office solicitor also pointed out that there was no legal obligation to consider the wishes of the owners at all after the vesting order was made. He summed up his approach as 'somewhat Draconian', but noting that this was the approach in the legislation: 'the whole exercise is, in law, to get the rates paid without any concern for the welfare, wishes or interests of the former proprietors of these lands'.[342]

Ms Woodley commented that this was a 'revealing quote that sums up the situation plainly and bluntly'.[343] Claimant Apihaka Tamati-Mullen Mack also commented on this evidence, and on the compulsory sale of the A3C sections, stating:

> It is clear for us as Ngātiawa that the Crown was only concerned with collecting rates. It seems they just wanted to get the rates paid without any concern for the welfare, wishes or interests of us as Ngātiawa. In short, Māori interests need not be considered at all. The only aim was to settle the debt.[344]

In response to head office's position, the district officer agreed not to apply for cancellation of the vesting orders. He noted that there were policy (rather than legal) issues relating to such vestings:

> As a matter of policy, in view of [the] troubles we have had with these vestings in the past, we usually try to keep the owners informed. In three cases the owners

341. Assistant district officer to head office, Māori Affairs, 31 January 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 61)
342. Office solicitor to deputy secretary, Māori Affairs, 3 February 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), pp 62–63)
343. Woodley, 'Local Government Issues' (doc A193), p 524
344. Apihaka Tamati-Mullen Mack, brief of evidence (doc F42(b)), p 55

became aware of the vestings only when the sales had been almost completed, leading to caveats being lodged etc.[345]

It was common for the local authority not to contact the owners before seeking vesting orders. The department did try to identify and contact them after the orders were made, even though there was no legal obligation to do so under the rating legislation. The department knew that the Ngarara West A3C owners did not want their land sold. 'In this particular case', the district officer wrote, 'despite the pleas of the owners, we don't think they have the means to do anything about the sections or the residue area'.[346] He noted that the rates had only been cleared on one section – this was the section that had to be sold after it was revested (see above).[347] It was presumably too late to consider a rating exemption by this time since the vesting order had already been approved. There was an inexorable logic to the rating legislation in force at the time: even though leasing this land would not cover the rates (and a receivership was therefore pointless), and even though this land could not be used for lack of road access, it would still have to be sold because the payment of outstanding rates was the priority.

By this time, the county council was trying to get the Ngarara West A3C residue block vested for sale as well due to the non-payment of rates. Importantly, the council was refusing to construct a road so that the owners could develop their land and pay the rates. The owners managed to prevent this vesting in April 1967 by paying £45 in arrears. The court adjourned the county's application and the Māori Affairs department decided to take no action on the other A3C blocks until the fate of the residue was determined, since there was a better chance of selling the blocks with the residue included. The county council undertook to hold discussions with the owners of the residue block as to the future of the land, and later reported that they were willing to have their land vested in the Māori Trustee for sale. The application for a vesting order was heard in November 1967 but the council's information of supposed consent was again incorrect. It was 'clear that the owners were not in agreement' with the proposed vesting. The opposition of Rangitoenga Tamati (also known as Rangi Thomas) was reported along with that of other owners. Mr Flowers, for the county council, claimed that this opposition had been withdrawn. In any case, the court was satisfied that the terms of the Act had been met, which did not require the agreement of the owners. The court vested the residue land in the trustee for sale, subject to the consent of the Minister.[348]

Before recommending that the Minister approve the order, the department contacted land agents Harcourt & Co to determine whether the previous buyer was still interested now that the residue was also for sale. The response from Harcourt

345. District officer to head office, Māori Affairs, 24 February 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 64)
346. District officer to head office, Māori Affairs, 24 February 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 64)
347. Woodley, 'Local Government Issues' (doc A193), pp 523, 525
348. Woodley, 'Local Government Issues' (doc A193), pp 525–526

& Co was that the purchaser was prepared to resubmit an offer of $6,000 for the residue and Government valuation plus 10 per cent for the adjoining A3C blocks, amounting to $14,800. Mr Cork, agent for Harcourt & Co, was aware of the Māori owners' opposition to the sale and their desire to develop the land for a housing subdivision. He advised:

> These offers are, to my mind, extremely fortunate. Doubtless, some of your Officers know this land and recognise it as rough and stony and covered with big blackberry. Because his brother is an earthworks contractor, Mr Gurney can develop the land at a lower cost, whereas others would find it prohibitive. I feel that Rangi Tamati and his other objectors – with whom, may I say, I am in sympathy in principle – was not being realistic about his 'other proposition' for its marketing development. Roading alone would have cost them far too much. I was present at a Local Body meeting when it was made clear that the County Council was not prepared to undertake roading there because it was private land. The existing 'road' is nothing but a track on paper.[349]

After receipt of this offer, the department recommended Ministerial consent to the vesting of the residue. The Minister, Ralph Hanan, signed his approval on 20 February 1968. By this time, the other land had been vested in the Māori Trustee for almost three years, while the owners struggled to find land on which to build houses for their families. The situation worsened soon after, however, because the purchase offer fell through as a result of problems with the existing road line, which had not been designated a public road.[350]

Once again, officials had to consider whether the Māori Trustee would have to develop the land, at least to the point of constructing roading, before the compulsory sale could be completed. The council pressed the trustee to build the road but the department's new district officer 'refused to discuss the matter & remarked he was not prepared to spend the Maori Trustee's money clearing up a stupid Maori partition'.[351] A stalemate was reached, with neither side prepared to build the road. The owners' requests for assistance were rejected by both the council and the Māori Affairs Department. The owners asked the Māori Trustee to carry out the housing subdivision for them. The trustee refused to do so because of doubts that the costs could be recovered from the owners.[352] Also, in May 1969, Rangitoenga Tamati tried to get rents owed to his family (held by the Māori Trustee) applied to pay off the rates arrears. He was unsuccessful, either because his request was misfiled or because the additional information sought was not provided. Either way, the owners (former owners by this point because of the vesting) were powerless to stop the compulsory sale.[353]

349. A G L Cork, Harcourt & Co, to Department of Maori Affairs, 30 January 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 69)
350. Woodley, 'Local Government Issues' (doc A193), pp 527, 528
351. Flowers, [June 1968] (Woodley, 'Local Government Issues' (doc A193), p 528
352. Woodley, 'Local Government Issues' (doc A193), pp 527–530; district officer to county clerk, 13 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 75)
353. Woodley, 'Local Government Issues' (doc A193), p 527

The council tried to break its stalemate with the Māori Trustee in December 1969. It served notice on the trustee to clear the blocks of 'noxious weeds' or face legal action. The district officer retaliated in March 1970 by threatening to refuse any further vestings, pointing out that the land was 'practically unsaleable' without roading, and that the trustee had no money to pay for clearance of the block. As noted earlier, this undeveloped land was covered in blackberries and had no access by road. The Māori Trustee, he said, would 'gladly' accept any 'realistic' offer so long as the trustee did not have to 'put the title in registrable order'. The district officer also noted that there was always 'some title, access or location difficulty' with the Horowhenua County Council's section 109 vestings.[354]

The stalemate might have continued but a 'realistic' offer was finally made in September 1970. This offer included Ngarara West A3C Residue, A3C5, A3C6, A3C11, A3C14, and A3C15 (totalling 6 acres 30.86 perches) for a sum of $12,600.[355] The district officer reported to head office that 'in view of the difficulty we have had in disposing of the land (it has been vested in the Maori Trustee since 1964) we consider the offer reasonable even though it is only $2200 above the latest valuations available'. Although these valuations were out of date, the district officer noted that '[w]e did not obtain Special Valuations as we did not wish to incur any further expense on these sections'.[356] The final decision rested with the Māori Trustee, who minuted this report that the offer was 'reasonable in the circumstances' and should be accepted, noting that the 'sooner we are quit of this particular trust, the better'.[357]

Ms Woodley observed:

> Of note was that Mr Flowers had said in 1968 that the sections were worth $2700 each which, together with the 1961 valuation of Ngarara West A3C Residue, was a total value of $17,400 so the $12,600 received was well below the valuation. It was also below the previous offer made in January 1968 of $14,580. It seems likely too that the rates on which the charging orders were based would have been assessed based on more current valuations than that of 1961 and 1965 and would have accrued over the six years since the vesting in 1964 and therefore deducted from the purchase money. So not only were owners left with no land but their housing needs had not progressed and they received well below what the land was worth. As well, deductions for rates from the purchase money would have been paid to the Horowhenua County whose service provision to the undeveloped land had been minimal. The Council had also been unwilling to assist with the provision of the road.[358]

354. District officer to county clerk, 13 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 75)
355. Woodley, 'Local Government Issues' (doc A193), pp 529–530
356. District officer to head office, 14 September 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 76)
357. Māori Trustee, minute, 15 September 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 76)
358. Woodley, 'Local Government Issues' (doc A193), p 531

As the department's officer solicitor pointed out in 1967, the Māori Trustee was not acting as a trustee for the owners in making such decisions. Rather, he was carrying out statutory duties under section 109 of the Rating Act 1925 to sell land vested in him by court order so that unpaid rates could be paid to councils. There were no statutory protections for the (former) owners once the Minister had approved the vesting order.

5.8.5 The compulsory vesting of Ngarara West A32C blocks for sale

In 1967, the council applied to have two small Waikanae blocks, Ngarara West A32C1 (one rood) and A32C2 (2a 3r 20.2p) compulsorily vested for sale. These sections were located off Te Moana Road, not far from Whakarongotai Marae. There were 10 owners on the title at the time, three of whom were deceased. There was a history of non-payment of rates associated with these blocks. Hariata Higgott explained that her grandmother, Marewa Hemi-Kupa Gilbert, had used her pension to pay rates until her death in 1960.[359] Part of the land had been subject to a public works taking to widen the road in 1962, and the compensation (£59.17.4) was used to pay off some of the accumulated rating debt (totalling £231 9s 11d by that year). According to Mr Flowers, he had spoken to some of the owners, who wanted assistance with their housing needs. There was a house on A32C1 but it was reportedly old and in disrepair. The rates debt for A32C2 had risen to £350 by the time of the court hearing in April 1967. None of the owners were present in court when the vesting orders for both blocks were made, although Flowers advised that one of the 10 owners, Robert Ropata, wanted the land vested in the Māori Trustee – this advice later proved to be incorrect.[360]

This particular vesting order was not sent immediately to the Minister for his approval. As with the Ngarara West AC3 blocks, the department made its own efforts to contact the owners, since the council's sometimes minimal efforts had failed. It is not clear why this was done after rather than before the vesting order was made by the court. This may not have been standard practice across the country, as the district officer felt the need to explain it to head office in Wellington: 'It has been, and still is, normal practice for the office to notify those owners for whom we have addresses, in an effort to get them to pay the rates so that there will be no need to sell. Where no interest is shown, we go ahead and arrange a sale.'[361]

The district officer, K Morrill, explained to officials in Wellington that '[n]ormally we cooperate as far as we can, realising that we are mere servants of the Court to recover arrears for the County'. But it was not, in fact, seen as that simple. Wilson gave three main reasons for this:

359. Hariata May Higgott, brief of evidence, 22 January 2019 (doc F10), p 12

360. Rawhiti Higgott, brief of evidence (doc F3), p 41; 'A proclamation', 15 February 1962, *New Zealand Gazette*, 1962, no 12, p 300 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 105); A J Douglas to County Clerk Horowhenua County Council, 'Ngarara West A32 C2', 2 December 1966 (Woodley, document bank (doc A193(c)(viii)), p 20)

361. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 556)

- the problems that compulsory vesting orders created for the department in its other word;
- the local authority's habitual failure to do its job properly; and
- the need to look after the interests of the owners.[362]

On the first matter, Morrill advised head office that the vestings created a lot of work and led the department officials 'into a conflict with the owners'. The owners were sometimes clients of the department in its various fields of work, and the department's 'image becomes somewhat tarnished when we carry out sales at the instance of the local body'. The fact was, he said, that there was a 'moral' aspect to compulsory sales, even if they were legal, and many Māori saw these sales as 'something very like confiscation'.[363]

The second problem was the failings of the local authorities that sought vesting orders. Morrill advised the department head office that the county council had been 'over doing it with its section 109 vestings' (this was referring to the 1960s), when the council was not in fact carrying out its own duties properly:

> The fact is that in many cases it is not perfectly clear that the County has taken all reasonable steps to recover the rates before calling on the Maori Trustee. Then again they have mis-represented the sale potential of the land. It seems to me that where the land has a substantial value or where there is not a multiplicity of owners, the County has remedies which it could exercise itself.[364]

The third issue was the protection of the owners' interests. Morrill suggested that 'the Department is generally considered to stand in a fiduciary capacity to Maoris in general', and the department's position was therefore 'not as clear cut as in the case with a receiver'. It was important to take into account what was best for the owners in financial terms. In the particular case of the two A32C sections, Morrill argued that the land would be suitable for a housing subdivision, which would be more profitable to the owners. But the department had only been able to contact one owner (Robert Ropata), who opposed compulsory vesting and wanted a housing subdivision instead, with some sites reserved for the owners. The owners could not afford to carry it out themselves, however, and the Māori Trustee was not 'keen' on arranging housing subdivisions (as also discussed in respect of the A3C blocks). If nothing was done, Morrill reported, the land's value would eventually be cancelled out altogether by the accumulating rates. The owners had no access to finance for development and the land itself was not revenue producing. Morrill's conclusions were not hopeful:

362. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 555)
363. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 555)
364. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 555)

> Our dilemma is this – if we sell the land as is, the rates would be cleared but the mooted subdivision scheme would be ruined. This could mean an unjustifiable loss to the owners both financially and through the loss of house sites. On the other hand, the section is eating its head off in rates and there is little or no prospect of the owners clearing them and meeting future rates.
>
> Regretfully, it appears we will have to sell as is, as we have no real grounds for going back to the Court for cancellation of the Order. The only other alternative is to ask for cancellation and a substituted vesting in the Maori Trustee for subdivision. Although not being too keen on the idea, it is a thought and it can at least be said that Waikanae is as good a place as any to undertake a subdivision project.[365]

It is notable that all these circumstances, which were common for Māori owners at the time, did not lead to any suggestion of using the power available under the Act to exempt the land from rates. Presumably it was too late after the court had made the vesting order, although the department was sometimes prepared to go back to the court for cancellation of such orders.

In any case, head office officials believed that the district officer was being 'over scrupulous'.[366] Ms Woodley commented that they were 'unsympathetic' to Morrill's concerns or the owners' interests. Nor did they agree that the compulsory vestings for sale were akin to confiscations. In their view, the simple fact was that the local body had a right under the legislation to ask for vesting orders. It was up to the court to decide whether such orders should be granted. If the court granted the order, then the Māori Trustee's role was simply to follow the rules and execute the order. Also, it was possible that the situation might be worse under the new 1967 Rating Act – this may have been a reference to the removal of the Ministerial veto.[367] The head office approach was very similar to that followed in the case of the A3C blocks, as discussed above.

The Deputy Māori Trustee, R J Blane, commented that it was difficult even for the Māori Trustee to obtain development finance at that time. Also, a further subdivision at Waikanae 'could well depress the market which is at present difficult'.[368] While this questioned the profitability and therefore utility of a subdivision, there was still no consideration as to whether these sections should have been exempted from rates in the first place. Rather, the owners were blamed individually for not 'bestir[ring]' themselves to pay the rates, with the point made that the owners would not likely 'trouble' themselves with paying future rates on any sections that

365. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 556)

366. Williams, minute, 8 April 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 155)

367. Williams, minute, 8 April 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 155)

368. Blane, minute, 8 April 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 154)

were reserved for them in a housing subdivision if it went ahead.[369] This showed little understanding of the many problems faced by Māori landowners at the time, many of which had been created through past Crown acts or inaction.

The Māori Trustee was not prepared to finance a subdivision. Blane wrote to the district officer, stating: 'We think that it goes too far to suggest that, because some *undesirable results* may be thought to flow by reason of the Maori Trustee acting on the section 109 order, the Maori Trustee is under some obligation to consider financing a scheme of subdivision.' (Emphasis added.)[370] The trustee was, however, prepared to give the owners a little more breathing room. Blane suggested that the other owners should all be contacted if their addresses could be found (only one had been contacted so far), and they would be given some time to pay the rates arrears before the Māori Trustee proceeded with the sale.[371]

By November 1968, all the owners had been contacted except for one, who had died in the interim – it is not clear why this had not been done in the first place, either by the council or the department. They were now given two months to come up with the money to pay the rates arrears but were unable to do so. As a result, the district office finally forwarded the vesting order to the Minister for approval, 20 months after the court had made the order. Although the legislation had changed in the meantime, and the Minister's consent was no longer required under the Rating Act 1967, the original vesting order had been made under the 1925 Act. By this time the rating arrears represented about 17 per cent of the valuation of A32C and six per cent of the smaller A32C1. The Secretary of Māori Affairs, Jock McEwen, who was also the Māori Trustee, advised the Minister to sign, noting that the market was steady at Waikanae and the Māori Trustee would have no difficulties selling the land. The Minister accordingly signed his approval on 14 November 1968.[372] McEwen's advice was given as secretary, not as Māori Trustee.[373]

We received evidence that the owners were in fact trying to keep their land. Claimants Rawhiti and Hariata Higgott stressed the strong connection their whānau had to their homestead and the land on which it was located. Their grandparents, Te Ropata Tangahoe and Marewa, had built their house on Ngarara West A32C around 1930, and raised seven children there.[374] They were able to sustain their whānau both through Te Ropata's employment and by living off the land and gathering food from the māhinga kai at Waimeha Stream and the Waikanae River. Despite this effort, they struggled financially. Te Ropata and Marewa's children pitched in by selling and bartering foodstuffs, but they had little success

369. Blane to district officer, 24 April 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 156)

370. Blane to district officer, 24 April 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 156)

371. Woodley, 'Local Government Issues' (doc A193), p 558

372. Woodley, 'Local Government Issues' (doc A193), pp 558–559

373. Secretary of Māori Affairs to Minister, 11 November 1968 (Woodley, 'Local Government Issues' (doc A193(c)(v), p 159)

374. Rawhiti Higgott, brief of evidence (doc F3), p 40; Hariata Higgott, brief of evidence (doc F10), p 6

in securing a significant income.[375] By the 1960s, Rawhiti and Hariata's mother, Hinemona, appeared to be the last of the children living in the homestead, caring for her children on her own, and she had limited job prospects.[376] Rawhiti Higgott explained that the other whānau members had migrated to the cities in search of work. He stated:

> Everyone else had left the home leaving only my mum to care for things. They were leading their own lives in the big city working and caring for their own whanau. My mum could not do it on her own. There was no help, although my Aunty Miri, who lived in Hastings, tried to stop the taking of the land and my Uncle Robert also tried. Even with the help of MP Mrs Tirikatene-Sullivan, this couldn't change the mind of the Crown.[377]

The Māori Affairs Department was well aware of the struggles which whānau in this situation had to undergo due to fragmented title, too little land (forcing owners to move away), and lack of finance for development. Commenting on this case, the district officer stated:

> In our experience where owners are scattered, some having settled elsewhere, it is next to impossible to get complete agreement on the question of rate arrears as substantial as these are. Those who are living away tend to hold those who are occupying or using, responsible for the rates.
>
> The land is not of much good to the 9 owners and their families unless they could subdivide for their own use, and they haven't the money. Meanwhile rates are accruing at the rate of $160 per year.[378]

The approach to Whetu Tirikatene-Sullivan, mentioned above, was made by one of the owners a month after the Minister had approved the vesting order. Miriama Newton (Mr Higgott's 'Aunty Miri') was living in Hastings. She asked the member for Southern Māori to intervene with J R Hanan, the Minister of Māori Affairs. Mrs Tirikatene-Sullivan agreed, writing to the Minister that the whānau was trying to raise the money to pay the rates arrears to save their land, and suggesting that perhaps money owed to Te Ropata Tangahoe (a descendant of Wi Parata) would become available from the Hemi Matenga estate.[379]

By this time, the court's order was in force because it had been approved by Hanan. He replied that the Māori Trustee had 'no discretion but to try to carry out the terms of the order so long as the rates remain unpaid'. Hanan was, however, prepared to arrange for the owners to have more time. 'Generally speaking', he said, the Māori Trustee would be prepared to wait if there was a prospect of

375. Hariata Higgott, brief of evidence (doc F10), pp 6–7
376. Rawhiti Higgott, brief of evidence (doc F3), p 80
377. Rawhiti Higgott, brief of evidence (doc F3), p 42
378. District Officer to head office, 4 March 1970 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 168)
379. Woodley, 'Local Government Issues' (doc A193), p 559

the owners settling the arrears and 'entering into some firm agreement with the County Council for the payment of future rates'. Hanan observed that the rates now totalled nearly $1,000, and he acknowledged that 'this could be quite a hurdle for the owners to overcome'. The land itself was valued at $9,500 and would therefore be 'well worth saving if the owners could manage it'. The Minister stated that the Māori Trustee had already tried to arrange a compromise with the council over the rates arrears without success. The owners were given a three-month reprieve at the Minister's instigation to try to find the money but otherwise the Crown would not assist them.[380]

The owners were not able to meet the Minister's terms by the deadline of 1 April 1969 – to pay the arrears and make a 'firm' arrangement with the council over future rates – so the Māori Trustee prepared to go ahead with the sale. At this point, however, the county council intervened. The council decided that it wanted to buy an acre of the land for a fire station, and so it made an offer to the Māori Trustee before the sections were put out to tender. The council advised the department that if this land was *not* sold to it, then it would use the Public Works Act to take it compulsorily instead.[381] The council also designated A32C1 and part of A32C2 as a 'Reserve for Future Fire Station' in a proposed district scheme change.[382] This obviously limited the scope for selling to anyone other than the council or, in fact, using the land in any other way. As at 1969, the provision requiring councils to consider the relationship of Māori to their ancestral land had not yet been included in the town and country planning legislation.[383]

Following these developments, A32C1 was revested in its single owner so that it could be sold privately to the council – we do not know exactly how and why this happened. It may be that the council preferred to negotiate directly with the owner rather than the Māori Trustee. In any case, the Māori Trustee agreed to the council's private negotiations with the owner. The land was sold to the council for the Waikanae Fire Service at a price of $3,000.[384] Given the rates arrears and the rezoning of this land as a fire station reserve, we think that the owner would have had little choice but to sell.

The larger two-acre section, A32C2, remained vested in the Māori Trustee for some time longer. Officials noted that one person, presumably Rawhiti and Hariata Higgott's mother, was still living in the homestead on A32C2 at the time the neighbouring block was sold. This was seen by officials as a 'minor problem' since any

380. Minister of Māori Affairs to Tirikatene-Sullivan, 23 December 1968 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), pp 162–163)

381. Woodley, 'Local Government Issues' (doc A193), pp 560–561; Rawhiti Higgott, brief of evidence (doc F3), pp 42–43

382. Waikanae Fire Committee, 'Proposed Waikanae Fire Services Loan 1970 – $22,000', 8 December 1969 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 111)

383. See Town and Country Planning Act 1977, s 3(1)(g).

384. Woodley, 'Local Government Issues' (doc A193), pp 560–561; Waikanae Fire Committee, 'Proposed Waikanae Fire Services Loan 1970 – $22,000', 8 December 1969; Certificate of Title under Land Transfer Act, Ngarara West A32C1, transfer 803215 (Rawhiti Higgott papers in support of brief of evidence (doc F3(a)), pp 106, 111)

purchaser would want vacant possession. The council, however, had withdrawn its purchase offer by late 1969.[385] The Waikanae Fire Committee were evidently still interested in purchasing part of A32C2, but noted in a report in December 1969 that the construction of a fire station was no longer urgent.[386]

The Māori Trustee was in negotiations with a private buyer when Miriama Newton again sought the Minister's help in March 1970 to save the land for its Māori owners. The new Minister, Duncan MacIntyre, responded that the owners had already been given extra time and that the Māori Trustee could not delay a sale any longer. The prospective buyer was a neighbouring Pākehā owner, who intended to join this land with his own for a more valuable subdivision.[387] According to Ms Woodley, the land was sold privately to this buyer after his initial negotiations with the Māori Trustee. The rates and the Māori Trustee's expenses were deducted, amounting to over 11 per cent of the payment. We have no information as to why the Māori Trustee agreed to a private sale but it is clear that the resultant sale was not a free and willing choice on the part of the owners.[388] Mr Higgott noted that 'many people' saw the sale of this land as a virtual confiscation. Also, the information presented to us by Mr Higgott suggests that the land was actually revested in the Māori Trustee on 22 September 1970 under section 155 of the Rating Act 1967 before its sale in October 1970.[389] The evidence is contradictory on this point. In any case, the new buyer sold part of the land to the council for the fire station.

Ms Woodley summed up a key point when she commented that this land had to be sold to pay rates, even though it was 'acknowledged as being undeveloped, having limited access and that the owners could not afford to subdivide'.[390]

For the claimant whānau involved, the relatively small size of the block bore no relation to the impact of its loss. Rawhiti Higgott, in his evidence, expressed the 'deep loss of connection'[391] the whānau feels due to the alienation of their papakāinga:

> The loss of the homestead to the whānau was a shock. We lost our turangawaewae, a place we called home. The Māori Trustee let us down, the local Council let us down. There was no moral consideration for our circumstances. We became landless. The shame that went with this then and today remains.[392]

385. District officer, to head office, Maori Affairs, 30 September 1969 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(v)), p 165)

386. Waikanae Fire Committee, 'Proposed Waikanae Fire Services Loan 1970 – $22,000', 8 December 1969 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 111)

387. Woodley, 'Local Government Issues' (doc A193), pp 561–562

388. Woodley, 'Local Government Issues' (doc A193), p 562

389. Rawhiti Higgott, brief of evidence (doc F3), pp 42–43; Certificate of Title under the Land Transfer Act, Ngarara West A32C2: 'Order of Court pursuant to (now) Section 155 of (now) the Rating Act 1967 vesting the within land in the Maori Trustee for the purpose of a sale – 22.9.1970 at 11am.' (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 107)

390. Woodley, 'Local Government Issues' (doc A193), p 562

391. Rawhiti Higgott, brief of evidence (doc F3), p 40

392. Rawhiti Higgott, brief of evidence (doc F3), p 80

Rawhiti and Hariata's uncles, Kahu and Robert, were present when the homestead built by their parents was burnt to the ground as part of a fire service training exercise, causing further distress.[393] The fire station remains on the site to this day.

5.8.6 The compulsory vesting of Ngarara West A78E2 for sale

Ngarara West A78E2 was a small section, 1r 8.98p, in the centre of the Waikanae commercial area.[394] It was located adjacent to Whakarongotai Marae.[395] The fate of this section of land is one of the grievances raised in the Baker Whānau Land Alienation Claim (Wai 1628), filed by Matiu Baker and André Baker in 2008. André Baker told us that this land was of immense ancestral significance to his whānau. He explained:

> Ngārara West A78E2, was passed to my kuia Haua Kiriona Baker by her first cousin Tohuroa Wi Parata as a tuku whenua. Both are mokopuna (grandchildren) of Te Kākākura Wi Parata and have take tupuna (ancestral rights) to whenua through their senior Ātiawa and Ngāti Toa Rangatira whakapapa, including Ngāti Hinetuhi, Kaitangata and Otaraua; and Ngāti Te Maunu and Ngāti Mutunga.
>
> The intention of the tuku whenua was so the Baker whānau could 'continue to have a home', referring to the dispossession and muru raupatu of tuku whenua, and eventually their papakāinga in Ōtaki.
>
> Gifts of land confirmed rights and cemented relationships. This tikanga has been continuously compromised from the beginning of Pākehā incursions into our rohe to secure our whenua.[396]

The A78E2 section was unoccupied at the time and rates arrears had been accumulating since 1959. There were five years' worth of outstanding rates, amounting to a total of £37 2s, by the time the county council applied to the Māori Land Court for a vesting order in August 1964.[397] J H Flowers told the Māori Land Court that he was unable to trace the owner via the Department of Māori Affairs. Nor was Flowers able to advise the owner of the vesting proceedings. Suzanne Woodley commented that 'his failure to obtain ownership details and contact details and advise owners of proceedings was not unusual'.[398] The court did not view this as a reason to suspend the vesting hearing and the Minister did not see it as a reason not to approve the vesting for sale. Flowers also told the court that this well-situated section would 'sell readily'.[399] The Minister's approval came a few months later

393. Rawhiti Higgott, brief of evidence (doc F3), pp 42–43; Hariata Higgott, brief of evidence (doc F10), p 14
394. Woodley, 'Local Government Issues' (doc A193), pp 533, 854
395. André Baker, brief of evidence, 22 January 2019 (doc F6), p 11
396. André Baker, summary of brief of evidence, 8 February 2019 (doc F6(a)), pp 3–4
397. Woodley, 'Local Government Issues' (doc A193), p 533; Crown counsel, closing submissions (paper 3.3.60), p 127; André Baker, brief of evidence (doc F6), p 3
398. Woodley, 'Local Government Issues' (doc A193), p 533
399. Otaki Minute Book 71, 3 August 1964, p 78 (Woodley, 'Local Government Issues' (doc A193), p 533)

in May 1965, at the same time as he approved the vesting of the Ngarara West A3C blocks discussed above.[400]

The department's title information showed that A78E2 was owned by Raumoa Matenga Baker, a former sergeant in the first New Zealand Special Air Service unit. The county clerk later advised the department, however, that the valuation roll, on which the rates demands were based, was incorrect. It transpired that rates demands had been sent to Raumoa Baker's mother, Haua Matenga Baker, who was shown on the roll as owner and occupier. These demands were sent to an Ōtaki address and to 'Porirua Pa, Porirua'. No response was received.[401] André Baker told us:

> Te Raumoa was prevented from protecting the whenua Ngārara West A78E2 of my kuia Haua, for rates arrears. Disadvantaged because the Horowhenua County Council was negligent or ignorant, or both, apparently unable to locate my Uncle and my kuia or our whānau. Incomprehensible when one considers the known identity and respect for the Baker and Parata whānau, mana whenua for more than seven generations within our traditional rohe.[402]

In April 1965, the Māori Trustee was approached by the county council, which wished to purchase the land for 'municipal purposes'. As with Ngarara West A32C, the council itself wanted to acquire the land, which must have been a factor in the application for a vesting order. Also, again as in the case of A32C, the council used rezoning under the Town and Country Planning Act 1953 as a tool to acquire the land. As at 1965, the provision requiring councils to consider the relationship of Māori and their culture and traditions to their ancestral land had not yet been included in the legislation.[403] Ngarara West A78E2 was designated a 'Reserve for Civic purposes' in a review of the district scheme, with the 'intention that the land be used as part of the Waikanae commercial centre'. Before the vesting, other land nearby, including Māori land, had been alienated for similar purposes. A Government valuation was obtained for Ngarara West A78E2 for £850.[404] The district officer commented that, 'in view of the zoning, there was no point in putting the property on the market'.[405]

After an offer was made by the county council, the Department of Māori Affairs unsuccessfully attempted to contact Raumoa Baker for a second time. Notwithstanding this, J R Hanan approved the vesting order on 4 May 1965, as

400. 'Order Vesting Land in the Maori Trustee for Sale', 4 May 1965 (Woodley, document bank (doc A193(c)(vii)), p 52)
401. Woodley, 'Local Government Issues' (doc A193), p 533
402. André Baker, brief of evidence (doc F6), p 6
403. See Town and Country Planning Act 1977, s 3(1)(g).
404. Woodley, 'Local Government Issues' (doc A193), p 534; Park, Cullinane & Turnbull to Gascoigne, Wicks, Walton & Rout, 16 December 1965 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(iii)), p 70)
405. District officer to Head Office, Department of Maori Affairs, 15 April 1966 (Woodley, 'Local Government Issues' (doc A193), p 534)

noted above.[406] Crown counsel submitted that at this point, Crown officials – cognisant that Raumoa Baker had neither received rates demands or been notified of the proceedings – should have intervened to halt the vesting.[407] It was always open to officials to return to the court and seek a cancellation of a vesting order.[408] Instead, the Māori Trustee made an offer on 5 November 1965 to 'sell the land to the Council for £935, being the SCG [special Government valuation] plus 10%'.[409] On 8 November, the county clerk wrote back accepting the offer, with the provision that rates due to the council would be deducted from the purchase price. Council solicitors then sent the Māori Trustee relevant sale documentation to sign on 15 November 1965.[410]

The timing is important because, shortly after the agreement was reached, Raumoa Baker's address at Blenheim was discovered. Ms Woodley suggested that there was no urgency on the part of Crown officials to advise Raumoa Baker that his land was being compulsorily sold. Nor did the council attempt to stop the sale to allow the owner an opportunity to pay the rates and retain his land. The zoning, however, would have made it difficult for him to do anything with the land but sell to the council. On 12 November 1965, a letter was sent advising Raumoa Baker of the sale. Ms Woodley explained that the sale process continued in the meantime: 'The District Officer said that the transfer was submitted for execution the day before the letter was sent to Mr Baker (on 11 November) though the settlement was not 'executed' until 22 November and then 'effected' (but not registered) on 20 December 1965.'[411]

It is unclear when Raumoa Baker received the letter. However, on 19 November, Raumoa Baker phoned the district officer and indicated that he would pay the rates owed. Officials told Baker that it was 'too late' because the Māori Trustee had entered into a sale contract that could not be withdrawn.[412] Claimant counsel observed that these events occurred at a whirlwind pace once Baker's address had been located, with the result that the Māori owner was given no reasonable chance to save his own property.[413]

In response, Raumoa Baker sought the assistance of J H Moffatt, the secretary for the Ōtaki Māori Committee. Mr Moffatt sought clarification as to what legislation had been used to take the land and noted that Mr Baker had 'doubts that the rate demands had been received and intimated . . . that he would be prepared to

406. Crown counsel, closing submissions (paper 3.3.60), p 130
407. Crown counsel, closing submissions (paper 3.3.60), p 130
408. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 556)
409. District officer to Head Office, Department of Maori Affairs, 15 April 1966 (Woodley, 'Local Government Issues' (doc A193), p 534)
410. District officer to county clerk, Horowhenua County Council, 5 November 1965; county clerk to district officer, 8 November 1965 (Woodley, 'Local Government Issues' (doc A193), p 534)
411. Woodley, 'Local Government Issues' (doc A193), pp 534–535
412. District officer to Department of Maori Affairs, 15 April 1966 (Woodley, 'Local Government Issues' (doc A193), p 535)
413. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 59

pay back rates to retain the title.'[414] On 6 December 1965, Mr Baker's solicitors also sent a letter to the county council, noting their client was 'disturbed' the council intended to sell his land and sought full clarification of the circumstances of the vesting.[415]

The council's response, via its lawyers, noted the identity of the owner in the valuation rolls, the rezoning of the land for civic purposes, the rates arrears and charging orders that had preceded the vesting order, and the steps taken to recover the rates.[416] The county clerk did not want to write directly for fear of 'inadvertently say[ing] more than is necessary and prejudic[ing] the conclusion of the sale'.[417] Significantly, the county clerk's solicitors told Mr Baker that the period for objecting to the vesting had closed, and that the rates demands sent to Mrs Haua Baker 'in accordance with the valuation roll . . . [had] been ignored and exhaustive enquiries by the Council office and by the Maori Trustee . . . [had] been unavailing'.[418] There was no acknowledgement, however, that the valuation roll itself was erroneous.[419] The solicitors advised the county clerk of their correspondence and asked the Māori Trustee to proceed with the sale immediately.[420]

Legal difficulties, however, prevented a speedy completion of the sale. Both the council and Raumoa Baker lodged caveats on the title, each trying to protect their position. At the same time, the department had trouble getting the district land registrar to register the vesting order. The situation had not been settled by April 1966 when Raumoa Baker's solicitors filed a motion in the Supreme Court to extend his caveat, which was due to elapse. The department's district officer and the council tried to circumvent this by getting the transfer registered and paying out the money to Mr Baker, but he would not accept it. His solicitors asked the Māori Trustee to hold the money in trust while the process to extend the caveat was completed. In the end, Raumoa Baker's solicitor admitted defeat. The caveat had expired and the Supreme Court had refused to extend it. Mr Baker himself, however, wanted to keep fighting for his land and was considering appealing directly to the Minister. But it was too late: with the caveat expired, the council was able to finish registering the transfer.[421]

The Māori Trustee's solicitors advised that Raumoa Baker's share of the purchase money (minus the rates arrears and the trustee's expenses) should be paid to him at once: 'If he receives and accepts the money without too much delay, then

414. J H Moffatt to Horowhenua County Council, 1 December 1965 (Woodley, 'Local Government Issues' (doc A193), p 535)
415. Gascoigne, Wicks, Walton & Rout to Horowhenua County Council, 6 December 1965 (Woodley, 'Local Government Issues' (doc A193), p 535)
416. Woodley, 'Local Government Issues' (doc A193), pp 535–536
417. County clerk to Parks, Cullinane & Turnbull, 13 December 1965 (Woodley, papers in support of 'Local Government' (doc A193(c)(iii)), p 68)
418. Park, Cullinane & Turnbull to Messrs Gascoigne Wicks Walton & Rout, 16 December 1965 (Woodley, 'Local Government Issues' (doc A193), p 536)
419. Woodley, 'Local Government Issues' (doc A193), p 536
420. Woodley, 'Local Government Issues' (doc A193), p 536
421. Woodley, 'Local Government Issues' (doc A193), pp 536–539

he may well decide to drop the matter altogether.'[422] This strategy seems to have worked. There is no record of Raumoa Baker appealing to the Minister or trying to take further legal action, and in fact he now had to pay the costs of the legal action taken so far.

During the hearings, André Baker referred to this process as a 'muru raupatu.'[423] Not only had the whānau lost their own whānau tūrangawaewae in Waikanae,[424] but there was also no possibility of using the land for the 'future growth and development' of the iwi tūrangawaewae, the adjacent Whakarongotai Marae. Further, Raumoa Baker was the kaitiaki of A78E2 and the tuku it embodied. André Baker stressed the 'personal cost to Te Raumoa Baker' and the effect on his mana.[425]

Crown counsel conceded that there were a series of failures in the handling of this matter, and that the Crown failed to intervene when it should have done:

> The Crown accepts that the Department of Māori Affairs was made aware, when the Horowhenua County Council made enquiries about the identity of the owner of Ngarara West A78E2 before vesting the block, that the block's owner had not been contacted regarding the vesting of their land in the Māori Trustee under section 109 of the Rating Act 1925.
>
> The Crown considers that either the Crown or the County Council would have been able, as part of their extensive enquiries, to make contact with Mrs Haua Baker in order to ascertain who the owner of the block was and, it being her son, his contact details. There is no evidence that either did so.
>
> The attempts made by the County Council to locate the owner through the Department of Māori Affairs meant that officials should have been aware, when the block was vested, that ratings demands had not been sent to the owner of Ngarara West A78E2.
>
> The name of the owner of Ngarara West A78E2 was on the Particulars of Title to Land, which was held by the Department of Māori Affairs. The Crown considers it should have supplied the Particulars of Title to Land to the Horowhenua County Council. If that had been done, the block's owner would have been notified of the vesting of his land in the Māori Trustee for the purposes of sale, and could have, as events proved he wished to, sought to prevent the sale.
>
> The vesting order itself was subject to approval by the Minister for Māori Affairs, which he gave on 4 May 1965. The Crown considers that at this point in time, the Crown, knowing that the owner of Ngarara West A78E2 had neither received rates demands or been notified of the vesting of his land in the Māori Trustee for the purposes of sale, could have intervened to halt the vesting.
>
> The Crown accepts that the failure of the Crown to take this step to halt the vesting constituted a breach of the principle of active protection.[426]

422. Watts & Patterson to Department of Maori Affairs, 30 May 1966 (Woodley, papers in support of 'Local Government Issues' (doc A193)(c)(vii), p 82)
423. André Baker, brief of evidence (doc F6), p 11
424. Wai 1628 SOC, 1 September 2008 (paper 1.1.58), p [1]
425. André Baker, brief of evidence (doc F6), p 11
426. Crown counsel, closing submissions (paper 3.3.60), pp 129–130

We agree that this is an apt concession but it only applied to the particular circumstances of this one compulsory vesting. No general concession was made as relates to the others discussed in this chapter, yet all three cases show that the owners had not been properly identified and contacted either before the vesting order was made or before the Minister gave his consent to the compulsory vesting and sale. One crucial difference between A78E2 and the others is that the owner *could* have paid off the rates arrears had he been properly identified and notified by either the council or the department.

5.8.7 Common features of the compulsory vestings at Waikanae

Ms Woodley argued, on the basis of the evidence she had reviewed, that the process of compulsory vesting was typically based on an *assumption* that the rates had been levied against the correct person. It was rare for the owners to be present in court when vesting orders were made, and there were 'ongoing issues with the accuracy of the valuation rolls for Māori land with entries not always accurately reflecting partitioning, successions or alienations'.[427] In all the examples discussed in this chapter, the Māori Affairs Department played a large role. It did not try to contact the owners itself until after the vesting order had been made by the court. From that point on, the owners were always on the back foot, even if the correct identity and contact information could be found. Officials did not actually manage to contact more than one of the 10 owners of A32C2, for example, until very late in that process.

There were a number of common features in the cases of the Ngarara West A3C blocks, the A32C blocks, and A78E2:

- The legacy of the nineteenth-century native land laws had left Māori owners in a very difficult position by the mid-twentieth century. For many, it was nearly impossible to pay rates on land that was multiply owned, undeveloped, and often facing title or access difficulties of one kind or another. The remaining land base was small in the wake of private purchasing, and each piece was extremely valuable to those whānau who retained it as their turangawaewae.
- The Minister of Māori Affairs and his officials had not investigated whether rating exemptions were appropriate in the circumstances of the remaining Māori land at Waikanae. It was clear from the examples discussed in this part of the chapter that rating exemptions ought at least to have been considered before vestings were ordered by the court.
- There was some blurring of roles in the Māori Affairs Department due to the integration of the department and the Māori Trust Office. Up until the point at which the Minister approved a vesting, officials were acting as officers of the department. After the Minister had given his approval, those directly involved were acting as officials of the Māori Trust Office to carry out the vesting order. But officials were uncertain as to the nature of the trustee role under section 109 of the Rating Act 1925. They were also motivated by the

427. Woodley, 'summary of 'Local Government Issues'' (doc A193(a)), p 7

wider considerations of their other roles in the department. Local district officers were in touch with the flax roots of Māori society and were aware that Māori saw the vestings for sale as confiscations. The department's office solicitor advised that the Rating Act was clear: the Māori Trustee was not a trustee for the former owners under a section 109 vesting order, and officials were not to consider the 'welfare, wishes or interests of the former proprietors of these lands.'[428]

- The Minister could and did intervene in the operations of the Māori Trustee after consent had been given for a forced sale. In the one instance above where Hanan did so, he was not prepared to go beyond obtaining a three-month reprieve for the owners to try to find the means to pay the rates arrears. The Crown did not provide any active assistance to the owners, despite the legacy of Crown acts and omissions that was at least partly responsible for their predicament. Nor did the Crown introduce amendments of the Rating Act to provide greater protection for Māori. It was not until 1988 that the power of compulsory sale of Māori land for non-payment of rates was abolished.
- In these particular instances, the Ministerial veto did not protect Māori land from sale for non-payment of rates.
- The valuation rolls were not kept up to date and the Horowhenua County Council failed to correctly identify or notify all the proper owners in these particular cases. Ms Woodley suggested that this was a general problem. Typically, the Māori Affairs Department did not try to identify and contact owners until after the vesting order was made by the court, and sometimes not until after the Minister had assented to the vesting for sale. Local district officers were sometimes sympathetic and tried to protect Māori interests as far as they could within the constraints of the rating legislation. This form of protection took two forms: contacting owners so they had a chance to pay the rates arrears before a sale; and sometimes trying to maximise the price obtained for the land.
- In two of the three instances, the Horowhenua County Council used the zoning powers conferred by the Town and Country Planning Act to rezone vested land to ensure its sale to the council. As noted above, the requirement for councils to consider the relationship of Māori and their culture and traditions to their ancestral lands was not introduced into the Town and Country Planning Act until 1977. No such requirement was introduced to the Rating Act 1925, under which these compulsory vestings were made.
- Under certain circumstances, land was revested in its owners so that a private sale could be completed. This did not mean that a free and willing sale occurred.

We make our Treaty findings below in section 5.9.2.

428. Office solicitor to deputy secretary, Māori Affairs, 3 February 1967 (Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), p 63)

5.9 Treaty Analysis and Findings

5.9.1 Abandonment of the 1900 agreement and reduction of legislative protections for Māori land

As described in detail in section 5.4 of this chapter, the Crown reneged from its negotiated agreement with the Kotahitanga parliament by 1905. The protections against land alienation in the Māori Lands Administration Act 1900 had been dismantled by 1909. The 1900 Act, while not perfect, had represented an agreement that no more Māori land should be sold, that elected Māori members should be involved in the administration of their lands, that multi-purpose reserves should be established for individuals or hapū before any leasing, and that European settlement should continue through leasing alone. By 1909 this was replaced by policies and legislation that permitted all sales but required the retention of a minimum amount of land for each individual, to be assessed at the time of sale or lease. This was designed to prevent total landlessness rather than ensure a sufficiency of land for customary purposes and use in the economy. From 1913, landlessness was no longer even a minimum protective standard if the Māori Land Board considered that the land could not support an individual or that the individual had the skills for paid employment.

In addition, Māori representation in the Māori Land Councils, which gave them some control over the administration and protection of their lands, was whittled away to one non-elected Māori member in 1905 and then no Māori members at all in the new Māori Land Boards in 1913.

We therefore disagree with the Crown's submission that:

- the Native Land Act 1909 and its successors gave adequate protection to Māori in the retention of their ancestral land; and
- any failures in protection were the responsibility of the independent Māori Land Court judges who implemented the law.

For the relevant period for this chapter, 1905 to 1930, we find that the Crown's legislative protections in respect of Māori land were inadequate. We also find that Māori in general, and Te Ātiawa/Ngāti Awa in particular, were excluded from decision-making in the body that administered and implemented the protections in respect of their ancestral lands. The legislation was inconsistent with the Treaty principles of active protection and partnership. Additional findings will be made in respect of the legislation and its implementation in later volumes of the report.

The prejudice to Te Ātiawa/Ngāti Awa was the loss of land that followed the abandonment of the agreement with Kotahitanga, the weakening of legislative protections, and the loss of tino rangatiratanga over their lands with the loss of representation on the body that administered (and implemented the statutory protections for) their lands.

5.9.2 Crown failure to ameliorate the private purchasing system

There were two key factors involved in the Crown's failure to ameliorate the private purchasing system so that it was not seriously damaging to Māori in general, and to Te Ātiawa/Ngāti Awa ki Kāpiti in particular.

5.9.2.1 *Board confirmation of purchases*

The first factor was the Crown's protection mechanism, which took the form of a requirement that sales and leases be confirmed by the Native Land Court (the Native Land Court Act 1894) and then by the Māori Land Board (the Native Land Act 1909). From 1913, the board and court were interchangeable, because the board consisted of the judge and registrar, and the judge could confirm alienations sitting as the board or the court. In the performance of its confirmation role, the legislation gave the board the status of a court of record. The board was supposed to assess and confirm or veto each alienation according to a set of statutory criteria, which included, among others, adequacy of price, retention of some land (as above at section 5.4.4.3), and that the purchase was not contrary to equity or good faith or the interests of the vendors.

In section 5.7.2, we concluded that, for the lands of Te Ātiawa/Ngāti Awa in the first three decades of the twentieth century, the Crown's protection mechanism failed. Whether this was due to staffing, as Dr Rigby argued, or to other factors is not clear. The court staff did not play an investigative role in terms of vetting alienations. The board or court was largely reliant on the registry information about land owned by individuals and the material put before it at hearing by the prospective purchaser. The rate of land loss for Te Ātiawa/Ngāti Awa by the end of the 1920s showed that the system was, at the very least, incapable of providing a meaningful check on land alienations vis-à-vis land retention. We find that the Crown failed to provide an effective protection mechanism for Te Ātiawa/Ngāti Awa lands in breach of the Treaty principle of active protection.

We expect that more findings will be made about the confirmation system later in the inquiry after hearing all evidence and submissions.

5.9.2.2 *The need for systemic reforms*

The second of the key factors mentioned above was the Crown's failure to reform the private land purchasing system. As noted above, the Crown's intervention in the system was confined to a series of checks at the end to ascertain whether a purchase met the statutory requirements. But the Crown could have intervened to ameliorate the system itself. Some of the fundamental characteristics of the private purchasing system have been explored in section 5.6 of this chapter. In sum, for the period under review, these were:

- individualisation of title had removed tribal or collective controls on alienation;
- the fragmentation of land and the scattering of interests across multiple sections made it harder for owners to either access finance for development or to use their land, including for farming;
- leases were too easily converted into purchases (with rent treated as advances on a purchase);
- in order to obtain development finance, some individual owners became caught in a debt trap whereby they had to 'trade land for debt', as Dr Rigby explained in his report;

- Pākehā purchasers were the main source of credit for Māori owners, and the purchasers charged Māori higher interest rates than the institutions from which they borrowed;
- Pākehā purchasers could more easily refinance their debts with reputable institutions, whereas the purpose of purchasers advancing money to Māori owners was to obtain their land;
- individual owners were strapped for cash and debts tended to mount up for immediate needs rather than investment in land development.

Key issues in this system were the individualisation and fragmentation of Māori land title and a virtual settler monopoly on access to cheap finance. The Treaty principle of equity required the Crown to reform the private purchase system and provide a more level playing field as between Māori and settlers. This would have enabled the Crown to protect Māori interests while still allowing for a reasonable degree and pace of settlement. The solution adopted by the Crown after negotiation with Kotahitanga in 1898–1900 was to stop all purchasing (in theory) and progress settlement by widescale leasing. This solution having been abandoned in 1905–09, the Stout–Ngata commission recommended new reforms in 1907.

According to the commission, the most urgent priority was for the Crown to provide cheap development finance to Māori, as it already did to settlers. The commission also recommended no more direct dealings between Māori and settlers; sales and leases would take place by auction. This was not a new recommendation. Sales by auction only had been proposed frequently in the nineteenth century, to remove the predatory aspects of direct dealing (where settlers had distinct advantages over Māori) and to ensure the highest market prices for Māori. Further, the commission recommended consolidation schemes to create viable farms out of owners' scattered interests, and the creation of papakāinga reserves for individuals, families, and tribes.

These recommendations, if acted upon in time, could have helped level the playing field between Māori and settlers at Waikanae by removing the dependence of the former on the latter for finance, by stopping the use of rents to turn purchases into leases, by tackling at least one of the more intractable title problems, and ultimately by enabling owners to develop their lands and free themselves from debts incurred for consumption needs. Some Te Ātiawa/Ngāti Awa owners were already caught in the debt trap by then, however, and it would have taken time for the reforms to be embedded and to make a significant difference.

In any case, the Crown chose not to act on these recommendations of the commission, and it did not otherwise reform the private purchase system. Thus, in respect of Te Ātiawa/Ngāti Awa and their remaining lands in the first three decades of the twentieth century, we find the Crown in breach of the principles of equity and active protection.

5.9.2.3 *Prejudice*

The prejudice arising from the Crown's weak protections and its failure to reform the system of private purchasing was rapid, uncontrolled, and devastating land loss. Te Ātiawa/Ngāti Awa ki Kāpiti were already close to landlessness by 1930.

They retained too little land to benefit from Ngata's development schemes in the 1930s. Some individuals and whānau retained pieces of land, especially the Parata whānau and the Hemi Matenga Estate, but those lands dwindled further as the twentieth century progressed.

The Crown accepted that landlessness was a serious consequence of its acts and omissions:

> The Crown concedes that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[429]

In this chapter, we have set out some of the Crown acts and omissions which led to Te Ātiawa/Ngāti Awa landlessness in the twentieth century.

5.9.3 Rating exemptions and compulsory vestings for sale in the 1960s

In this chapter, we have considered how the rating regime affected Te Ātiawa/Ngāti Awa lands. The Crown failed to investigate the surviving pieces of Māori land at Waikanae in the mid-twentieth century to determine whether any land or class of land should be exempted from rates under section 104 of the Rating Act 1925. The Native Rates Committee had recommended this course of action in 1933 but the recommendation was not carried out in this part of the inquiry district. As a result, rates remained a factor in the sale of multiply owned Māori land, which was often poor-quality, undeveloped, and plagued by access or title problems. It is not possible to quantify the extent to which rating influenced sales of such land in the twentieth century but it was definitely an important causal factor. The Crown's failure to actively protect Māori land at Waikanae through rates exemptions also made non-revenue producing Māori land vulnerable to compulsory vesting and sale. In particular, the Crown failed to consider exemptions when the Horowhenua County Council applied for vesting orders for the Ngarara West A3C blocks, the A32C blocks, and A78E2. This series of Crown omissions was a breach of the Treaty principle of active protection.

In addition, the Ministerial veto was not used to protect Māori land in the cases of the Ngarara West A3C blocks, the A32C blocks, and A78E2, despite (a) the failure of either the council or the department to properly identify and contact all owners prior to the department's recommendation to approve the vesting, and (b) circumstances in each case which justified the exercise of the Ministerial veto. The Crown failed to actively protect these small, surviving remnants of Māori land at Waikanae. Nor did the Crown provide any positive assistance to the owners to retain their land, even when appeals for assistance were made to the Minister.

429. Crown counsel, closing submissions (paper 3.3.60), pp 23–24

5.9.3

Later in the inquiry, after hearing all evidence and submissions, we will make findings on whether it was ever justifiable under the Treaty to sell land compulsorily to pay rates arrears. In the cases discussed in this chapter, section 109 of the Rating Act 1925 was used to forcibly deprive Māori of their ancestral land without adequate justification. This was in breach of the plain meaning of article 2 of the Treaty, which guaranteed the right of Māori to retain their land for so long as they wished to do so. The Māori Affairs Department was aware (a) that section 109 of the Rating Act 1925 was a 'draconian' provision, (b) that Māori considered these forced sales to be confiscation – 'muru raupatu', as claimant André Baker put it – and (c) that the legacy of the Crown's native title system was responsible for many of the problems that resulted in non-payment of rates. But the Crown took no action to ameliorate the owners' position or to remove this confiscatory provision from the Rating Act until 1988.

Te Ātiawa/Ngāti Awa whānau were prejudiced by the confiscation of some of the last remaining pieces of their tūrangawaewae at Waikanae for non-payment of rates.

CHAPTER 6

THE PARATA NATIVE TOWNSHIP

6.1 Introduction

This chapter addresses Te Ātiawa/Ngāti Awa claims about the Parata native township, which was established at the turn of the century under a Crown legislative scheme for towns on Māori land in the remoter areas of the North Island. By the late 1890s, Te Ātiawa/Ngāti Awa lands in Ngarara West C and A were being rapidly alienated to settlers. At the national level, Māori hoped to halt such sales through the Kotahitanga Māori parliament and the Māori Lands Administration Act 1900. Their strategy was to stop all purchases so that Māori could retain their surviving lands and derive permanent benefits from the settlement occurring all around them. The premise was that European settlement would be confined to leasing, and that Māori would derive benefits from rentals and from the economic development of their regions (see chapter 4). Service towns for rural farming areas were a key component in that development. This dovetailed with the Crown's recent scheme to establish 'native townships' where sections would be leased to settlers, and Māori would benefit from rentals, reserves, and economic growth. Wi Parata was interested in establishing a Māori-owned town on his lands near the railway line, but the resulting town was established under the Crown's native township legislation instead. The use of this legislation at Waikanae, where settlement was already occurring at pace, was one of the more controversial aspects of the township's establishment.

The Parata native township was established on 17 August 1899 on 49 acres of Ngarara West C41. This area now forms part of modern-day Waikanae. Four years prior, the Crown had introduced the Native Townships Act 1895. Section 3 of the Act allowed up to 500 acres of Māori land to be taken compulsorily for the establishment of a native township. The name of the Act implied the townships created under it would be controlled by, and for the benefit of, Māori. Their actual purpose, however, was to extend Pākehā settlement on Māori-owned land in strategically or economically important areas. The townships themselves were administered by the Crown or Crown-appointed bodies, which held the land in trust for its beneficial owners.[1] By 1907, 18 such townships had been established across the

1. Suzanne Woodley, *The Native Townships Act 1895*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), pp 1, 7–8

North Island.[2] Only two were located in the Porirua ki Manawatū district – Hōkio and the Parata native township.

Te Ātiawa/Ngāti Awa claimants alleged that the native township legislation and its utilisation in the inquiry district eroded their tribal estate and breached the principles of the Treaty of Waitangi.[3] The claimants also told us that only the quarter-acre Ruakohatu urupā (of the original 49-acre Parata native township) remains in Māori ownership today. We note here two significant concessions that the Crown has made in this inquiry:

> The Crown accepts that the individualisation of Māori land tenure provided for by the native land laws made the lands of Te Ātiawa/Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa ki Kāpiti. The Crown conceded that its failure to protect those traditional tribal structures was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[4]
>
> The Crown concedes that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[5]

In response to allegations specifically concerning the Parata native township, however, the Crown disputed the claim that its township was a cause of alienation of Te Ātiawa/Ngāti Awa ancestral lands, asserting that the claimants' tūpuna intended to sell the affected land anyway.[6]

In this chapter, we examine the terms and impact of the native townships legislation of 1895 and 1910 as it applied to the Parata native township. In particular, the Native Townships Act 1910 made critical changes to the original scheme, including the introduction of perpetual leases and the power for Māori land boards to sell the vested sections of township land. The creation and alienation of the township reserves, especially the native reserves, was also a major issue of concern to the claimants.

The Parata native township, however, has a unique feature which (as far as we are aware) is absent from the other native townships. Due to the total individualisation of Ngarara West title in 1891, as discussed in chapter 4, legal ownership of the township land was held by a single Māori owner rather than a wider tribal

2. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pt 3, p 253
3. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 25; claimant counsel (J Mason, K Lee), closing submissions, 2 December 2019 (paper 3.3.55), p 29; claimant counsel (B Gilling, S Dawe, R Brown), closing submissions, 21 October 2019 (paper 3.3.51), p 77
4. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 21
5. Crown counsel, closing submissions (paper 3.3.60), pp 23–24
6. Crown counsel, closing submissions (paper 3.3.60), p 142

group or body of owners. This meant that only one owner would receive the rentals and reserves. Nevertheless, Wi Parata had customary obligations to his iwi as a chief. The claimants argued that it is not clear whether the Crown's native township scheme would have benefited Te Ātiawa/Ngāti Awa more generally. To complicate matters further, the single owner, Wi Parata, was in the process of transferring the land to his brother, Hemi Matenga, at the time he agreed to the establishment of a native township. While we were not made aware of any direct statements by Wi Parata concerning his aspirations for the Parata native township, he actively pursued development and commercial opportunities with Pākehā in the late nineteenth century, while attempting to retain strategic control of Māori land. Claimant Patricia Grace commented that 'up until the time of his death in 1906, Wi Parata acted always to preserve the independence, power, prestige and land of Maori. At the same time he welcomed settlers for what they could contribute.'[7] The utility of a service town for the other Te Ātiawa/Ngāti Awa landowners, therefore, depended on their ability to retain land and access development finance, so that they could develop their land for farming or enter into profitable leases.

Soon after the Parata native township's establishment, the native township legislation was amended to allow the sale of township lands (which were supposed to be a permanent endowment for their beneficial owners). Also, beneficial ownership of the township land passed to the trustees of the Hemi Matenga Estate, acting under the terms of his will. This was a crucial development because decisions which fell to the beneficial owners under the 1910 legislation, especially consenting to sales, were in fact made by the Estate trustees. Under the will, their duty was to maximise income and ultimately liquidate the Estate, not retain the land or transmit it to successors.

This chapter first sets out the parties' respective arguments regarding the Parata native township and identifies the issues they give rise to. We then explore the claimants' grievances about the establishment of the township, the administration of the township (including sales), and the fate of the town's native and public reserves. Our findings are set out at the end of the chapter.

6.2 The Parties' Arguments

6.2.1 The claimants' case

The claims and submissions we received regarding the Parata native township focused largely on two areas: establishment of the township, and its administration and the level of success it had in delivering economic and other benefits promised to Māori owners.

Claimant counsel argued first that the declaration of the Parata native township was inconsistent with the intent and purpose of the Native Townships Act 1895, given the extent of existing European settlement at Waikanae when it was

7. Patricia Grace, brief of evidence, 2 August 2018 (doc E11), p 5

established.[8] The claimants alleged that in the course of this process, tangata whenua interests were subordinated to those of the Crown and Pākehā settlers.[9] As a result, they contend that utilisation of the native township legislation to establish the township, 'abrogated the claimants' legal rights to their lands'.[10]

The claimants asserted further that the Crown established a native township at Waikanae under the 1895 Act without adequate consultation. Moreover, this action was contrary to the intention of their tūpuna to create a Māori-controlled township in the area. Claimant counsel argued that the Crown erroneously engaged Wi Parata concerning the taking of the affected township land, ignoring the protests of his brother, Hemi Matenga, that he was the actual owner.[11] Claimant counsel submitted the Crown was cognisant of the entangled ownership situation, but knowingly disregarded it in order to establish the township.[12]

Regarding the operation of the township scheme, claimant counsel submitted the Crown breached its duty of good-faith conduct and the principle of partnership by not enforcing the payment of township leases.[13] Further, claimant counsel submitted the wider community derived minimal economic benefit from the township scheme because rents were paid to a single beneficial owner.[14]

Claimant counsel raised several issues concerning the leasehold regime and subsequent freeholding of Māori land. They argued perpetual leases prioritised settlers and that rental payments to Wi Parata, and later Matenga, were insufficient.[15] Claimant counsel submitted the Crown failed to actively protect the claimants' economic base by 'facilitating the alienation of the township lands to private purchasers'.[16] Claimant counsel also submitted the beneficiaries of Matenga had little control and were denied 'the usual opportunity to make decisions about the township via a meeting of assembled owners'.[17]

6.2.2 The Crown's case

The Crown requested that the Tribunal defer general findings on the native township legislative regime until a later stage of the inquiry.[18] Crown counsel noted that *Horowhenua: The Muaūpoko Priority Report* (2017) declined to make findings on general issues concerning the legislative scheme in advance of hearing all of the claims related to native townships. The Crown therefore reserved its position on the 'more general issues' relating to the native townships legislation.[19]

8. Claimant counsel, closing submissions (paper 3.3.49), p 26; claimant counsel, closing submissions (paper 3.3.49), p 83
9. Claimant counsel, closing submissions (paper 3.3.51), p 83
10. Wai 1018 amended statement of claim, 21 May 2018 (paper 1.1.56(c)), p 32
11. Claimant counsel, closing submissions (paper 3.3.51), pp 79, 82
12. Claimant counsel, closing submissions (paper 3.3.51), p 82
13. Claimant counsel, closing submissions (paper 3.3.55), pp 31–32
14. Claimant counsel, closing submissions (paper 3.3.51), p 83
15. Claimant counsel, closing submissions (paper 3.3.51), p 84
16. Claimant counsel, closing submissions (paper 3.3.51), p 84
17. Claimant counsel, closing submissions (paper 3.3.51), p 84
18. Crown counsel, closing submissions (paper 3.3.60), pp 131–132
19. Crown counsel, closing submissions (paper 3.3.60), p 144

The Crown argued that Wi Parata agreed to the establishment of the Parata native township, asserting that it acted in good faith by commencing its negotiations at the 'highest levels' with Wi Parata. In the Crown's submission, it sought and received Wi Parata's consent to his township coming under the native township regime, despite being under no legislative requirement to obtain such consent.[20] Further, the Crown submitted that both Wi Parata and Hemi Matenga ultimately wanted to develop and sell the township area.[21]

The Crown denied allegations that its conduct caused the alienation of township sections.[22] Instead, the Crown submitted that 'intensive' freeholding activity only occurred in response to the beneficiaries of Matenga's estate, who petitioned Parliament to remove the restrictions concerning the alienation of land in 1948.[23] Consequently, the Crown argued, it acted as requested and the liquidation of Matenga's estate followed as a result.[24] Crown counsel submitted:

> [A]ny disagreement between the beneficiaries as to whether the remaining township sections and other land in Hemi Matenga's Estate ought to have been liquidated cannot be sheeted home to the Crown. The Crown acted on the petition of the beneficiaries themselves and the decisions and actions of the trustees of the will reflect the original wishes of Hemi Matenga himself, as set out in his will.[25]

The Crown also submitted that the success or otherwise of the Parata native township was largely determined by factors outside its control, including speculative leasing that obstructed the development of township sections. The Crown argued it took action to address the low rate of development, but could not compel lessees to develop their land. In terms of rents payable to the Māori beneficiaries, the Crown submitted that when the administration of the leases was its responsibility, 'approximately 91% of rents payable were actually paid'. After 1908, when the Crown transferred administration to the district Māori land boards under the Māori Land Laws Amendment Act 1908, Crown counsel submitted that the Crown was not responsible for the failures of the administrative agency tasked with collecting rents or for the lack of accurate records.[26]

6.3 Issues for Discussion

Based on the arguments advanced by claimants and the Crown, this chapter addresses the following broad questions:

- How and why was the Parata native township established and what involvement did the Māori owners have?

20. Crown counsel, closing submissions (paper 3.3.60), pp 132–133
21. Crown counsel, closing submissions (paper 3.3.60), pp 140, 147
22. Crown counsel, closing submissions (paper 3.3.60), p 142
23. Crown counsel, closing submissions (paper 3.3.60), pp 142–143
24. Crown counsel, closing submissions (paper 3.3.60), p 143
25. Crown counsel, closing submissions (paper 3.3.60), p 143
26. Crown counsel, closing submissions (paper 3.3.60), pp 138–140

- What influence did Māori have on administrative decisions concerning their township lands, and to what extent did they receive the expected benefits from the scheme?
- How were native allotments (reserves) and public allotments administered and alienated?
- What was the role of the Hemi Matenga Estate trustees in the decision-making about, and the alienation of township lands, and did the Crown provide appropriate assistance to the Estate beneficiaries?
- To what extent was the Crown responsible for the alienation of Parata native township sections?

6.4 How and Why Was the Parata Native Township Established and What Involvement Did the Māori Owners Have?

We begin this section with a brief discussion of the legislation governing the establishment and operation of the Parata native township, followed by our assessment of the particular circumstances leading to the proclamation of the township in August 1899.

6.4.1 The Native Township Acts, 1895–1910

The Native Townships Act 1895 aligned broadly with the Liberal Government's commitment to promote settlement throughout the interior of the North Island by overcoming Māori resistance to settlement.[27] Settlers had often found it difficult to secure land, either through purchase or long-term lease, from Māori in isolated areas. A key feature of the Act meant that township lands remained in Māori ownership but were leased to European settlers via the commissioner of Crown lands. Maintaining ownership by Māori was intended to overcome some of their opposition to settlement. However, the Act and its amendments did not require the Crown to obtain the consent of Māori owners prior to proclaiming a township. There was also no provision for Māori to object to the creation of a township, to its location, or to the name to be selected by the Governor. Instead, affected land would be legally transferred to the Crown in trust and Māori beneficial owners would theoretically benefit from rents and the development of their land.[28]

Following a proclamation, the surveyor-general was authorised to plan townships' streets, sections, and public reserves.[29] Land to be utilised for roads and public reserves was vested in fee simple in the Crown without compensation and was to be administered under the Public Works Act 1894 and the Public Reserves Act 1881.[30] Additionally, native allotments were vested in the Crown 'in trust for the use and enjoyment of the Native owners'.[31] In other words, even land set aside

27. Dr Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report', December 2018 (doc A214), p 55
28. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 261–263
29. Native Townships Act 1895, s 5
30. Native Townships Act 1895, s 12(1)–(2)
31. Native Townships Act 1895, s 12(3)

for Māori use was legally transferred to the Crown. These native allotments could not together exceed 20 per cent of the total area of a township.[32] The surveyor-general was required to take into account the wishes of the native owners, but only to the extent that they did not interfere with the plan he had in mind for the town's layout.[33] All other allotments were vested in the Crown in trust for the Māori owners.[34]

The Act empowered the Commissioner of Crown Lands to administer the native township.[35] The commissioner was permitted to lease any allotment other than the native allotments.[36] Leases could be offered by public auction or tender, and the rent was to 'be the best obtainable'. The Act prescribed that leases could not exceed 21 years. However, lessees were entitled to a right of renewal for a further 21 years.[37] If a lessee defaulted on rent, failed to keep any of the lease conditions, or was found not to be using the land, the Commissioner of Crown Lands had right of re-entry.[38] The 1895 Act contained no provision for sale of township sections to lease holders. From 1908, the Crown transferred the trust administration of all native townships to Māori land boards.[39] The township land remained vested in the Crown until 1910, when it was vested by legislation in the district Māori land board.[40]

In 1910, a new Native Townships Act was introduced. Suzanne Woodley noted that settlers had been pressuring the Government since the 1895 Act's inception to allow lessees to acquire freehold title.[41] Professor Alan Ward explained that the issue became so polarising that the Liberal-held seat of Taumarunui, outside of this inquiry district, was at stake. In response, the Liberals considered they were 'obliged to grant perpetual lease and the rights of tenants to purchase in order to hold off an opposition proposal to compulsorily convert leases to freehold'.[42]

As noted above, the Native Townships Act 1910 transferred legal ownership of all townships to district Māori land boards, to be held in trust for the beneficial owners. These boards were empowered to issue perpetually renewable leases (the

32. Native Townships Act 1895, s 6; see also Waitangi Tribunal, *Horowhenua: The Muaūpoko Priority Report*, (Wellington: Waitangi Tribunal, 2017), p 382.
33. Native Townships Act 1895, s 7; see also Waitangi Tribunal, *Te Mana Whatu Ahuru*, pp 261–263
34. Native Townships Act 1895, s 12 (4); see also Waitangi Tribunal, *Horowhenua*, p 382
35. Native Townships Act 1895, s 17
36. Native Townships Act 1895, s 14
37. Native Townships Act 1895, s 15
38. 'Regulations under The Native Townships Act, 1895', 4 February 1896, *Rules and Regulations of the Native Land Court: English and Maori* (Wellington: Samuel Costall, 1895), p 7; Native Townships Act 1895, s 14(3)
39. Maori Land Laws Amendment Act 1908, s 2
40. Native Townships Act 1910, s 4
41. Woodley, *The Native Townships Act 1895*, p 25
42. Alan Ward, 'James Carroll', in *The Turbulent Years: The Maori Biographies from the Dictionary of New Zealand Biography 1870–1900*, *Volume 2* (Wellington: Bridget Williams Books and the Dictionary of New Zealand Biography, Department of Internal Affairs, 1994), p 13 (Woodley, *The Native Townships Act 1895*, p 25)

'Glasgow lease') for any township section.[43] The 1910 Act also removed the barriers to freeholding. Sections 19 and 23 empowered the boards to sell township lands to the Crown or 'any persons' with the 'precedent consent' of the beneficial owners or their trustees. Where there were more than 10 beneficial owners, Māori land boards were able to call a meeting of assembled owners on the application of 'any person interested'. The 1910 Act also enabled Māori land boards to lease and sell the previously inalienable native allotments set aside for Māori occupation; only allotments that contained a meeting house or church were now protected from sale.[44] As an additional safeguard, no sale to a lessee or private purchaser could occur without the consent of the Governor-in-Council, which meant that the Crown retained a direct protective role in respect of the sale of township lands, as the Native Minister explained in Parliament at the time.[45]

6.4.2 Settler pressure for a township at Waikanae

As discussed in chapter 4, in 1891 Wi Parata was awarded sole ownership of a large area of land in Ngarara West C, including Ngarara West C41.[46] Following the 1890–91 rehearing and the division of Ngarara West into multiple individual partitions, Crown and private purchasing made serious inroads in the 1890s, especially in the Ngarara West C block. As settlement spread there was an accompanying pressure, described by historians Barry Rigby and Kesaia Walker in the twentieth-century lands report as 'significant, well organised and persistent pressure' for the establishment of a native township at Waikanae under the recent 1895 Act.[47] Crown counsel also acknowledged that during this period, there was ever-growing demand for land to build homes for those living and working in the area.[48]

Wi Parata became deeply concerned that the Crown would compulsorily acquire some of his land under this Act. The evidence we received suggests Wi Parata believed that establishing his own private township (leasing and selling sections directly to settlers) could appease Pākehā agitation, but allow him as rangatira to maintain overall control of both the land and the district. Indeed, as Rawhiti Higgott told us, Wi Parata wanted all his people to benefit and prosper from the development of Waikanae.[49]

In 1896, Wi Parata wrote to the Minister of Lands:

43. Native Townships Act 1910, s 13; Public Bodies Leases Act 1908, s 8; see also Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 129.
44. Native Townships Act 1910, ss 15, 19, 20, 23
45. Native Townships Act 1910, s 23(4); Waitangi Tribunal, *Horowhenua*, p 397; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 2, p 825; James Carroll, 11 October 1910, NZPD, vol 152, p 333
46. Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues c. 1819–1900', 11 December 2017 (doc A194), p 550
47. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 67, 75–76
48. Crown counsel, closing submissions (paper 3.3.60), p 134
49. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 33

> Hearing that the settlers are about to negotiate for a township at Waikanae, & have asked you to move in the matter. I beg to advise you it is my instruction to cut up a township & Have already instructed my surveyor to draft out same. Trusting this will stop any steps you are about to take & that same will meet with your approval.[50]

Despite Wi Parata's conciliatory approach and his willingness to establish a township on his land, 61 settlers headed by Henry Walton sent a petition to the Minister of Lands seeking the creation of a native township in September 1896. The petition stated 'it is impossible to obtain land for building sites [in Waikanae], and there is a steady demand for such land'.[51] Alfred Newman, the member for Wellington Suburbs, observed that had the petition been more widely circulated, it would have attracted more signatures. Moreover, he told the House that if a township were established, there would be 'a very steady demand' for sections.[52] A note was also attached to the petition recording Wi Parata's strong objection.[53] The exact nature of Wi Parata's objection was not recorded, nor was the author of the note.

Initially, the Crown considered Wi Parata's proposal for a private township favourably. The assistant surveyor-general stated: 'I understand that Wi Parata has laid out a Native Township at Waikanae, and no doubt the petitioners could obtain land from him on reasonable terms.'[54] Officials believed a private township could save the Crown the considerable expense associated with the survey and establishment of a native township under the Act.[55] Crown officials also expressed doubt whether a native township was suitable at Waikanae given the level of existing Pākehā settlement. A note was attached to the surveyor-general's copy of the settlers' petition advising that the Native Townships Act was never meant to apply to lands 'in the very centre of European settlement'.[56] It is unclear who authored the note. However, by 1896, Waikanae was a growing coastal settlement, with a road and railway link to Wellington. Similarly, some land from Ngarara West C41 was also being leased to Pākehā settlers and the Crown had just completed a purchase of 5,000 acres of this block.[57] In Rigby and Walker's view, these

50. Wi Parata to Minister of Lands, 9 September 1896 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 75–76)
51. Henry Walton and 60 others, petition to Minister of Lands, 11 September 1896 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 76)
52. Alfred Newman to Minister of Lands, 21 September 1896 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 76)
53. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 77
54. Assistant surveyor-general to Henry Walton, 16 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 79)
55. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 76
56. Note to surveyor-general, 3 October 1896 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 77)
57. Walzl, 'Ngatiawa' (doc A194), pp 553–554; Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 961, 973–991; see also section 4.7.2.

circumstances meant Waikanae was incompatible with the express purpose of the Native Townships Act 1895.[58]

On 16 August 1897, Wi Parata wrote to the Minister of Lands stating, 'on hearing of the matter [of settlers lobbying for a township] I decided to have one cut up & Now have same almost completed.' Wi Parata asked the Minister to supply a copy of the settlers' petition so he could engage those wanting sections directly.[59] The Minister promptly provided Wi Parata with a copy and noted that before a private township could eventuate, 'it will be necessary to submit a plan to the Government, through the Surveyor General Wellington, for approval'.[60] The following month, Wi Parata retained the services of R B Martin, a local surveyor, to lay out a township on part of Ngarara West C41. Martin's township proposal was subsequently forwarded to the chief surveyor at Wellington on 4 September 1897.[61]

In response, Henry Priddey, a carpenter already leasing Ngarara West C41 land from Wi Parata, wrote to the surveyor-general expressing concern that his 15-year lease would be affected. Priddey had reportedly built a house and workshop on the leased land. Priddey was simply told by the surveyor-general that 'the matter is one that concerns only yourself and the owner of the land from whom you rent'.[62]

Despite a proactive approach by Wi Parata, settler pressure persisted. It was clear the petitioners at Waikanae strongly favoured a government-led solution to their demand for a township. On 8 September 1897, Walton wrote to the Minister of Lands seeking an update regarding their petition.[63] The assistant surveyor-general advised that the petition had been received, but not dealt with, because it was not the intention of the 1895 Act to establish townships 'in the very centre of European settlement'.[64]

In late September 1897, the chief surveyor wrote to Wi Parata and Martin concerning their private township. The chief surveyor advised Martin's plan had been referred to the surveyor-general but inquired:

> I should be glad to know a little more, however, about the matter, such as the general object of cutting up the township, whether it is to be sold or leased; it is not very clear, either, under what section of the NL Court Act 1894 you are proceeding, is it for instance No. 62?[65]

58. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 118
59. Wi Parata Kakakura to Minister of Lands, 16 August 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 77)
60. Assistant surveyor-general to Wi Parata, 26 August 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 77)
61. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 78
62. Commissioner of Crown Lands to Priddey, 17 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 79)
63. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 79
64. Assistant surveyor-general to Henry Walton, 16 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 79)
65. J W A Marchant to R B Martin, 20 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 80)

Ms Walker explained that section 62 of the Native Land Court Act 1894 allowed the surveyor-general, with the approval of the Minister of Lands, to authorise any surveyor to enter upon any native land to make any survey. Accordingly, no one was permitted to survey native land without this authorisation, unless permission was granted by the Native Land Court.[66] More generally, the assistant surveyor-general took the view that Wi Parata's private township scheme was, however, legal:

> I have to say that as there is a Land Transfer Certificate of Title for this Block, and there is no restrictions as to its disposal, there is not the same reason for objecting to a township being laid out here, as there was in the case of the Awarua Block. Apparently Ngarara West C is in the same position as any other freehold land, and unless you have a knowledge of any trusts, the subdivision of it into a township cannot be interfered with.[67]

In addition to surveying a private township, Wi Parata entered into two leases with local Pākehā for timber-cutting rights at Ngarara West C23 (782 acres 2 roods 7 perches). Ms Walker recorded that the local settlers were pressuring Wi Parata to cut up part of Ngarara West C23 into smaller lots for settlement. While the extent to which he understood native township legislation is somewhat unclear, Ms Walker concluded that he likely sought out these leases in an attempt to prevent the alienation of Ngarara West C23 via the Native Townships Act 1895. However, statutory restrictions on who could lease or purchase Māori land, as well as restrictions on how much and what quality lessees or purchasers could hold, made this process difficult.[68] As discussed in chapter 4, the Crown re-imposed pre-emption across the country in 1894 under section 117 of the Native Land Court Act of that year, although exemptions for private transactions could be sought under an amendment passed in 1895.

On 4 April 1898, Wi Parata's lawyers submitted his petition to the Governor 'praying for the exemption of section 23 Ngarara West C from the operation of section 117 of the Native Land Court Act 1894'.[69] Wi Parata also applied to the Native Land Court to have the leases confirmed. However, the Native Land Court did not confirm the leases because they fell outside the rules governing aggregation of first-class land.[70] Soon after, Wi Parata urged the Premier and Native Minister, Richard Seddon, to reconsider the leases because the affected land had, in his view, been incorrectly designated as 'first-class'. Wi Parata's lawyers argued the land was

66. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 80
67. Assistant surveyor-general to surveyor-general, 23 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 80)
68. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 81–83
69. Moorhouse and Hadfield to Richard Seddon, 12 May 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 81)
70. Native Land Court Act 1894, s 117; Native Land Laws Amendment Act 1895, s 4; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 81–82

in actuality mixed quality, meaning different aggregation limits should apply. Ms Walker explained:

> The matter then seems to have been resolved in Wi Parata's favour. A gazette notice exempting 640 acres of Ngarara West C section 23 from section 117 of the Native Land Court Act 1894 was published in the *New Zealand Gazette* on 26 January 1899. Eventually Wi Parata got around the limits on how much first-class land could be alienated by 'cutting off a portion to reduce the area to 640 acres, the area allowed to be purchased under the Native Land Court Act 1894.' Wi Parata encountered considerable trouble and expense in an effort to obtain the exemption needed to lease his land.[71]

In June 1898, a settler delegation from Waikanae visited the Premier and queried whether 'the Government [could] acquire the land occupied by Wi Parata and sell it as allotments for small homestead purposes'.[72] This was a reference to using the Land for Settlements Acts, which allowed the Crown to acquire large settler estates compulsorily in order to break them up for closer settlement by small landowners. The Premier resolved to discuss the matter with John McKenzie, the Minister for Lands, who was responsible for the Land for Settlements scheme. While no correspondence between McKenzie and Wi Parata was discovered, McKenzie reportedly considered a 50-acre Crown purchase of Ngarara West C23 for 'a small settlement' in August 1898.[73] However, the surveyor-general advised McKenzie that Ngarara West C23 could not be taken compulsorily:

> I fear there will be some difficulties about acquiring the 50 acres out of this [section 23] Block, belong to Wi Parata. I understand he has very strong objections to sell . . . As to taking the land compulsorily, it is Native land, and I do not know of any power to take Native lands compulsorily for settlement purposes; nor is there any provision under the Land for Settlements Act for taking Native land, the compulsory powers being confined to lands granted by the Crown.[74]

Instead, the surveyor-general considered Wi Parata's plan for a township on Ngarara West C41 could serve the same purpose if it was brought under the Native Townships Act 1895. However, the surveyor-general advised that 'it would be stretching the law, for the Act does not contemplate the establishment of Native Townships where other townships exist as in this case'.[75] McKenzie's correspondence with the surveyor-general is significant because it demonstrates the Liberal

71. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 83
72. Parata township file (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 83–84)
73. McKenzie to surveyor-general, 22 August 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 84–85)
74. Surveyor-general to Minister of Lands, 26 August 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 84–85)
75. Surveyor-general to Minister of Lands, 26 August 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 85)

Government was leaning towards Crown intervention, as opposed to Wi Parata's intention to establish a private township.

On 26 August 1898, Wi Parata again wrote to the Minister of Lands informing him:

> I saw Mr Seddon on Tuesday re the Waikanae township & hope to have plans with pieces[?] of each section ready very shortly & will place them before you for your approval. Kindly send me list of those that are wishing to acquire township sections, so that I can write to them when the necessary papers are completed.[76]

Ms Walker could find no further evidence of what exactly Wi Parata and Seddon discussed at this meeting. However, it is reasonable to conclude from the above quotation that Seddon was prepared to support Wi Parata's private township scheme at this stage.

Nonetheless, by September 1898, Crown officials were considering acquiring land owned by Wi Parata under the Native Townships Act 1895. Significantly, officials believed this could not occur without Wi Parata's explicit consent because the township was considered too close to existing settlement.[77] According to Ms Walker, the Crown's shift in position was likely caused by several high-level meetings involving government officials and settlers from Waikanae.[78]

By late December 1898, the Crown had formed the view that Wi Parata had abandoned his plans for a private township. The chief surveyor informed the Minister for Lands that: 'I have recently obtained reports which go to show that Wi Parata has apparently abandoned the idea of laying out a township, for nothing of the kind is going on, whilst the demand for town and suburban sections at Waikanae is strong.'[79] On 20 January 1899, the surveyor-general wrote to Wi Parata asking whether he objected to the Crown taking some of his Waikanae land under the Native Townships Act 1895.[80] On 8 February 1899, he replied: 'Before handing over the land to the Government I would like an interview with Mr Seddon. So if you would kindly let me know when I can see him I will come down & settle the matter.'[81]

After several meetings with Premier Seddon, Wi Parata ultimately gave his consent in May 1899. It is unclear whether Seddon pressured Wi Parata to abandon his private township but there is no evidence that he did so. Given the Crown's acceptance of his original plan for the layout of a town, it may be that they were negotiating terms. Ms Walker commented:

76. Wi Parata to Minister of Lands, August 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 85)
77. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 86
78. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 124
79. Chief surveyor to Minister of Lands, 29 December 1898 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 89–90)
80. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 90
81. Wi Parata to W J Short, 6 February 1899 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 91)

> The question that arises here is why did the Crown not simply wait for Wi Parata to complete his township, when the previously submitted surveyor's plan indicated that it was close to completion? The letter to Wi Parata suggests that the overwhelming driver of this decision was settler pressure for a township to be created as soon as possible. However, as officials earlier acknowledged, Wi Parata's township could have met that need. There is no sign that the Crown ever considered working in partnership with him to assist him in the final steps needed to create an independent township. Instead, the decision was made to press ahead with a Native township by seeking Wi Parata's consent to bring his township under the Native townships legislation.[82]

In light of this, the claimants said that Wi Parata only acquiesced to the constitution of the Parata native township after Premier Seddon exerted significant pressure. The claimants also held the view that Wi Parata was led to believe the Crown would have established a native township on his land regardless of whether he gave permission.[83] Rawhiti Higgott added:

> The Township was forced upon Wi Parata and at first, he objected. Eventually, it seems, he felt obligated to agree to the township on his land be set up under the Native Townships Act 1895, as he wanted his people to benefit and prosper from any development.[84]

Conversely, Crown counsel argued these direct negotiations occurred at the 'highest levels' and represented good faith on behalf of the Crown because there was no legislative requirement to do so.[85]

After Wi Parata's consent had been obtained, Crown officials moved quickly and acquired Martin's township survey. Soon after, in May 1899, the chief surveyor met Parata at Waikanae to discuss the township, its ongoing development, and reserves. Wi Parata wanted to safeguard his existing water right agreement with the Wellington–Manawatū railway company, which consisted of a dam and pipeline running from the Kakariki Stream across sections 34, 39, 23, and 22. The Crown agreed to his wishes on this matter.[86]

The final layout of the township, including streets named for whānau members, was largely unchanged from Wi Parata's original plan.[87] On the matter of leasehold sections, it was agreed that 'Wi Parata and Mr Martin [the private surveyor he had engaged] will fix the prices at which the lands are to be offered, subject to the Surveyor General's approval.' Further, Wi Parata stipulated that no one was to erect a hotel on the township and that only substantial houses of six rooms or

82. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 90
83. Claimant counsel, closing submissions (paper 3.3.49), p 26
84. Transcript 4.1.18, p 287
85. Crown counsel, closing submissions (paper 3.3.60), pp 132–133
86. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 69, 71–72
87. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 94

more could be erected.[88] Claimant Hyrum Parata also commented that Wi Parata wanted 'substantial' buildings erected within the township.[89] In closing submissions, Crown counsel submitted this evidence demonstrated Wi Parata was ultimately agreeable to the establishment and location of the Parata native township.[90] This is evident, for example, in the fact that the Crown allowed Wi Parata to have far more say about the layout of the native township than the legislation required, and his wishes were largely accepted and given effect to in the final plan of the township.[91] They explained that this level of input was allowed for several reasons.

The Crown was amenable to adopting the survey already completed for Wi Parata (and reflecting his wishes), as this would save the Crown both time and money and potentially allow settler demand for township lands to be met more quickly. There was also a need to make practical arrangements with those who were already leasing portions of the township site from Wi Parata. This would then clear the way for putting leases for the township sections up for public auction. Wi Parata's mana as a rangatira of Te Ātiawa/Ngāti Awa ki Kāpiti and Ngāti Toa, and as a former Māori member of Parliament may have meant that Crown officials were more inclined to consult him and take his wishes into account. It is also possible Wi Parata and Seddon had agreed that the township as laid out by Wi Parata was to be adopted largely unchanged. However, without further evidence about their discussions this cannot be confirmed.[92] On 17 August 1899, the Parata native township was gazetted under the Native Townships Act 1895. It was described as 'a portion of Subd Ngarara West C Block containing 49 acres 1 rood and 19 perches'. Later that month, a further notice made minor changes to the description of the township's boundaries. The township plans were exhibited at the post office at Waikanae. Owners opposed to the sufficiency, size, or location of the reserves were able to file objections in the Native Land Court before 30 November 1899.[93] It was at this point, the claimants say, that control of the development of the township was no longer in the hands of Te Ātiawa/Ngāti Awa. The claimants also contended this designation under the Native Townships Act 1895 is difficult to understand, given Parata's intention to develop a private township, unless the Crown's primary objective was to facilitate the alienation of Māori land.[94]

6.4.3 Hemi Matenga challenges the Crown's understanding of who owned the Parata native township

On 10 January 1900, Hemi Matenga, the brother of Wi Parata, wrote to the surveyor-general claiming he was 'the registered proprietor' of the Parata native

88. Commissioner of Crown Lands to surveyor-general, 7 April 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 94)
89. Hyrum Parata, brief of evidence, 10 May 2019 (doc F50), p 2
90. Crown counsel, closing submissions (paper 3.3.60), p 132
91. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 95
92. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 95
93. 17 August 1899, *New Zealand Gazette*, 1899, no 69, p 1513 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 96–97)
94. Claimant counsel, closing submissions (paper 3.3.49), p 26

township. Crown counsel argued this correspondence demonstrated Hemi Matenga's intention to alienate the township land from Māori ownership 'much earlier in time than when the land was eventually freeholded (predominantly in the mid-1900s)'.[95] The letter, also signed by Wi Parata, explained:

> My mother died leaving land to my brother Wi Parata and myself. The title of which was issued to my brother. In 1897 an order in council was obtained to enable me to obtain the title to my share of the land. My brother executed a transfer of 640 acres. Before this was registered he applied to the Government to dispose of a portion of 640 acres under the Native Township act [*sic*] it being his wish not to part with the fee simple of the land to the English. Now that I am the registered proprietor of the land I desire to sell the township as I consider this course will assist me in finding tenants for the land I propose offering for lease [in pencil someone has added 'outside the township']. I have the honour to ask that you will take whatever steps you deem necessary to assist in giving effect to my wish.[96]

A second letter, written by Matenga's lawyers and dated January 1900, reiterated his claim to ownership of the township lands. The letter expressed Matenga's consternation and disappointment that the Crown had removed his control of the land for the township without consultation or consent. The letter also alleged that Matenga was the one to engage the private surveyor, R B Martin, to lay out the township. Further, the letter stated:

> Matenga following out his own course and never dreaming of such an action being taken as has been, has entered into agreements with people as to the occupancy of parts of the Township lands – How about these agreements? Matenga is uncertain [?] as to what part and how much of his land the government are taking – will you kindly supply him with a plan of the proposed Township so that Matenga may see what is being done and save Matenga from entering with further agreements – As Matenga had agreed to lay out this Township we must say we cannot see why this government interfered. Matenga is naturally very incensed about the whole matter.[97]

Matenga's ownership claim was met with considerable surprise by Crown officials. Until then, the Crown had dealt only with Wi Parata and noted that as far as it was aware, Matenga was not the registered owner of the block. Further, Wi Parata had never informed Crown officials during detailed discussions that Matenga was supposed to be the actual owner.[98] Matenga's lawyers held that the transfer may not have actually been registered because of 'certain formalities'. His lawyers added that the transfer remained with Wi Parata's lawyers, having been

95. Crown counsel, closing submissions (paper 3.3.60), p 132
96. Hemi Matenga and Wi Parata to surveyor-general, 10 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 100)
97. Nelson to S Percy Smith, 22 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 101)
98. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 101

signed 'some 2 or more years ago'. Matenga's lawyers stressed their client had, however, long been in possession of the land and had entered into unregistered leases with tenants. In other words, while the transfer from Wi Parata to Matenga was not officially recognised, it had long since taken effect on the ground.

The claimants argued that the Crown was aware of the complicated ownership situation, but knowingly disregarded it in order to establish the township.[99] Conversely, Crown counsel submitted that there is no evidence of bad faith by Crown agents continuing to engage directly with Wi Parata before Hemi Matenga's protests because Parata remained the registered owner of the land, as well as a senior rangatira. Wi Parata was also highly engaged in the process and, as noted above, did not appear to inform the Crown of the changing ownership situation.[100]

Ms Walker did not uncover any evidence demonstrating Matenga was instrumental in the establishment of the Parata native township. However, they did locate a transfer, signed by Wi Parata, conveying approximately 453 acres of part of Ngarara West C41 to Matenga on 27 October 1897. This land was adjacent to the railway and included the Parata native township site. Still, it took until 27 November 1900 for the transfer to be registered.[101]

Wi Parata's transfer of land to his brother was motivated by dissatisfaction with the Native Land Court award of 40 acres of the Ngarara West block to Matenga in 1891. Wi Parata, therefore, resolved to transfer 2,000 acres to his brother, namely land from Ngarara West A78 and Ngarara West C41. Indeed, on 21 August 1896, Wi Parata submitted a petition to the Governor and the Native Minister. The petition alleged that the court had treated his brother as an absentee. Wi Parata's petition stated he was 'desirous of transferring to his said brother two hundred (200) acres of first-class land part of section number 78 and eighteen hundred (1,800) acres of third-class land part of section number 41'.[102]

Wi Parata's petition received favourable consideration and on 20 January 1897 an order in council confirmed that 200 acres of Ngarara West A78 and 1,800 acres of Ngarara West C41 was exempted from section 117 of the Native Land Court Act 1894, 'for the purpose of alienation by way of transfer to Hemi Matenga Waipunahau'. However, the exemption was granted on the condition that Matenga would not be able to alienate his land other than by will or a term of lease for 21 years.[103]

Although Wi Parata gained an exemption from alienation restrictions under section 117 of the Native Land Court Act 1894, he was unable to attain confirmation from the Native Land Court because of anti-aggregation restrictions. Legislation prescribed that no more than 640 acres of first-class land could be transferred, however, Wi Parata wished to transfer at least 1,800 acres of Ngarara

99. Claimant counsel, closing submissions (paper 3.3.51), p 82
100. Crown counsel, closing submissions (paper 3.3.60), p 137
101. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 103–104
102. Petition of Wi Parata Kakakura, 21 August 1896 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 106)
103. 'Gazette notice excepting land from operation of section 117 of the Native Land Court Act 1894', 20 January 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 106)

West c. Consequently, Wi Parata transferred the 453 acres of Ngarara West c41 to Matenga.[104] The new title was then issued to Matenga in late 1900.[105]

Despite Hemi Matenga's claim to ownership, the surveyor-general refused to cancel the gazettal of the township. He informed Matenga and Wi Parata that the proclamation of the native township that vested the township land in the Crown had extinguished native ownership:

> In reply I have to say that this township has been proclaimed under the Native Townships Act, and is therefore no longer native land. The ownership of it merely involves the question of whom the rent should be paid. This will be ascertained in due course. It is proposed therefore, to proceed in the usual way and register the plan and then offer the Township for lease, leaving it to the Court to decide who are the owners entitled to receive the rents.[106]

However, an internal letter from the surveyor-general to the Minister of Lands noted it was possible to revoke the proclamation because the map of the township had yet to be registered. The surveyor-general, however, declined to revoke the proclamation, citing 'the expense and trouble that has been gone into [on] the matter'. He also explained that because the plan had been exhibited without objections, the site was ready to be leased.[107]

On 24 January 1900, the surveyor-general received notice that Matenga was pursuing the full transfer of land and had filed a caveat to prevent the constitution of the Parata native township.[108] Matenga wrote to the Commissioner of Crown Lands saying:

> My brother Wi Parata has transferred to me 640 acres of the land belonging to me through my mother deceased. He wishes to transfer to me the balance of my share, amounting to 2,000 acres, but is debarred from doing so through the classification by the Land Board. I have the honour to ask that your board will do me the kindness to reconsider the classification of this block. It is my intention when I have obtained the title to cut up the land and lease it.[109]

We received no evidence that Crown officials took steps to investigate or clarify the ownership status of the township lands with Wi Parata. Instead, the chief surveyor was instructed to deposit the native township plan with the district land registrar as soon as possible. Ms Walker explained that the surveyor-general saw

104. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 106–112
105. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 174
106. Surveyor-general to Hemi Matenga and Wi Parata, 15 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 113)
107. Surveyor-general to Minister of Lands, 12 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 113)
108. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 114
109. Hemi Matenga to Commissioner of Crown Lands, 10 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 111)

this as an 'insurance measure'. His reasoning was that 'the Act is mandatory, and if it has been complied with, the township has been constituted, and the title has apparently passed to the Queen by virtue of section 10 of the Act. This being so, it is not seen how the caveat can affect the case.'[110]

The township plan was deposited with the district land registrar on 26 January 1900. Further questions about the caveat were also put to the district land registrar by the Under-Secretary for Lands.[111] The Under-Secretary asked: 'Will you kindly state if you consider this caveat over-rides the terms of the Statute and if, in your opinion, it in the meantime prevents the land being disposed of and titles issued to the lessees.'[112] The registrar's response was that the caveat could have no effect, and the Crown was, therefore, able to register the leases. The registrar clarified 'a caveat was lodged by Hemi Matenga, which included the site of this Township. I understand however that it was not intended to affect it.'[113] By April 1900, the Crown appeared to consider the issue resolved because preparations were underway to put the leasehold sections of the township up for public auction.[114]

Crown officials, however, remained confused about whether the transfer from Wi Parata to Hemi Matenga had in fact been made. The insistence by the Crown that Wi Parata remained the owner of the township land meant that despite Matenga's protests, he was forced to seek authorisation from his brother to enable the rents to be paid to him. This occurred in August 1904, when the paymaster-general notified the Commissioner of Crown Lands that the authority had been received and that he ought to take steps to pay the rents to Hemi Matenga.[115] This did not, however, resolve the underlying issue of the beneficial ownership of the township lands. It also had a significant effect on payment of rents, and ultimately on the ability of Matenga to enjoy the proceeds from the township during his lifetime.[116] There was also confusion among both Wi Parata and Hemi Matenga as to how the township was actually administered and who was entitled to the rents.[117]

Hemi Matenga ultimately considered the Crown had wrongfully overridden his rights as owner of the township lands. He instructed his lawyers to raise the issue with Premier Seddon, 'with a view to remedying the grievance and handing back the management of the land to the owner who is quite competent to look after it himself'.[118] The Crown made no official response to Matenga's request for return of the control and management of the Parata native township. Ms Walker

110. Surveyor-general to chief surveyor, 24 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 114)
111. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 114–115
112. Under-Secretary of Lands to district land registrar, Wellington, 10 March 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 115)
113. District land registrar to Under-Secretary of Lands, 19 March 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 115)
114. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 115
115. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 168–169
116. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 165
117. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 131–132
118. Nelson to S Percy Smith, 31 January 1900 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 102)

ultimately concluded the Crown failed to investigate Matenga's assertions of ownership because it still viewed Wi Parata as the legitimate beneficial owner of the township site.[119]

It was not until October 1966 when the Māori Trustee clarified the matter of Hemi Matenga's ownership claims. The Māori Trustee was preparing to close his file on the township and instructed staff to begin 'an investigation to get the matter cleared up'.[120] The file demonstrated a portion of Ngarara West C41, including the township had been transferred from Wi Parata to Hemi Matenga on 27 October 1897. An attached note on the matter explained that the transfer was not registered under the Land Transfer Act until 27 November 1900, after which Hemi Matenga was the beneficial owner of the township lands.

Wi Parata's death in September 1906 underscored the difficulties for Hemi Matenga to be recognised as the beneficial owner of the township lands. On 22 May 1908, Hemi Matenga's lawyers were informed that the Commissioner of Crown Lands was about to take steps to pay rents accrued up to 31 March 1908. However, it was the Crown's view that 'Hemi Matenga and Hira Parata are the administrators of the will of Wi Parata deceased. The rents, will, in consequence, be paid to them.'[121] In response, Hemi Matenga again responded that the Crown's position was incorrect and that he was the sole owner of the land and, therefore, entitled to all of the rents.[122] Crown officials ignored this protest, and on 28 May 1908, paid the accumulated rents from 2 April 1906 to 31 March 1908 to Hemi Matenga and Hira Parata jointly as administrators of Wi Parata's estate.[123] It remains a mystery as to why the Crown did not check the title on the land transfer registry.

In 1910, Hemi Matenga and Hira Parata, as the trustees of Wi Parata's estate, took conclusive action to settle the ownership issue. Hemi Matenga's lawyers wrote to the Māori land board in June 1910 about the difficulty of getting rents paid. They enclosed a deed of assignment, dated 3 May 1910, from Hira Parata and Hemi Matenga ('assignors' as executors of Wi Parata's will) to Hemi Matenga ('assignee'). The deed assigned all unpaid and future township rents to Hemi Matenga, together with 'all the rights and interests vested in or belonging to the said Wi Parata Kakakura at the date of his death under "The Native Townships Act, 1895" in respect of the said Township.'[124]

The board seemed satisfied that the deed of assignment resolved the issue as to who should receive the rents, stating in an internal memorandum that Hemi Matenga could now 'be regarded as the beneficial owner of the rentals, and as such

119. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 116
120. Note to Mr Douglas, 14 March 1966 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 175)
121. Under-Secretary for Lands to Adams & Harley, 22 May 1908 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 169)
122. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 169
123. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 170
124. Deed of assignment between Hira Parata and Hemi Matenga, 3 May 1910 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 172)

is entitled to the sum at credit of the account'.[125] This internal memorandum seems to have settled the matter of the rents but still not that of the ownership of the township land. It was not until after Hemi Matenga died in 1912 that the matter was conclusively resolved when the Native Land Court issued a succession order, dated 14 January 1914, naming the trustees of his estate as the 'the persons who are entitled to succeed to the interest of and in the said land [Parata Township] as from 26 April 1912'.[126]

While the issue of which brother was the beneficial owner may seem a minor one in comparative terms, it is clear that the Crown as trustee was careless of Māori interests. As discussed in the next section, the township was slow to develop under the Crown's control, rents were sometimes in arrears, payments were delayed, and the ongoing failure to correctly identify the beneficial owner was symptomatic of wider problems. We discuss the impacts of these issues on the claimants later in this chapter.

6.5 How Were Parata Native Township Sections Administered and What Influence Did Māori Have on Decisions about their Land?

6.5.1 Leaseholding Parata native township sections

The Native Townships Act 1895 empowered the Commissioner of Crown Lands to lease township sections via public auction or tender for a term not exceeding 21 years. However, the lease could be renewed for a period not exceeding a further 21 years. The Native Townships Act 1910 vested all native township lands in district Māori land boards, which were empowered to issue a perpetually renewable lease (known as the 'Glasgow lease') for any township section.[127]

Ms Walker noted the initial auction of township leases, held on 11 September 1900, was a 'solid start' but not an overwhelming success. Approximately half of the 36 sections were taken up. The total annual rental for the 18 sections was £56 19s. Two further sections were leased by the end of 1900. The remaining sections had all been leased by 1904.[128] Mr Martin calculated the upset rentals (the lowest rent that would be accepted) that were advertised against every section. The Government adopted these valuations with only one exception: Martin's valuation of £40 for section 39 was reduced to £35 by officials.[129] The number of sections leased by the Commissioner of Crown Lands, and then the district Māori land board, remained relatively stable between 1901 and 1921. Of the 36 available sections, an average of 88 per cent were leased. After 1921, however, there was

125. J B Jack, president, Ikaroa District Maori Land Board, memorandum, 11 July 1910 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 172)

126. Succession order for interests of Hemi Matenga's interests in Parata township, 14 January 1914 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 178)

127. Native Townships Act 1910, s 13; Public Bodies Leases Act 1908, s 8; see also Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 129.

128. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 130–131

129. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 130

a considerable drop in the number of sections leased. This was the result of an increase in the number of sections freeholded (discussed below).[130]

Both Wi Parata and Hemi Matenga continued to seek involvement in the township's administration, which must have further muddied the waters as to which of them was the beneficial owner. On 18 September 1900, a week after the auction, Matenga's lawyers wrote to the Commissioner of Crown Lands to express their client's concern that he had not been provided with any advance notice of the auction. According to Matenga, he had no idea the auction had taken place. Wi Parata also reportedly believed he had the right to take control of any township sections that had not been leased.[131] Crown officials, however, considered that the beneficial owner's only role was to receive income from township rents.

The rate of leasing in the Parata native township meant that profitable rental income for the owner remained realistic. However, several factors impacted the actual benefits the beneficial owner received from the township scheme. In particular, the holding of sections for speculative purposes was an impediment to development. Hyrum Parata told us the fact the Act did not impose on the lessee any conditions to substantially improve township lands hindered the progress of the township.[132] Historian Alan Ward held a similar view, observing that while speculators acquired leases, the sections would often lie idle, impacting the township's popularity because settling in an undeveloped area was a less attractive prospect to potential lessees.[133] Settlers who lobbied for the township prior to it being gazetted, requested the Crown take action to deter speculators. Specifically, they suggested lessees who wished to live on the township's sections or run businesses might be prioritised in the public ballot for leaseholds. However, the Crown was unable to adopt this suggestion because of the open ballot procedure for auctioning leases, as prescribed by the Native Townships Act 1895.[134]

Very early in its existence, Crown officials raised concerns about the lack of development within the Parata native township. In January 1901, a Crown report found that 'on 12 sections no improvements have been done & the improvements on the other sections consist chiefly of fencing, only two houses have been built'.[135] Nonetheless, the report was optimistic that the situation would improve. Wi Parata, too, had expectations for the township's development. On 3 March 1902, the surveyor-general noted Wi Parata

> called upon me today and pointed out that the lessees of this Township have not built upon their sections, and complied with provisions of Regulation No. 6 of the

130. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 132
131. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 131
132. Parata, brief of evidence (doc F50), pp 2–3
133. Alan Ward, *National Overview*, Waitangi Tribunal Rangahaua Whanui Series, 3 vols (Wellington: Waitangi Tribunal, 1997), vol 2, p 409 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 134)
134. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 134
135. Crown lands ranger to Commissioner of Crown Lands, 15 January 1901 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 135)

> Conditions of Lease. He wishes you [Commissioner of Crown Lands] to take steps to cancel the leases and dispose of the land to people who will build, improve and advance the township.[136]

In June 1902, W H Field, the member for Ōtaki and also a township lessee, wrote to the Commissioner of Crown Lands noting 'some complaint is being made by Wi Parata and others that many sections in this Native Township are not being built on or otherwise improved'.[137] The Crown appeared generally sympathetic to Wi Parata's concerns about the slow pace of development, which affected all the Te Ātiawa/Ngāti Awa landowners who had expected to benefit from economic growth.[138] Both Wi Parata and Hemi Matenga saw a growing and vibrant township as a way of attracting more Europeans to the district, which would enable them (and other Māori owners) to lease and benefit from their other lands in the Ngarara block.[139]

In March 1904, a second report by the Crown lands ranger found that two-thirds of lessees, amounting to 23 sections, were using their sections for grazing purposes only. Further, he noted that there were people keen to get sections to build homes 'but they consider the price asked by the present lessees [for transfer of the leasehold] to be exorbitant'.[140] In response, the Commissioner of Crown Lands sought a legal opinion concerning the extent of the Crown's powers to compel lessees to carry out improvements on their leasehold sections. The Crown Law Office took the view that there was nothing in the lease or regulations that would compel lessees to make 'specified improvements within a given time'. Moreover, the Crown Law Officer considered the commissioner was unable to alter the regulations or terms of the leases.[141] Wi Parata was informed of this position by the Native Minister on 9 September 1904.[142] In closing submissions, Crown counsel also took a similar view, arguing that despite the low rate of development, the Crown could not compel lessees to develop their land.[143]

Further, in 1905, W H Field referred to the Parata native township in Parliament. He commented: '[T]hough divided into some forty sections only six houses had been built, and the main object had been therefore defeated, the majority of the sections having been taken up and being still held for speculative purposes.' Field was reportedly told that the Government did not have the power to enforce the erection of buildings and other improvements 'to make these townships a

136. Surveyor-general to Commissioner of Crown Lands, 3 March 1902 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 136)
137. W H Field to Commissioner of Crown Lands, 4 June 1902 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 137–138)
138. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 136–137
139. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 134
140. Crown lands ranger to Commissioner of Crown Lands, 25 March 1904 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 138–139)
141. Under-Secretary of Lands to Commissioner of Crown Lands, 8 August 1904 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 142)
142. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 142
143. Crown counsel, closing submissions (paper 3.3.60), pp 138–140

success.'[144] It is unclear whether any measures were taken to boost development of the township. The lack of development was an ongoing concern for Wi Parata for the remainder of his life.

Te Ātiawa/Ngāti Awa as a collective derived minimal economic gain because the township rents were paid to one beneficial owner. This was a concern for the claimants in this inquiry.[145] The restriction of immediate benefits to one owner was a consequence of the total individualisation of title that occurred in 1891. As explained in chapter 4, the Ngarara and Waipiro Further Investigation Act 1889 required the identification of all individual interests on the ground, following the recommendations of the Ngarara commission. Wi Parata and the majority of owners opposed this compulsory division of their interests, including by action in the Supreme Court, but were unable to prevent the Native Land Court from carrying out this complete individualisation of their title under the 1889 Act. If the owners' wishes had been observed in 1889–91, the township land would still have been in the ownership of most of the Te Ātiawa/Ngāti Awa registered owners, who would then have benefited from the rentals and the native reserves. By 1906, the Crown had abandoned the 1900 agreement with Kotahitanga to ban all purchasing. As explained in the previous chapter, the private purchase of Māori land in the district was rapid and uncontrolled from 1905 onwards, with no Crown assistance in terms of capital to develop the dwindling Māori estate. The original plan for a town that would benefit its rural hinterland became increasingly irrelevant to Te Ātiawa/Ngāti Awa as a result.

In 1908, two years of accumulated rentals were paid over to Wi Parata's estate.[146] It is difficult to get an accurate picture of the extent to which lessees were in arrears. However, there is enough in the available sources to suggest that the late payment of rents was a persistent problem, meaning that the township generated an inconsistent income. From 1901 to 1908, for instance, only 50 to 80 per cent of rents owed were actually paid. However, in 1903, 1907, and 1908, more rents were paid than owed, indicating payment of rental arrears.[147] During this period, detailed accounts for each native township were published in the *Appendices to the Journal of the House of Representatives*. Between 1900 and 1908, the Commissioner of Crown Lands monitored the leases relatively closely and acted to resolve situations where rent was unpaid. However, despite the terms and conditions of the lease allowing the commissioner to take swift action after just a month of a lessee being in arrears, he often only took action after arrears mounted significantly.[148] In light of this, the claimants asserted the Crown breached its duty of good-faith conduct and the principle of partnership by not enforcing the payment of township leases.[149]

144. 'Native Townships Local Government Bill', 16 October 1905, NZPD, vol 135, p 738 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 142)
145. Claimant counsel, closing submissions (paper 3.3.51), p 83
146. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 170
147. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 147
148. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 150
149. Claimant counsel, closing submissions (paper 3.3.55), pp 31–32

In late 1908, the Aotea Māori Land Board began administering the township (followed by the Ikaroa Māori Land Board in 1914). At this point, Crown counsel argued the Crown was no longer responsible for the failures of other administrative agencies tasked with collecting rents or for the lack of accurate records.[150] Ms Walker also explained after 1908, arrears became a more widespread problem:

> Two factors worked against the board's ability to ensure rents were paid on time. The boards were based in Whanganui and Levin (later in Wellington), respectively, some distance from Waikanae. They did not have the services of the Crown Lands Ranger, who the Commissioner had often called upon to inspect the township sections and talk to lessees. Monitoring of rent payments also suffered because of the transition from the Commissioner of Crown Lands to the Aotea District Maori Land Board in 1908, followed by a rapid transfer to the Ikaroa District Maori Land Board in 1910 (when the boundaries of the board's districts changed).[151]

Ms Walker only discovered five balance sheets – from 1908, 1910, 1916, 1947, and 1949 – that contained information about rent arrears, suggesting these two Māori land boards often failed to meet their obligation to report on arrears under the regulations that governed their procedures. The regulations relating to the district Māori land boards under the Native Land Act 1909 required that a return be laid before the board showing the names of all lessees of lands vested in or administered by the board who defaulted on rents for at least three months. Also, the return should have shown the amount of such rent in arrears.[152]

Further, the schedule of township leases from 1908 records that eight of the 22 leases were in arrears. Additionally, many lessees had not been receiving regular notices that their rents were due.[153] Legal powers did exist for reserves agents to re-enter, repossess, and relet sections that had fallen into rent arrears for 30 days or more. However, in the case of the Parata native township, the Māori land board generally opted to send warning notices for non-compliance.[154]

Administrative costs of the township also reduced economic benefits for beneficial owners. These costs included commissions on rent and on the proceeds of the sale of sections to lessees. The Native Townships Act 1895 provided only for the costs of the survey and constitution of the township to be charged to Māori. Later amendments and regulations did not explicitly provide for further charges to be recovered, including the whole cost of the township's administration.[155] The beneficial owner and later trustees may also have been unaware of the extent of the costs deducted from the income they received. Balance sheets from the period from 1911 to 1933 rarely showed costs beyond the commissions on rent, which averaged around 5 per cent of the township's total income per year. On the other

150. Crown counsel, closing submissions (paper 3.3.60), pp 138–140
151. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A24), p 151
152. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 150
153. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 151–151
154. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 415
155. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 219

hand, balance sheets for the period of 1946 to 1957 consistently itemised costs, the median cost per year being 16.3 per cent. The costs of surveying the township, while relatively small, also fell on the owners to repay.[156] With the death of Hemi Matenga, the circle of township beneficiaries widened in 1912, as discussed in the next section.

6.5.2 The will of Hemi Matenga and the beneficial ownership of the Parata native township after 1912

The death of Hemi Matenga on 26 April 1912 affected the beneficial ownership of the Parata native township in a very significant way. The township land itself was not specifically dealt with in Hemi Matenga's will. Instead, the will stipulated that all the residual property, which included the Parata native township land, was to be managed by two trustees: Malcolm Pratt Webster and Thomas Neale, both Nelson merchants. These trustees would act for the descendants or beneficiaries of Hemi Matenga and Wi Parata identified in the will. Rents from the township were to be managed as a fund with all other residual property. Matenga's will also stipulated that the trustees were empowered to sell or lease real estate, with any proceeds added to the fund.[157] While Matenga trusted both men, it is unclear whether they had any relationship with the beneficiaries or understood the cultural and spiritual significance of the land to the beneficiaries or descendants.[158] Nonetheless, as Crown counsel submitted, it was Hemi Matenga's own decision that the land should be dealt with in this way rather than ultimately preserved in Māori ownership, based on his view of what would most benefit his successors.

In January 1914, the Native Land Court issued a succession order to Webster and Neale as the trustees of the Matenga Estate. This was done under section 150 of the Native Land Act 1909, which stated: 'If an interest in Native land is devised by the will of a Native to any person in trust (otherwise than a bare trustee) the succession order shall be issued in the name of the trustee, but the existence of the trust shall be set forth in the face of the order by reference to the will of the deceased.' The effect of the succession order meant that the trustees were empowered with sole decision-making authority concerning the Estate. The trustees had authority to 'expend such part as they should think fit of the income towards the education, advancement in life or for the benefit of certain persons named'. Once this occurred, the will stipulated they should 'accumulate and invest the net income in each year not applied for the benefit of these beneficiaries'.[159] Additionally:

> after the death of the last of Wi Parata's children (named in the will as Metapere Ropata, Winara Parata, Hira Parata, and Utauta Webber) the trustees were to pay the

156. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 218–219
157. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 177, 179
158. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 177
159. Petition of Reuben Tiwini, Konehu Bailey, and Ernest Morton Ryder, Levin, not dated (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 179)

New Zealand Maori Mission Board the sum of £1,000 and then the residuary fund was to be divided into equal shares for the named offspring of Wi Parata's children.[160]

Ms Walker summarised that the provisions of the will meant that although the township revenue was being paid to the trustees of the Estate, it was not being distributed to the beneficiaries. Instead, the funds were being reinvested by the trustees until the eventual distribution to Hemi Matenga's great-nieces and great-nephews.[161] The board dealt solely with the trustees and not the Parata whānau.

The trustees of the Hemi Matenga Estate still experienced considerable difficulty in receiving regular rent payments from the Ikaroa Māori Land Board (and later, the Māori Trustee). The consistent payment of rents was contingent on the trustees regularly prompting the Ikaroa Maori Land Board. When the trustees failed to do so, payments would become overdue. In September 1929, after rents went unpaid for almost three years, the surviving trustee, Thomas Neale, asked the position of the Ikaroa Māori Land Board on payments.

The Ikaroa Māori Land Board replied that 'remittances of rents etc due to this estate have been forwarded by this Board when requested so to do by the late Mr Webster'. The board enclosed a voucher for accrued rents, information on sections, and it undertook to pay rents to the Estate twice a year.[162] Although Neale noted he was grateful for the rent payments, he observed that paying rents only when requested was not satisfactory, and had resulted in lost opportunities to invest the funds and earn interest for the Estate.[163] Only after 1929 were rents consistently paid twice a year, with balance sheets supplied.

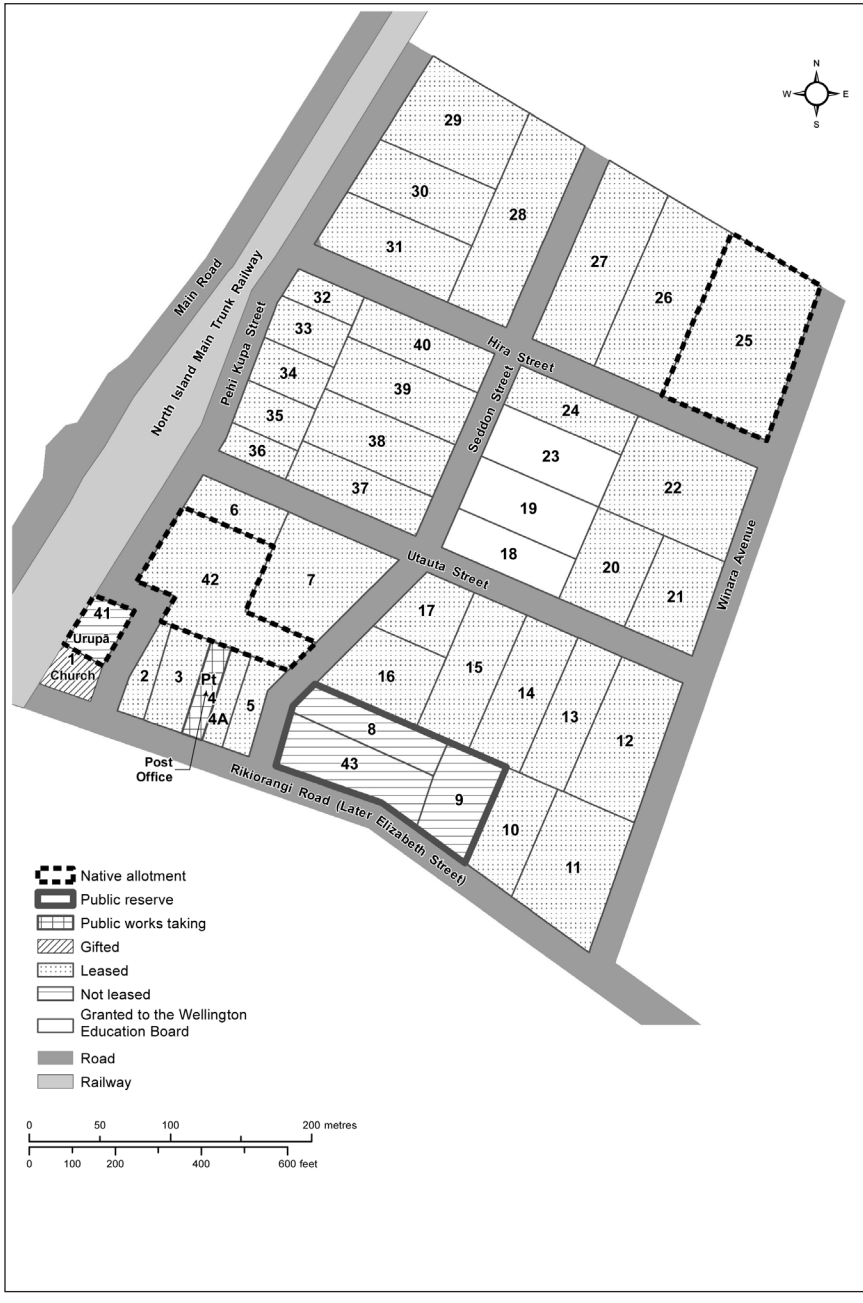
6.5.3 Freeholding Parata native township sections

As discussed, the Native Townships Act 1910 enabled Māori land boards to sell township lands to the Crown or 'any persons' with the 'precedent consent' of the beneficial owners or trustees, and allowed the Crown to purchase from beneficial owners directly. Despite these changes to the legislation, the tenure of sections within the Parata native township remained almost entirely leasehold until 1920.

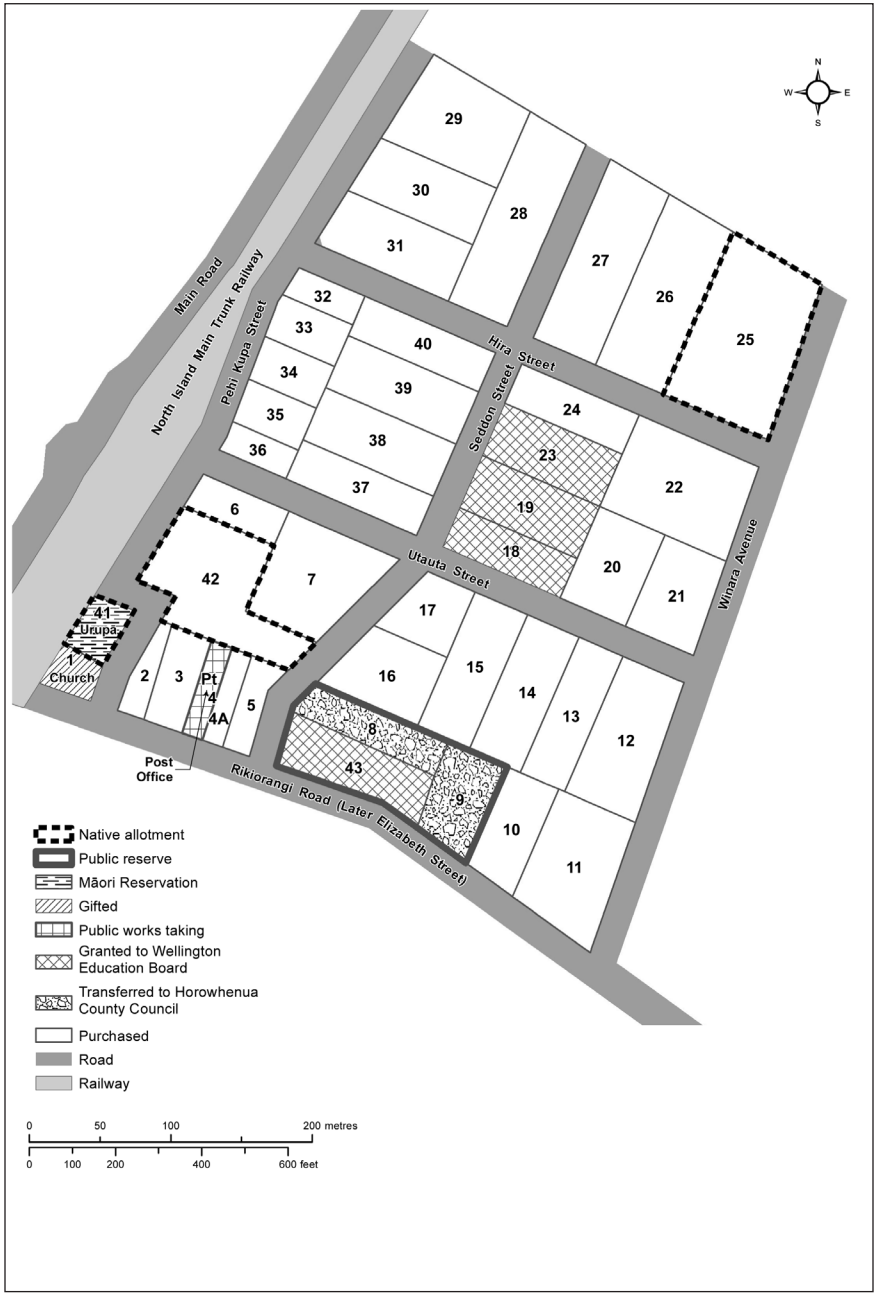
From late 1909, Hemi Matenga had expressed support for a suggestion that some township sections could be sold to lessees. He appeared to believe that freehold tenure would promote the township's economic growth to the benefit of all. Matenga's desire for the power to freehold was noted in parliamentary debates on the Native Townships Bill in 1910. As W H Field, the member for Ōtaki, commented:

In the case of the township in my district, however, the owner is a wealthy man – a half caste: a brother of the late Wi Parata, who is well able to conduct his own affairs

160. Hemi Matenga, will, 22 November 1911 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p179)
161. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp179–180
162. Ikaroa District Maori Land Board to Thomas Neale, 18 September 1929 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p181)
163. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p182



Map 10: Parata Native Township sections, 1910.



Map 11: Parata Native Township sections, 1970.

> – and I know that it is his desire to be allowed the power to sell if possible. I do not know that he would sell; but it seems a pity, if he is willing to sell, and since he has ample property for his future maintenance, that he should not be allowed to sell to tenants who are willing to buy.[164]

W H Field had a vested interest in these provisions being passed, as he leased one of the township sections.[165] Field also painted a picture of significant underdevelopment in the township. Several other members suggested that the native townships scheme had been a failure.[166]

Following the passing of the Native Townships Act 1910, Matenga reiterated his wishes, via his lawyer W H Field, to sell the fee simple of some of the township sections to lessees.[167] Again, we note that Field himself was a Parata township lessee, as well as Hemi Matenga's lawyer, likely amounting to a conflict of interest when dealing with this particular matter. The Ikaroa Māori Land Board, however, appeared to favour perpetual 99-year leases (the so-called 'Glasgow' leases), which had been made available under the Native Townships Act 1910, as opposed to outright sales, although there was little difference in practical terms. The president of the board replied to Field:

> I am not at present prepared to say what view the Board will take later of the matter, so far as the proposal relates to leased lands. Lessees may convert their leases into 'Glasgow Leases'. At present the Board has in view the question of offering for competition, Glasgow leases of Sections 29, 30 and 31 Block I, which are at present vacant. Perhaps Hemi would agree to those being sold instead of leased.[168]

During 1912, Matenga again requested permission to sell sections of the township. Similarly, the board received inquiries for freeholding from three lessees. In each case, the board replied in the following manner:

> the Board has no particular desire, at the present time, to dispose of the freehold of any sections in the above Township. There is, however, nothing to prevent you making an application for the purchase of the section leased to you, but you will [be] require[d] to state the price you are prepared to pay, when the Board will no doubt give your offer full consideration.[169]

164. 'Native Townships Bill', 2 September 1910, NZPD, vol 151, p 275 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 189)
165. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 189
166. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 218
167. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 190
168. President, Ikaroa District Maori Land Board to Field and Luckie, 21 September 1911 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 190)
169. Clerk, Ikaroa District Maori Land Board to Mrs F Cruickshank, 31 January 1913 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 191)

It is not surprising, therefore, that Hemi Matenga's will provided for the sale of the township as well as other land. When he died in April 1912, the trustees of his estate were reportedly aware that the Ikaroa Maori Land Board was willing in principle to deal with applications to convert leaseholds to freehold in township sections. Again, the Native Townships Act 1910 provided three steps for the sale of land to occur. Applications required the precedent consent of the beneficial owners, the agreement of the board, and the consent of the Governor-in-Council.[170]

In the case of the Parata township, the beneficial owners were the Estate trustees, not the will's beneficiaries. Decisions made by the trustees concerning the sale of township sections were taken in context of their duties to adhere to the terms of Hemi Matenga's will. The foremost purpose of the will was to protect and grow assets through a residuary fund, before the proceeds were ultimately distributed among the second generation of beneficiaries. To achieve this, the trustees were directed to sell and convert his real and personal property, including the Parata native township, into money. Because of this direction, the eventual liquidation of the township lands was almost an inevitability.[171] The beneficiaries of the will had only one option, if they wished to retain their surviving interests in these ancestral lands, and that was to appeal to the Crown to intervene and protect their interests. This option is discussed further below.

From 1912, the Ikaroa Māori Land Board began receiving inquiries and offers from lessees to purchase township sections. In early 1914, the board received a petition from 10 lessees in the township saying that they were

> desirous of obtaining the freehold of the sections we hold under lease in the above township. As under the present leases we are unable to get any advances to improve the present situation thereby keeping the township from advancing and making progress. We therefor[e] trust that you may see your way to remove any restrictions so that holders may be able to purchase. The natives are willing it should be so also are the trustees who manage the Estate.[172]

Despite this early interest, it was not until August 1921 that the trustees gave their consent for freeholding to commence. As early as February 1913, the trustees had offers to purchase before them, however, the question of ownership of the township was still a live issue. This appears to have caused the Ikaroa Māori Land Board to hold back information on the township and its leasing arrangements. In December 1914, after ownership had finally been determined by the court's appointment of the trustees pursuant to Hemi Matenga's will, the board supplied the trustees with valuations of all the township sections and asked the trustees to consider selling all of them. The trustees, however, appeared to have contemplated this offer for several years. This delay seems to have been in part due to the duties

170. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 197–198, 201
171. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 193
172. Letter regarding the Parata Township, 1914 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 199)

imposed on the trustees by Matenga's will to maximise possible benefits for the Estate and its beneficiaries. In March 1919, the Ikaroa Māori Land Board asked the trustees whether they would consent to the freeholding of one section of the township at the request of the lessee. By August 1921, the trustees had signalled their willingness to give their consent to applications by lessees for freehold.[173]

We were not made aware of the reasons as to what caused the trustees to finally give consent. Several other factors contributed to the start of an intensive period of freeholding of the township sections through the 1920s:

> Most township leases were coming up for renewal and the opportunity for a more secure tenure on which they could borrow was attractive to many lessees. Economic and social conditions were also improving. The settler community at Waikanae had recovered from the immediate aftermath of World War I and the 1918 influenza pandemic, and the economic climate was positive. These circumstances seem to have encouraged many of the lessees to purchase their sections.[174]

In the case of the Māori beneficiaries, their consent was not sought or required. The beneficiaries also had little recourse to object to the sale of land or to challenge the way the trust was administered. Claimant counsel argued the Crown failed to actively protect the claimants' economic base by allowing freeholding by private purchasers.[175] In closing submissions, Crown counsel submitted the Crown was neither involved, nor responsible for this decision to freehold Parata native township land.[176]

By 1921, demand for freehold land increased as leases expired, which meant that the decision about sale would be made by the Estate trustees, the board, and the Crown, not by the Parata whānau. The trustees of Hemi Matenga's estate agreed in principle to freeholding when lessees applied to the board. As the 1920s came to an end, 18 of the 36 original township sections were freeholded. Demand for freeholding decreased significantly between 1930 and 1950, when only one section was freeholded. This inactivity was largely due to the Native Purposes Act 1941 prohibiting the trustees of Hemi Matenga's estate from selling land. The Depression of the 1930s and the Second World War may also have inhibited the ability of lessees to purchase sections.[177]

In January 1923, Tohuroa Parata, a beneficiary of Matenga's estate, wrote to the Native Minister explaining:

> It is the intention of the present Trustees Messrs M P Webster & T Neal [*sic*] both of Nelson to dispose of all lands at present under Lease to different persons, after the Lease[s] have terminated. Personally I would not like the lands sold but to be re-let,

173. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 195–197, 200
174. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 200
175. Claimant counsel (Wai 1628), closing submissions (paper 3.3.51), p 84
176. Crown counsel, closing submissions (paper 3.3.60), p 133
177. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 183–184

> as there are several in the district who will pay so much as 100 p c. advance of the present rates. I may not benefit from the estate personally but my children will after me, and I am sure the Land would be more to them than the money from the sales of such lands . . . The Trustees have not yet supplied us with any information as to what they are doing with the rents from the estate, since the decease of Hemi Matenga [in] 1912. I would like you to confer with Sir Maui Pomare re this matter.[178]

The Crown was not willing to consider any form of intervention at this point, although it later did so in the 1940s. The Under-Secretary noted that there was no particular duty imposed on the trustees to supply the beneficiaries with information about what was occurring with the rents. In terms of objecting to the activity of the trustees, the Under-Secretary also advised that 'if, however, any of the beneficiaries have reason to believe that the trustees are not carrying out the Trusts created under the will, it is open to them to move the Court in the matter'.[179] This, of course, was of no assistance to Tohuroa Parata as to take such action would be expensive with no guarantee of success.

During the 1920s, nine lessees acquired freehold title to 18 sections in the township. Lessees wishing to purchase the freehold of their sections were required to make a written application. As per the native township legislation, the board then met and approved the application. The trustees of Matenga's estate were informed of the application and the board's approval and asked to give their consent to the sale. Once the trustees' consent had been obtained, the board sought the consent of the Governor-General-in-Council to the transaction, and an order in council was gazetted. Proof of these steps and a draft transfer was then forwarded to the district land registrar, who then registered the transfer and issued a certificate of title to the new owner.[180] It appears that the Crown rubberstamped all applications to sell, perhaps persuaded by the agreement of the Estate trustees. The concerns expressed in 1923 by Tohuroa Parata on behalf of his whānau and future generations do not appear to have been taken into account when the Crown routinely approved sales of Parata township lands.

6.5.4 The Crown intervenes at the request of the beneficiaries

In 1938, a major dispute concerning Hemi Matenga's will developed after the trustees' solicitor advised that the trustees could not legally continue to accumulate and invest surplus income for more than 21 years after his death. Instead, the trustees' solicitor believed 'the surplus income in each year after the 26th April 1933 should have been paid to the next-of-kin of the deceased'.[181] This position

178. Tohuroa H Parata to Native Minister, 31 January 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 194)

179. R N Jones to Native Minister, 28 February 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 194)

180. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 201

181. Petition of Reuben Tiwini, Konehu Bailey, and Ernest Morton Ryder, 1944 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 203)

conflicted with the terms of Hemi Matenga's will and resulted in litigation on behalf of the beneficiaries.

In June 1938, Tohuroa Hira Parata and other beneficiaries petitioned Parliament regarding the Estate. The others involved in the petition were Tukumaru Webber, Rarangi Webber, Mike Webber, Arona Webber, Paioke Parata, Te Ropata, Herehere Ropata, Tata Parata, Ngamoana Ropata, and Hauangi Parata.[182] The petition conveyed their objections to the trustees of the Estate ceasing accumulating and investing the income from its assets.[183] The petitioners believed this would reduce the value of the Estate, 'contrary to the express wishes of the deceased'.[184]

Tohuroa Parata and others who petitioned Parliament in June 1938 were also concerned about what would happen when the residuary fund was divided. They were particularly worried about further land being sold. The petitioners noted that once the last of Wi Parata's children (Utauta Webber and Mahia Parata) died, the sale of properties was inevitable, as the terms of Matenga's will obliged the trustees to sell the land and distribute the cash between the petitioners and their co-beneficiaries. The petitioners stated this 'would result in the waste of the said Estate and would not enable them to fulfil their desires to have it constituted a perpetual trust'.[185] The perpetual trust that the petitioners wished to establish would retain their ancestral land in their own beneficial ownership and continue the distribution of income among them. It was also envisaged that three trustees of their choosing would run the perpetual trust rather than those appointed by the will, who were completely indifferent to the beneficiaries' wishes.[186]

In terms of what to do about either investing or paying out the income, the trustees of the Matenga Estate brought the matter to the Supreme Court in August 1938.[187] A compromise was eventually reached between the next-of-kin and the beneficiaries of Hemi Matenga – they agreed to receive an equal share of the surplus income from 26 April 1940 until the death of Utauta Webber. After her death, the residuary fund would be divided, but, following the terms of the will 'the next-of-kin could take no further benefit as there could be no intestacy'.[188] Ms Walker noted, however, the payment of this income appears to have been delayed for a number of years because the trustees were required to calculate the amount of income involved and whether tax was overpaid. It is unclear from the evidence whether the matter was resolved.[189]

182. Rigby and Walker, papers in support of 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214(a)), p 7
183. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 203–204
184. Petition of Tohuroa Hira Parata and seven others, 26 June 1938 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 205)
185. Petition of Tohuroa Hira Parata and seven others, 26 June 1938 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 205)
186. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 205–206
187. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 204
188. Solicitors to Minister of Native Affairs, 3 May 1945 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 204)
189. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 204

In response to the June 1938 petition, the Crown made provision in the Native Purposes Act 1941 for a perpetual trust to be established upon the death of Utauta Webber. Section 12 of the Act stated:

> the contingent residuary beneficiaries are desirous that certain Native lands at Wakapuaka aforesaid and at Waikanae in the North Island, being part of the assets of the estate of the said Hemi Matenga, deceased, be not sold pursuant to the terms of the said will, but that such lands, together with the remainder of the residuary trust fund, be retained as a perpetual trust upon the terms set forth in this section.

The provisions of the Native Purposes Act 1941 would supersede the will once the last surviving first-generation beneficiary (Utauta Webber) died, so long as at least one of the second-generation or 'contingent residuary' beneficiaries named in the Act was still alive when she died. A new trust would then be established, called the 'Hemi Matenga Trust'. It would have three trustees: one appointed by beneficiaries, one appointed by the Governor-in-Council, and the Native (later Māori) Trustee. In the interim, the Estate trustees would not be allowed to sell any more land. All residuary trust land, including the surviving Parata native township sections, was made inalienable except by way of mortgage or lease for periods of up to 21 years, until the main provisions came into effect on the death of Utauta Webber.[190] Although the petitioners had wanted to appoint all of the trustees, the legislation met their main goal in preserving the land for future generations.

Within less than a decade, however, the prohibition on freeholding was removed. Section 20(5) of the Māori Purposes Act 1948 repealed provisions for a perpetual trust, and with it the restrictions on alienation of estate land. The legislative changes were in response to a second petition in 1948 from Utauta Webber and 44 other beneficiaries of Matenga's estate. The petitioners had sought to remedy a technical flaw in the will that prevented the children of those beneficiaries who died before Utauta Webber taking up the share of their deceased parent. They stated:

> They were not and are not now desirous that a perpetual trust should be created, but on the other hand they desire that upon the death of the said Utauta Webber the said Will should be given full effect save only that the issue of any contingent residuary beneficiary who may have died should take the share of such beneficiary.[191]

The petitioners asked that 'the said [1941] Act should be amended so that upon the death of the said Utauta Webber the said Will shall be given full effect'. Ms Walker explained that the evidence does not show why the petitioners of 1938 and 1948 took such different stances on the idea of a perpetual trust. Ms Walker noted

190. Native Purposes Act 1941, s 12
191. Petition of Utauta Webber and 44 others, 1948 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 207)

evidence provided by Hauangi Kiwha at hearing, who suggested moves by the trustees to sell the remainder of the town were highly contested:

> The Hemi Matenga Estate was a topic of interest to all the beneficiaries in Hemi's will. The fate of the land was a very frequent point of discussion, often heated, between my father and others in the family. The family heard the arguments over the phone line. My father was strongly opposed to selling it. Others wanted to sell.[192]

By repealing the provisions of the Native Purposes Act 1941, the Crown was addressing the wishes expressed by the second group of petitioners in 1948. In respect of the township sections, they were likely motivated by the perpetual leases that would prevent them from ever regaining any control or the ability to occupy the sections themselves. A major consequence of the repeal was that the new trust with an owner-appointed trustee never came into effect, and the remaining township sections were all sold, ending the beneficiaries connection with that part of their ancestral lands.[193] As the Crown submitted, however, this was done at the wish of the petitioners.

6.5.5 Freeholding of the Parata native township resumes

Freeholding within the township recommenced shortly after the passing of the Māori Purposes Act 1948. In December 1948, an application from a lessee to purchase the freehold came before the district Māori land board. A few days later, the board wrote to the trustee of the Hemi Matenga Estate. The letter contained a valuation report on township sections 14, 15, and 17 and asked whether he would consent to sections being sold.[194] The trustee agreed provided the sale was in cash. But he also considered the valuation was too low and requested the board to commission an independent valuation from Dunbar Sloane. By mid-1949, the independent valuation had been completed, and the board put the application, along with several competing applications, before the trustee. The trustee accepted an offer to be made along the lines of the independent valuation. With the sale proceeding, the trustee's lawyers were instructed to draft a transfer.[195]

In October 1949, the issue was raised about whose consent was required to sell township lands. Lawyers for one of the applicants seeking to purchase section 14 argued that the consent of the beneficiaries of the will was required for the transaction to proceed. In reply, the lawyers for the trustee of Matenga's estate stated that the consent of the beneficiaries was not required. They noted that the Māori land board, in which the land was vested, was the legal owner of the township land. The Estate's surviving trustee was the beneficial owner (not the will's beneficiaries) and under the native townships legislation, the Estate trustee was merely a

192. Hauangi Kiwha, brief of evidence, 30 July 2018 (doc E7), p 7 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 211)
193. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 207; Crown counsel, closing submissions (paper 3.3.60), p 143
194. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 208
195. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 208

consenting party.[196] According to the trustee's lawyers, there was a further step: the Governor-General-in-Council 'must be satisfied as to whether the requirements as to consents have been complied with'. This was a very narrow interpretation of the protective function which the Native Minister of the day, Sir James Carroll, had said would be the Crown's task under the 1910 Act (see above). Further, the trustee's lawyers admitted that they did not seek the consent of the beneficiaries of the will because there was no requirement to do so 'as the Maori Land Board did not require it, nor would the Maori Land Court on an application for confirmation of sale of other land held by the Trustee'. Nor did the Crown in giving its consent to sales. The trustee's lawyers also believed that the beneficiaries of the will had no real interest in the township land but were 'only interested in the residuary trust fund resulting from the realisation of any estate lands and other assets'.[197]

The beneficiaries of the will had become beneficiaries of the residual fund, and the practice of the trustees of not seeking their consent to sell township sections excluded them from decisions over the retention of Parata native township lands.[198] The Crown accepted this exclusion when consenting to sales on the basis of the trustees' agreement to the exclusion of the Māori beneficiaries of the Estate.

The Ikaroa Māori Land Board agreed with the trustee's lawyers, stating that 'twelve previous sales were consented to by the Governor General on the assumption but this was the Law, and no queries were raised'. At the same time, the board considered that if the sale was delayed due to the position of the applicants' lawyers, it would keep the money. The Ikaroa Māori Land Board also considered that if it 'finally becomes necessary a meeting of assembled owners could be called'.[199] In the event, no such meeting was called, although either the board, the Estate trustee, or the Crown (the Governor-General-in-Council) could have made this a requirement of their giving consent. Obtaining the consent of the 'owners' in this way, which the board clearly considered was possible, ought to have been done in all cases.

In 1950, the possibility of one of the beneficiaries of the Estate becoming a trustee emerged. An application to appoint a new trustee or trustees was heard in the Māori Land Court in late January 1950. While the court appears to have been prepared for the beneficiaries to nominate trustees, it would not appoint the person they selected (who was one of the beneficiaries of the Estate) until they nominated an additional trustee deemed capable of carrying out the duties to the satisfaction of the court. The court indicated if a suitable trustee could not be found the court was willing to ask the Māori Trustee to take over as trustee of the Estate.[200]

196. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 208–209
197. Solicitors to Biss and Cooper, 28 October 1949 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 209)
198. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 209
199. H Dudson to Pitt & Moore, 14 November 1949 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 210)
200. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 210

By mid-April 1950, three trustees were appointed. They were W B Travers, Tukumaru Webber, and Alfred Blackburn.[201] Webber was the son of Utauta Webber and a beneficiary of Matenga's estate. Some among the beneficiaries remained adamantly opposed to sale. Claimant Hauangi Kiwha recalled her father, Tata Parata, 'stating to his cousin Tukumaru Webber who was a trustee of Hēmi Matenga's will, "We need to hold on to some of our land, we won't be able to buy that land and live on our own land."'[202] In our view, Tukumaru Webber, as one of the three trustees, was in a difficult position, as the trustees' overriding duty was to carry out the terms of the will.[203]

Meanwhile, the sale of sections 14, 15, and 17 of the Parata native township continued. Consent had previously been obtained from the retired trustee of the Hemi Matenga Estate, Ernest Ryder. The board, however, considered the consent of the new trustees was required. On 13 April 1950, they wrote to the trustees appraising them of the offers. By May 1950, the trustees had provided their consent to the sale of the sections. By early December the sale had been completed, and purchase money amounting to £1,913 3s 7d paid to the trustees of the Estate.[204]

In December 1953, Utauta Webber died. This event set in motion the final phase in the alienation of the township lands. Under the terms of Hemi Matenga's will, Utauta Webber's death as the last child of Wi Parata triggered the liquidation provisions. These required the trustees to convert the remaining property held by the Estate and divide the proceeds equally amongst the remaining beneficiaries. By this time, the township was being administered by the Māori Trustee (and no longer the Māori land board).[205] Records demonstrate that only 10 sections remained, and all but one of the 10 sections were under perpetually renewable leases. Crown officials entertained the possibility of revesting the legal ownership of the remaining township sections in the 'beneficial owners', although it is not clear whether vesting would favour the Estate trustees or the members of the Parata whānau who were beneficiaries of the Estate. However, this option was swiftly dismissed by the Crown. On 21 May 1956, the assistant district officer of the Māori Affairs Department informed the Māori Trustee that:

> There are 10 sections still subject to six perpetually renewable leases. The beneficial ownership is vested in the Trustees of the estate of Hemi Matenga, deceased. It has been suggested that some move be made to revest the township in the beneficial owners, but in view of the perpetually renewable leases *this course is hardly possible*.
>
> It is recommended that an approach be made to the Trustees of the Estate of Hemi Matenga for their views on the commencement of negotiations with the present lessees for the sale of the freehold to them. The Trustees have readily consented to

201. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 211
202. Kiwha, brief of evidence (doc E7), pp 7–8
203. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 193–194, 221
204. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 211
205. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 212

sales in the past. Would you please let me know if you approve of this being done. [Emphasis added.][206]

In June 1956, the Māori Trustee sought the trustees' views about consenting to the freeholding of the remaining sections. The trustees agreed, but on the basis that the price was at least equal to an up-to-date government valuation. By 20 December 1956, the Māori Trustee had instructed the Valuation Department to make a special valuation of the remaining leasehold sections with the costs of the valuation deducted from the township rents. All 10 remaining township sections were sold between 1959 and 1968. Section 36 was purchased by Mrs Roach – known also as Tutauanga Whakahihi and Tutauanga Ratahi – for £200, below the special valuation. It is unclear whether Mrs Roach was related to Wi Parata and Hemi Matenga, and the other beneficiaries of Hemi Matenga's will.[207]

6.6 How Were Native Allotments, Public Reserves, and Gifted Lands in the Parata Native Township Administered and What Influence Did Māori Have on Decisions concerning their Land?

6.6.1 The legislative framework governing native allotments

The Native Townships Act 1895 made provision for 'Native allotments', not exceeding 20 per cent of the total area of the township, to be reserved and laid off for the use of Māori owners. The 1895 Act contained no provisions concerning location, individual size, or quality of native allotments. It was also the duty of the surveyor-general to include in such reserves every urupā, and every building occupied by Māori.[208] Historian Leanne Boulton described this requirement as effectively placing a consultation duty on the surveyor-general to engage with Māori to assist decision-making concerning allotments.[209] The claimants held a similar view, stating native allotments were crucial for tangata whenua to maintain sufficient township land and cultural integrity.[210]

Upon creation, native allotments were vested in the Crown in trust for the 'use and enjoyment of the Native owners', in accordance with the terms of the Act and any regulations.[211] Under the 1895 Act, native allotments could not be leased or sold.[212] However, the Native Townships Act of 1910 empowered Māori land boards to lease native allotments. The 1910 Act required that the consent of the beneficial owners of native allotments be obtained in writing before any lease could be

206. Assistant district officer to Māori Trustee, 21 May 1856 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 214–215)
207. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 215–216
208. Native Townships Act 1895, s 6
209. Leanne Boulton, 'Native Townships in the Whanganui Inquiry District', 2003 (Wai 903 ROI, doc A39), p 57; (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 223)
210. Claimant counsel, closing submissions (paper 3.3.51), p 78
211. Native Townships Act 1895, s 12(3) (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 223)
212. Native Townships Act 1895, s 14

granted by the board.[213] Consent to lease could also be obtained via a resolution by a meeting of assembled owners, as outlined in the Native Land Act 1909.[214] Further restrictions prescribed that no lease would be granted on any allotment on which there was a church or meeting house.[215] Māori land boards were also empowered to sell land in townships, including native allotments. Section 23(1) of the 1910 Act, stated that if consent had been obtained in writing, by resolution of assembled owners or trustees, Māori land boards could 'sell to any person any land situated in a Native township and vested in the Board'.[216] As we discuss further below, this provision in the new Act violated the original terms as to reserving land in trust when Wi Parata agreed to a native township under the 1895 Act, which did not allow any sections to be sold. Indeed, Wi Parata later said in 1901 that he understood the reserves to be his own property and not vested in the Crown at all.[217] The new provision allowing the sale of reserves also had a disproportionate effect on the Parata township because consent would not be a matter for the beneficial owners but rather for the Hemi Matenga Estate trustees.

6.6.2 How were native allotments in the Parata native township established?

On 22 May 1897, discussions commenced between Wi Parata and the chief surveyor concerning the final placement of native allotments, public reserves, and streets. These areas remained largely unchanged from Wi Parata's private survey. Ms Walker noted native allotments did not seem to have been a point of contention between the parties. The chief surveyor recorded that Wi Parata had decided upon two native allotments and three other reserves for public purposes:

- a native allotment for Hemi Matenga (section 25);
- a native allotment for Metapere Tangahoe (section 42);
- a reserve for the Church of England (section 1);
- a reserve for public buildings (sections 8 and 9); and
- a reserve for schools (sections 43, 18, and 19).[218]

Notably, the native allotments accounted for 4 acres 1 rood 33 perches of the approximately 49-acre township. In other words, just over 8 per cent of the township area was set aside for Māori use and occupation, despite the 1895 Act permitting up to 20 per cent.[219] The Act empowered the surveyor-general to make the final decision on the nature and extent of native allotments reserved for the owner(s), based on his decision as to what was reasonable, and it is clear that this Crown official ought to have consulted further with Wi Parata (and Hemi Matenga) and reserved additional allotments. In our view, a figure of 8 per cent was not reasonable in the context of a limit of 20 per cent, having due regard to

213. Native Townships Act 1910, s 15
214. Native Land Act 1909, pt XVIII
215. Native Townships Act 1910, s 15
216. Native Townships Act 1910, s 23(1)
217. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 232
218. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 226, 231, 243, 250
219. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 227

the protection of Māori interests in a scheme which took legal ownership of all the land.

6.6.3 Section 25 (native allotment)

Section 25 was reserved as a native allotment under the 1895 Act. The section consisted of approximately two acres and was located on a hill slope at the north-eastern edge of the Parata native township. Wi Parata wanted to reserve the section for his brother, Hemi Matenga.[220] As we discussed previously, Matenga died in 1912 and his will nominated two trustees, Malcolm Webster and Thomas Neale, to manage his estate. In July 1921, the trustees informed the Ikaroa Māori Land Board of their intention to sell section 25:

> The trustees of Hemi Matenga's estate are desirous of selling the Testator's residential property in this township. The late Hemi Matenga, we understand, erected his residence on Lot 25. On reference to the title we find that this is described thereon as being a Native Reserve.[221]

The trustees wanted to manage the sale rather than having the board do it, so they applied to the board in September 1921 to revest the section in themselves as the Estate trustees. They also applied to the board to vest in them another section used by Hemi Matenga for grazing purposes. The trustees asked the board to consider this application with some urgency.[222] It wasn't until January 1923, however, that the board resolved to vest section 25 in the trustees.[223] Nonetheless, it quickly became apparent that under the native townships legislation, this would not be possible.[224]

On 23 March 1923, the Ikaroa Māori Land Board recommended the Governor-General issue an order in council, excluding part XIV of the Native Land Act 1909 from applying to section 25.[225] The Native Department advised the board that section 25 could not be revested in the trustees because 'there appears to be no authority under which land in a Native Township can be re-vested in the owners'.[226] This was an obvious and important flaw in the native townships legislation. With this initial legal path blocked, the trustees were advised that a transfer under section 23 of the Native Townships Act 1910 from the board to the trustees would be required.[227] That section enabled a Māori land board to sell any vested land

220. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 227
221. Pitt and Moore to secretary, Ikaroa District Maori Land Board, 21 July 1921 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 228)
222. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 228
223. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 228–229
224. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229
225. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229
226. Registrar, Ikaroa District Maori Land Board to Under-Secretary, Native Department, 18 May 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229)
227. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229

with the written consent of the beneficial owners or trustees.[228] On 24 May 1923, the trustees were asked to give their formal consent to the transaction and sign a memorandum of transfer. Once this was signed, the Māori land board would then seek the approval of the Governor-General-in-Council to the transfer.[229]

The Governor-General granted the transfer on 14 June 1923.[230] Webster and Neale were then called to provide a declaration of trust in terms of subsection 2 of section 130 of the Land Transfer Act 1915. However, before the transfer occurred, the Under-Secretary for the Native Department questioned whether the transfer adhered to section 23 of the Native Townships Act 1910.[231] In his view, 'usually a power to sell means a power to sell for money while the transaction in question appears to amount really to a change of trustees and administration which hardly seems to be contemplated by Section 23 of the Native Townships Act, 1910'.[232] As a result, the transfer under section 23 was blocked. At this point, the board suggested the trustees find a suitable tenant to whom the section could be leased who would then apply to buy the freehold. This quickly eventuated on 11 September 1923, when the trustees advised the board they had a 'tenant willing to take a 12-month lease at £2 per week and that he may later wish to purchase'.[233]

The issue of transfer of the land to beneficial owners was resolved a week after the trustees advised the board they had found a suitable tenant. Section 12 of the Native Land Amendment and Native Land Claims Adjustment Act 1923 empowered the board to transfer land in native townships to beneficial owners with the precedent consent of the owners or upon a resolution of a meeting of assembled owners. As a result of this legislation, on 11 October 1923 the board issued a fresh certificate of title for the Parata native township section 25 to the trustees, Webster and Neale.[234] In December 1926, the trustees sold the property to Emily Pierard.[235] This underlines the point that the trustees were considered to be the beneficial owners of the land vested in the board, and that this welcome legislative reform was useless in the case of the Parata township. Hemi Matenga's will and the trustees appointed under that will would continue to control the fate of the township lands unless the Crown intervened to assist those of Wi Parata's descendants who wished to retain their ancestral lands. As we discussed above, the petition that resulted in the 1941 legislation was overturned in 1948, allowing the trustees to continue selling off the Estate land.

228. Native Townships Act 1910, s 23
229. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229
230. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 229
231. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 230
232. Under-Secretary, Native Department to registrar, Native Land Court, 21 June 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 230)
233. M P Webster to president, Ikaroa District Maori Land Board, 11 September 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 230)
234. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 231
235. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 231

6.6.4 Section 42 (native allotment)

Section 42 was a native allotment that Wi Parata intended to reserve for his daughter Metapere, who was already living on the land with her husband, Ropata. The section was almost two acres in size and located near the urupā, church, and railway station. The way section 42 and the urupā were shaded on the final native township plan suggests that, in Wi Parata's mind, they formed a single place.[236]

After the township was established, it became apparent that Wi Parata considered he had the right to lease section 42, despite the 1895 Act vesting native allotments in the Crown and the fact that he had transferred ownership to his brother. This must have added to the Crown's confusion as to which brother was the beneficial owner. Wi Parata's lawyers contacted the acting surveyor-general in January 1901 seeking clarification about whether section 42 could be leased:

> [Wi Parata] regards these Reserves as having been reserved for him, and as having been excepted from the plan as belonging absolutely to him. Some time ago he agreed to lease this section 42 to our client Mr J F Mills, upon the same terms of leasing as are contained in the leases which the Commissioner is empowered to grant under the Act, at a rental £25 per annum. The question now to be determined is whether he can grant a valid lease of the Section.[237]

Wi Parata reportedly considered the native allotments as 'excepted portions' of the township which remained vested in him (and not his brother).[238]

With the status of section 42 unsettled, the survey office contacted the Commissioner of Crown Lands. The commissioner concluded that despite their labelling as reserves, sections 41, 42, and 45 were all native allotments under the 1895 Act. He advised the surveyor-general:

> I have the honour to inform you that sections 41, 42 & 25 in the above township were shewn on plan forwarded to you on 27.7.99, for exhibition, &c, as proposed Native Reserves, and they are apparently set aside under section 6 of 'The Native Townships Act, 1895' as Native allotments to [be] dealt with as provided by section 12(3) of said Act.[239]

This seems to us to have confused the point, as the statute stated that the native allotments were to be 'reserved', and referred to them as 'reserves'. The fact that they were also described as 'native allotments' does not change their status as reserves.[240] The status of the sections as native allotments vested in the Crown in

236. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214, p 231
237. Skerrett and Wylie to acting surveyor-general, 21 January 1901 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 232)
238. Skerrett and Wylie to acting surveyor-general, 21 January 1901 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 232)
239. Commissioner of Crown Lands to surveyor-general, 12 February 1901 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 233–234)
240. Native Townships Act 1895, s 6

trust for the owners was conveyed to the lawyers of Wi Parata on 20 February 1901.[241] However, soon after, section 23 of the Native Land Claims Adjustment and Laws Amendment Act 1901 was passed. This gave special provision allowing the lease of section 42:

> **23.** Whereas Section 42, Block v, of the Native Township of Parata was, in accordance with the provisions of 'The Native Townships Act, 1895,' set apart as a Native allotment, but is no longer required for that purpose: Be it therefore enacted that the said land shall from the passing of this Act be released from the restrictions relating to such allotments, and may be leased in accordance with the provisions of section fourteen of the said Act, anything therein to the contrary notwithstanding.[242]

While the amended legislation allowed for section 42 to be leased, it did not give Wi Parata the power to lease privately. As a result, he was given little choice but to agree that the section would go up to public auction for leasing. Metapere, who had been living on the section, also gave her written consent to the lease being offered.[243] The auction took place on 30 March 1903, with a 21-year lease effective from 1 July 1903.[244] Toward the end of this lease period, section 42 was sold to the original lessees, William and Sarah Hunter. At the time of sale, the trustees of Matenga's Estate would have had to consent.[245]

6.6.5 Ruakohatu urupā (Māori reservation)

Ruakohatu urupā is located on section 41 of the Parata native township. It is where the Parata whānau, including Wi Parata, are buried. As a 'native burying-ground', it was the duty of the surveyor-general under section 6 of the Native Townships Act 1895 to ensure that Ruakohatu urupā was included in a reserved native allotment of the Parata native township.[246] Today, the urupā is the only part of the original township that remains in Māori ownership.[247]

The early legal status of the urupā remains unclear. In January 1923, the Ikaroa Māori Land Board noted section 41 'appeared to form part of the cemetery' despite there being no record of it granted as such.[248] In June 1925, Maui Pomare wrote to the Native Minister:

> I have to advise that this reserve is shewn on the plans of the Parata Township, Block IX, Kaitawa Survey District. I am informed that the Cemetery is known as

241. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 234
242. Native Land Claims Adjustment and Laws Amendment Act 1901, s 23
243. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 235–236
244. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 236
245. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 236
246. Native Townships Act 1895, s 6
247. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 236
248. Registrar, Ikaroa District Maori Land Board to Pitt and Moore, 19 January 1923 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 236–237)

> Section 41 and that on the plan above referred to the Native reserve is shown on the opposite corner to section 41. I am given to understand that this is an error.[249]

The registrar of the Native Land Court reported: 'Plan WD 1586 showing the South West corner a Native Reserve (Wahi Tapu) containing 1 rood 12 perches and known as Section 41. This section, which is probably the cemetery Reserve, is part of the Parata Township.'[250]

Despite this, Crown officials remained uncertain as to the status of the urupā. Indeed, the Under-Secretary of Lands suggested that the urupā be categorised as a public reserve,[251] while the Commissioner of Crown Lands asserted it be regarded as a native allotment. Justifying the allotment status, the commissioner stated:

> as 'Wahi Tapu' meaning 'sacred or burial ground' section 6 of the above mentioned Act [Native Townships Act 1895] makes provision for Native Allotments or reserves and states that 'it shall be the duty of the Surveyor General to include in such reserves every Native burying ground'. I am, therefore, of the opinion that the land in question is not governed by Section 12 (Subsection 2) of the Native Townships Act, 1895, or by Section 11 of the Native Townships Act, 1910 as it is a 'Native Allotment' set aside for the use of Native owners.[252]

This information was forwarded to Maui Pomare with the attached comment – 'in view of the Commissioner's remarks the matter appears to be one for the Native Land Court and the Native Department'.[253]

The matter remained unresolved until May 1956, when the Native Department inquired whether the remaining Parata native township lands could be revested in their beneficial owners or should be freeholded.[254] In response, the Māori Trustee agreed that while freeholding was the more appropriate option, it was noted section 41 was marked as 'wahi tapu'.[255]

The status of section 41 came before Judge Jeune of the Māori Land Court on 11 November 1958. The court made an order that, under section 439 of the Māori Affairs Act 1953, section 41 be set apart as a burial ground. The section was then vested in Te Iti Ropata, Were Parata, Alfred Blackburn, and Tukumaru Webber as trustees.[256]

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249. M Pomare to Native Minister, 26 June 1925 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 237)
250. Registrar to Under-Secretary, Native Department, 5 August 1925 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 237)
251. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 237–238
252. Commissioner of Crown Lands to Under-Secretary for Lands, 15 September 1925 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 238)
253. McLeod to Maui Pomare, 28 September 1925 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 238)
254. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 238
255. Head office to district officer, 29 May 1956 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 238)
256. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 238

The order that section 41 was a Māori reservation for the purposes of a burial ground for the descendants of Wi Parata was gazetted in May 1959, with a certificate of title issued in favour of the trustees on 31 March 1961.[257]

6.6.6 Public reserves, roads, and streets

Section 5(1) of the Native Townships Act 1895 required that the surveyor-general have a surveyor lay out all the sections, allotments, reserves, and streets within a native township.[258] All reserves (other than native allotments) were vested in the Crown for the purposes specified in the plan and were to be dealt with under the Public Reserves Act 1881.[259] Similarly, streets and roads were also vested in the Crown and deemed to be roads 'within the meaning of' the Public Works Act 1894.[260]

Compensation was available under the Public Works Act 1894 for every person who had any estate or interest in any lands taken under the Act for public works.[261] Despite compensation being statutorily provided for, native townships, in practice, were excluded. As a result, compensation was not paid for public works takings because the Crown believed the practical and financial benefits of the township scheme for Māori owners would be sufficient. In other words, the lack of compensation was intended to be offset by the promised increase in value of the rest of the land, although this ignored the compulsory nature of the legislation.[262]

The roads and streets of the Parata native township were originally laid out in Wi Parata's private survey. The street names were chosen by Wi Parata and for the most part, were maintained in the final township plan of July 1899. Changes to street names were described by the chief surveyor as 'agreed upon'.[263]

Notably, Wi Parata objected to any road being 'laid between the Cemetery, the Church reserve, and the Railway Line'.[264] While this wish was respected, Pehi Kupa Street was extended, cutting into the 'Native Reserve' on section 42 and along the inland side (non-railway side) of the urupā and church. The final Parata native township plan also grouped the urupā and the church together, contrary to Martin's 1897 plan.[265]

Concerning public reserves, Wi Parata's private survey of 1897 featured only one, which was a reserve for the school site (section 43), since his initial private township was not conceived with the requirements of the Native Townships Act

257. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 238–239
258. Native Townships Act 1895, s 5(1)
259. Native Townships Act 1895, s 12(2)
260. Native Townships Act 1895, s 12(1)
261. Public Works Act 1894, s 34
262. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 240
263. Chief surveyor, memorandum, 6 June 1899 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 241)
264. Chief surveyor, memorandum, 6 June 1899 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 241)
265. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214, pp 241–242

1895 in mind. When the public reserves were formally gazetted in January 1901, there were three reserves listed:

- section 9 (3r, block VI), which was a site for public buildings;
- section 8 (2r 29p, block VI), which was a site for public buildings; and
- section 43 (3r 36p, block VI), which was for a site for a public school.[266]

These reserves were deemed to be vested in the Crown under section 12(2) of the Native Townships Act 1895 and were to be handled as reserves under the Public Reserves Act 1881.[267]

6.6.7 Sections 43, 18, 19, and 23 (school site)

Ms Walker observed that the establishment of a public school was important to Wi Parata's vision of a township.[268] A number of steps were taken to realise this vision, with the Board of Education reporting in October 1895 that they had accepted an offer by Wi Parata to lease an area of land at Waikanae as a site for a school at the price of £5 a year.[269]

In February 1896, a lease was entered between Wi Parata and the Wellington education board for an area of one acre with a rental of £10 per annum.[270] The Native Land Court refused to confirm this lease, citing section 3 of the Native Land Laws Amendment Act 1895, as the acre belonged to a block of land containing more than 500 acres.[271] As a result, Wi Parata was unable to lease the land to anyone but the Crown under this legislation. Despite the lease not being officially sanctioned, the rents being paid to Matenga continued from 1 February 1896 to 31 July 1905.[272]

By 1897, the school was established on what would later become section 43 of the Parata native township. When Mr Martin submitted his amended plan of the township in September 1897, he explained: 'Wi Parata gave sometime ago the school reserve, coloured red on tracing. There is a school erected on the section. It has been pegged out on the ground by the Education Board.'[273]

The final plan of the township showed the school reserve as section 43. In March 1899, prior to the township being gazetted, the education board made a request that provision be made for 'a permanent school site, near the present rented land, when the Waikanae Township is arranged for'.[274] No reply to the letter has been found.[275] In January 1901, section 43 was formally gazetted as a public reserve.[276]

266. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 242–243
267. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 243
268. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 243
269. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 243
270. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 243
271. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 243
272. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244
273. R B Martin to chief surveyor, 4 September 1897 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244)
274. Assistant surveyor-general to chief surveyor, 15 March 1899 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244)
275. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244
276. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244

In May 1906, the education board sought clarification from the Commissioner of Crown Lands regarding the school reserve, questioning whether it was the Crown or the Māori owner administering it. The education board made clear that they had recently become aware that the former owner was not entitled to the rent, and that Matenga had declined to make restitution. As a result, the education board were asking whether the Commissioner of Crown Lands could assist them in obtaining redress.[277] The commissioner informed him that he was unable to help.[278]

In August 1908, the education board abandoned section 43, which they considered unsuitable, and built a new school on sections 18 and 19 of the township.[279] The education board then attempted to acquire title to these sections, reporting that 'all arrangements' for acquisition of the new sections had been made 'with the Native owners.'[280] Ms Walker noted arrangements having been made with the township owner implies that the education board considered that the Māori owner had the power to lease and sell township sections.[281]

Notably, the Native Townships Act 1895 did not permit either the Crown or the beneficial owners to sell township land. In order to remedy this, the education board wrote to the Native Department, proposing a legislative change for the Native Minister's consideration, to allow for title to sections 18 and 19 to be obtained.[282] Shortly after this proposal, the board also sought to include another area of township land – section 23 – to be used as a teacher's residence. The inclusion of these three sections was agreed to.[283]

Section 38 of the Māori Land Laws Amendment Act 1908 was enacted in October of that year, providing for the acquisition of sections 18, 19, and 23. These sections were to be vested in 'His Majesty the King in trust for the Native owners according to their relative shares or interest therein.'[284] Section 38 of the Act empowered the Crown to grant the land to the education board, enabling the district land registrar to give effect to the transaction, and allowed every person with an estate or interest in the land to apply for compensation.[285] It did not, however, make any provision for the original school site to be revested in the owners.

One month after the enactment of section 38, the education board was issued a certificate of title. The Māori land board reiterated that under section 38, it did not have the authority to take action. Instead, the Māori land board placed the responsibility for action on the Crown, noting: 'The Crown will have to take the

277. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 244
278. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245
279. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245
280. Secretary, education board to Under-Secretary, Native Department, 26 August 1908 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245)
281. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245
282. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245
Maori Land Laws Amendment Act 1908, s 38
283. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 245
284. Maori Land Laws Amendment Act 1908, s 38
285. Maori Land Laws Amendment Act 1908, s 38

necessary steps, the Maori Land Board not being a party to the matter until the question of compensation under the latter part of the section, comes up.'[286]

Once the issue of compensation arose, the Māori land board would monitor 'the interests of the beneficial owners'.[287] In March 1909, the Aotea Māori Land Board sought information about whether any compensation had been paid as a result of sections 18, 19, and 23 being sold for educational purposes.[288] The education board confirmed that it had

> purchased Sections 18, 19 and 23 [Block IV Parata Township] for school purposes, and has now entered into occupation. The right of the lessees has been purchased, and arrangement has been made for the purchase of the interests of the owner, Mr Hemi Matenga.[289]

Following receipt of this information, the Māori land board applied to the Native Land Court in July 1909 to determine how much compensation should be paid by the Crown for taking sections 18, 19, and 23.[290] A valuation commissioned by the Māori land board put the total value of the sections at £154, with the owners' interests valued at £145, while the leaseholders' interests were valued at £9.[291] On 4 May 1911, the Māori land board paid £200 to Hemi Matenga 'on account of purchase money received from the sale of sections 18, 19, and 23, Block IV, to the Education Board'.[292]

While the status of sections 18, 19, and 23 was settled, it was a number of years before the status of the original school site, section 43, came into question. On 10 February 1915, the education board wrote to the Māori land board asking that the title to section 43 be issued to it.[293] The Māori land board referred the education board to the Commissioner of Crown Lands, on the basis that the land was vested in the Crown to be dealt with under the Public Reserves and Domains Act 1908.[294] Investigation by the registrar of the Native Land Court revealed that section 43 (as well as sections 8 and 9, to be discussed under their corresponding heading) had been wrongly included in the title issued to the district Māori land board for the township. As a result, this title issue had to be remedied before the commissioner could deal with section 43 under the Public Reserves and Domains Act 1908.[295]

286. President, Aotea Maori Land Board to Commissioner of Crown Lands, 25 November 1908 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 246)
287. President, Aotea Maori Land Board to Commissioner of Crown Lands, 25 November 1908 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 246)
288. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 246
289. Secretary, education board to clerk, Aotea District Maori Land Board, 4 March 1909 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 246)
290. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 247
291. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 247
292. Clerk, Ikaroa District Maori Land Board to Hemi Matenga, 4 May 1911 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 248)
293. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 248
294. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 248
295. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 248

The situation became even more unclear as the matter progressed.[296] On 4 May 1915, the lawyers for the education board wrote to the Under-Secretary for Lands to apply for title to section 43. The education board was informed that they might already have title to the section, but it was unclear which legislative sections took precedence. The Under-Secretary explained:

> section 8 of the Education Reserves Amendment Act 1882 (now section 5 of the Education Reserves Act 1908) enacted that all lands reserved under any Act for school sites became vested, without grant, conveyance or transfer, in the Education Board of the district in which they are situated.
>
> The land mentioned in your letter was set apart in the year 1900 by virtue of having been marked as a school reserve on the plan deposited in the office of the District Land Registrar at Wellington in terms of Sections 11 and 12 of the Native Townships Act, 1895, and therefore would appear to have immediately become the property of the Wellington Education Board in accordance with section 8 of the Act of 1882.
>
> If, however, it is held that the provisions of section 11 of the Native Townships Act 1910, which provides that all reserves in Native townships shall be dealt with as public reserves under the Public Reserves and Domains Act 1908, overrides the provisions of section 5 of the Education Reserves Act 1908, the only method of giving the Education Board a title to this land would appear to be by special legislation. Section 4(b) of the Public Reserves and Domains Act, 1908 which you suggest gives (with subsection 3 of section 11 of the Native Townships Act 1910) the necessary power, applies only to reserves comprised in Class I of the Second Schedule of the Act and not to school sites, which are comprised in Class III.
>
> It is therefore considered that Section 43 Block VI Parata Township is already the property of the Wellington Education Board and that the District Land Registrar should upon receipt issue a title in its favour.[297]

The next day, the lawyers for the education board replied saying that they were making an application for title to be issued.[298] This certificate was issued, and the board proceeded to subdivide section 43 into seven lots, which they quickly sold to private buyers.[299] In effect, this meant Māori received nothing for the land while the Crown had sold it rather than using it for the purpose Wi Parata had set it aside, the establishment of a public school. Had the land been gifted for a native school, legislation would have provided for its return so that it could be used for the purpose it was given. But, because it was a school under native township legislation, not only was return not possible but compensation was not an available option either.[300]

296. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 248
297. F T O'Neill, Under-Secretary, Lands Department to Brandon, Hislop, and Brandon, 5 May 1915 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 249)
298. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 249
299. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 249
300. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 249

6.6.8 Sections 8 and 9 (reserved for public purposes)

Sections 8 and 9 of the Parata native township were reserved for public purposes, as agreed by Wi Parata. Under section 12(2) of the Native Townships Act 1895, these sections were vested in the Crown and formally set aside in January 1901.[301]

Ms Walker noted that little is known about how these reserves were used in the first 50 years of the twentieth century.[302] However, in August 1947, the Commissioner of Crown Lands recommended that sections 8 and 9, along with another public reserve, be vested in local bodies. For sections 8 and 9, this body was the Horowhenua County Council. The commissioner reported that the county council had agreed in writing to the reserves being vested in them, and to the status of the land being changed to reserves for county purposes.[303] The vesting and change of purpose relating to sections 8 and 9 was approved by the Minister of Lands in November 1949.[304] An order in council on 2 March 1950 formalised the changes, with the certificate of title then issued to the Horowhenua County Council 'in trust for County purposes'.[305]

6.6.9 Section 4 (post office)

A small piece of land was taken from section 4 of the Parata native township for the purposes of a post office. The acquisition process began on 25 March 1907, when the Under-Secretary of the Public Works Department asked that section 4 be surveyed to enable them to take a part of it.[306] The surveyor, W Lawn, was instructed to peg off half the section, as the decision that it would be acquired for a post office had been made. The survey of section 4 was completed and a plan produced by 28 May 1907. On 25 July 1907, a proclamation was published in the *New Zealand Gazette* notifying that part of section 4 of the Parata native township was being taken under the Public Works Act 1905 for the purposes of a post office.[307]

Because the land was taken under public works legislation after the township was proclaimed, compensation was payable to the beneficial Māori owner. Obtaining this compensation was a lengthy process, with payment eventually received by Hemi Matenga almost four years after the land had been taken.[308]

Indeed, a valuation for the purposes of compensation was completed in November 1908, with the Public Works Department asking the Commissioner of Crown Lands in January 1909 to forward a claim for compensation.[309] On 19 March 1909, the Under-Secretary for Public Works wrote to the board informing it that the solicitor-general had advised:

301. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 250
302. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 250
303. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 250
304. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 250
305. WN569/17 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 250)
306. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), pp 250–251
307. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 251
308. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 251
309. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 251

> The land was originally vested in the Crown under the Native Townships act 1895 in trust for the Native owners according to their relative shares or interests therein – Sec 12(4) – the effect of the proclamation taking the land is to discharge the land from this trust but the trust attaches to the compensation money. Although the case is not expressly provided for in the Act, I think that the Native Land Court has jurisdiction under section 22 to assess the compensation and ascertain the Native owners entitled thereto. When this is done the Crown can pay money accordingly. If necessary a regulation could be made under Section 25 to meet the case.[310]

It was not until July 1909 that the Māori land board made an application to the Native Land Court to determine the amount of compensation payable under section 22 of the Native Townships Act 1895.[311] As a result of the hearing in the Native Land Court, the Public Works Department proposed that £62 be paid as compensation for the taking. The board accepted this offer, but a further hearing was required for it to be confirmed.[312] On 31 January 1911, the board was notified that the compensation payment was on its way.[313] Over a month later, the lawyers for Hemi Matenga asked that this compensation be paid. It was not until 4 May 1911 that Matenga was finally paid the compensation.[314]

In 1982, a new post office was built in Mahara Place on the other side of the railway line. Heather Bassett, who wrote the technical report on public works for this inquiry, noted that it is unclear whether section 4 (the original post office site) was offered back to the descendants of Wi Parata or Hemi Matenga under the new Public Works Act 1981. Irrespective of this, the original site was declared as taken in 1983, under sections 20 and 50 of the Public Works Act 1981, for cultural and community centre purposes.[315]

6.7 Treaty Analysis and Findings

6.7.1 The 1895 native townships regime

The Native Townships Act 1895 was a measure designed to promote European settlement in the interior of the North Island, where settlement was sparse and Māori resisted selling land to either settlers or the Crown. The Act was one of a number of measures designed to break through Māori opposition, which included the restoration of Crown pre-emption in 1894 and a massive Crown purchasing operation in the 1890s. The native townships legislation contained some protective

310. Under-secretary, Public Works Department to Aotea District Maori Land Board, 19 March 1909 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 251)
311. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 251
312. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 252
313. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 252
314. Ikaroa District Maori Land Board to Hemi Matenga, 4 May 1911 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 252)
315. Heather Bassett, 'Preliminary Report on Te Atiawa/Ngati Awa ki Kapiti Public Works Case Studies', May 2018, (doc A202), p 182; Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti' (doc A214), p 252

elements: the 1895 Act provided for the reservation of up to 20 per cent of the township for its Māori owners, it provided for consultation with Māori (although their consent was not required), and it established a permanent endowment for the Māori (beneficial) owners. Legal ownership was vested in the Crown but the townships were supposed to be administered in such a way as to benefit both settlers and Māori. All allotments were inalienable, leasing of allotments to settlers would provide a permanent income to the beneficial owners, and their own allotments were supposed to grow in value as the township progressed. On the other hand, townships could be established whether Māori agreed or not, and the beneficial owners were given no role in the administration of their own township. The Crown later passed legal ownership and the trust administration of the townships to Māori land boards without consultation with the owners, any provision for Māori decision-making in the town's administration, or properly ensuring the protection of Māori interests.

6.7.2 The establishment of the Parata native township under the 1895 Act

As discussed in section 6.4, there were some unusual features in the creation of the Parata native township in 1899.

First, the total individualisation of interests in 1891, which had come about as a result of the Ngarara and Waipiro Further Investigation Act 1889, meant that only a handful of Māori owners could benefit directly from the income of a native township. The majority of Ngarara West C sections were awarded to single owners in 1891 (26 of 41), with other sections awarded to two or three owners. The Parata native township was situated on one of the sole-owned blocks of Ngarara West C, which meant that the direct benefit of the township's income and reserves would go to one person, their whānau, and later, their descendants. A number of claimant whānau would be owners today if the Crown had not allowed the sale of township lands. We have already found the total individualisation of interests, which was forced on most owners in 1891, to be in breach of Treaty principles in chapter 4.

The evidence suggests, however, that Wi Parata as the rangatira of Te Ātiawa/Ngāti Awa intended the township to service a hinterland of Māori and settler farmers, and to ensure that his people benefited from the railway and the (by then) inevitable settlement of their district.

Secondly, the Parata native township was established at a location where a great deal of land had been sold to the Crown and settlers, and leasing was also widespread. This was not the intent of the Act. This township was established because of settler representations to the Crown against Wi Parata's plans to establish a privately owned township, where he would be the landlord and the main authority.

Thirdly, Wi Parata agreed to the establishment of a Government native township on his land, in replacement of his own township scheme, and he also succeeded in having his planned layout for the township adopted with few amendments. We accept that settler pressure for a township had influenced the Crown against having a private township at Waikanae, but there is no indication in the sources that Wi Parata's agreement, as the sole landowner, was coerced. Rather, he negotiated terms with Premier Seddon.

On balance, we find that, although the Native Townships Act 1895 did not require the consent of the Māori landowner(s), Wi Parata did in fact consent to the establishment of the Parata native township. Wi Parata represented himself to be the legal owner of the land. An incomplete transaction was in progress: a deed of transfer to Hemi Matenga had been signed the year before but the sale was not completed and registered until the year after the establishment of the township. The Crown was entitled to deal with Wi Parata until such time as the transaction was complete. Although the rangatira would have preferred his own township scheme, under his direct control, he saw benefits from the Crown's scheme for his whānau and for Te Ātiawa/Ngāti Awa more generally. Also, the Crown agreed that the township would follow his surveyed plan. It is not entirely clear, however, that he understood the legislative scheme fully, since he later believed that ownership of the reserved 'native allotments' had not been transferred to the Crown.

Some aspects of the establishment of the Parata native township were, however, in breach of Treaty principles. The Crown ought to have worked with Wi Parata to ensure that the full provision of 20 per cent of the township was reserved as 'native allotments'. The Crown breached the principles of partnership and active protection when it failed to do so. Also, the Crown took two additional allotments as public reserves without the agreement of the owner. Finally, and most importantly, Wi Parata, Hemi Matenga, and all future beneficial owners were excluded from any role in the administration of the township once it was established, as per the statutory scheme. This was a clear breach of the tino rangatiratanga guaranteed and protected by article 2 of the Treaty. Had the township been administered in partnership with Māori, it could have developed very differently.

On the issue of the Crown's continued refusal to accept Hemi Matenga as the beneficial owner – a refusal which extended to the Māori land board until the court's order of 1914 – it is very difficult to account for this situation, especially as the transfer had been registered under the Land Transfer Act. The Crown may have seen the vesting of the township in the Crown in 1899 as superseding the transfer to Hemi Matenga. In any case, it is not a substantive issue for the Tribunal.

6.7.3 The Parata township and the enactment of the Native Townships Act 1910

The fatal blow to Wi Parata's intentions for his whānau and his people came after his death. In 1910, a new Native Townships Act stripped the statutory scheme of the elements which had been of most benefit to Māori. The Act provided for settlers to purchase the freehold of their leased allotments or to obtain 99-year, perpetually renewable leases. No provision was made in the Act for sections to be revested in the owners rather than sold or let on perpetual leases. The disadvantages of the scheme continued – the beneficial owner Hemi Matenga and later the beneficiaries of his will had little or no say in how the township was administered – but the advantages were gradually removed as Parata native township sections were sold off. This very significant change was introduced to the legislation without consultation with Hemi Matenga, the owner in 1910, or with Wi Parata's whānau, or with Te Ātiawa/Ngāti Awa. Such a dramatic change to the scheme ought not to have been introduced without consultation or the consent of each

township's beneficial owner(s). Wi Parata intended the township lands to be an endowment for his whānau and a permanent benefit to his people, and he agreed to the establishment of Parata native township on that basis.

We find that this legislative change, insofar as it applied to the Parata native township without consultation or consent, was fundamentally contrary to the original agreement in 1899 and in breach of the principles of partnership and active protection.

We accept that Hemi Matenga was willing at the time to consider selling some sections, but many of his successors were not. Tohuroa Parata and others wanted to retain ownership of the township lands.

6.7.4 Was the Crown a good trustee?

Under the Native Townships Act 1895, the township lands (apart from the public reserves) were vested in the Crown in trust for the Māori beneficial owner(s). Under the Native Townships Act 1910, the trustee role was transferred to the Māori land boards. As stated above, the Crown divested itself of this trust without consultation or consent. The question arises: what measures did the Crown take to ensure that the trusteeship would be properly exercised from then on? Section 4 of the Act vested the land in fee simple in the board, and section 5 stated that the land would be held in trust for the beneficial owners and would be 'administered by the Board in accordance with the provisions of this Act'. The provisions of the Act then enabled the trustees to sell all sections or let them on perpetual leases. In both enabling sales and transferring the trust from the Crown to the boards, the Crown did reserve for itself an important protective power. As noted in the *Horowhenua* volume of our report, the Native Minister explained in introducing the new legislation that the consent of the Governor – in addition to that of the beneficial owners and the board – would be required for every sale. In our inquiry, Crown counsel disclaimed any responsibility for sales after the trust was transferred to the boards, submitting that '[t]he Crown was neither involved in nor responsible for decisions to freehold the Parata Native Township lands.'[316]

We do not accept that submission, partly because of the role retained by the Governor (later Governor-General)-in-Council, whose consent was necessary for all sales. As we stated in *Horowhenua*, 'the Crown did have a role in ensuring that all sales were in the best interests of the landowners concerned'.[317] Also, the Crown had Treaty obligations to the beneficial owners, regardless of whether it was still the trustee at law, including obligations of active protection. From the evidence of Ms Walker, the Crown routinely assented to sales of Parata native township lands, perhaps relying on the fact that the Hemi Matenga Estate trustees also routinely did so. According to the lawyers for that estate, the role of the Governor-in-Council was confined to ensuring that the legalities of consent had been observed but that was not the intent as described by Carroll in 1910, nor was it stated in the legislation. The board admitted that it could call a meeting of assembled owners

316. Crown counsel, closing submissions (paper 3.3.60), p 133
317. Waitangi Tribunal, *Horowhenua*, p 397; James Carroll, 11 October 1910, NZPD, vol 152, p 333

if it wished to do so. In our view, the Crown did not exercise a protective role in rubberstamping township sales, nor did it seek the wishes of the will's beneficiaries before giving its consent. Although not required by legislation, consultation was a minimum requirement the Crown was obliged to meet given Treaty guarantees. Failing to exercise its protective role properly was a breach of the principle of active protection, and the Crown's failure to consult before rubberstamping sales was a breach of the principle of partnership.

6.7.5 Hemi Matenga's will and petitions for Crown intervention

From 1912 onwards, the gradual sale of all the township sections save the urupā was complicated by the terms of Hemi Matenga's will and the role played by the Estate trustees according to the ultimate intent of the will – to maximise income and liquidate all assets after the death of the last of Wi Parata's children named in the will (which turned out to be Utauta Webber). The Native Townships Act 1910 required the consent of beneficial owners to sales and perpetual leases, which was to be given either directly or (for more than 10 owners) by way of a meeting of assembled owners. But the beneficial ownership of the Parata township was held in the first instance by the trustees of the Hemi Matenga Estate, who routinely agreed to sales, as discussed in section 6.5 of this chapter. The Estate trustees were not required to, and did not, consult the whānau who were beneficiaries of Hemi Matenga's will. We accept that this situation was not the responsibility of the Crown. When a substantial number of the whānau, led by Tohuroa Parata, petitioned the Crown in 1938 to intervene, legislation was enacted to establish a new trust and to stop the sales of the beneficiaries' ancestral lands. This was in keeping with the Crown's responsibilities as a Treaty partner.

In 1948, in response to a petition from Utauta Webber and others, the Crown agreed to introduce legislation to cancel the 'perpetual trust' established in 1941 and to restore the full terms of Hemi Matenga's will. Crown counsel submitted that '[t]he fact that the Crown acted to implement the petitioners' wishes clearly demonstrates the Crown acted in good faith and at the request of the beneficiaries themselves who sought the restrictions on alienation removed'.[318] It is not clear from the evidence whether all the beneficiaries agreed to this amendment but some of those who had petitioned for a perpetual trust in 1938 had since died.

We find no breach in respect of the 1948 legislation, which was enacted at the wish of the beneficiaries. By this time, of course, the beneficial owners had had no control over or direct role in the township lands for almost half a century. The option of revesting the land in its owners or trustees of their own choosing was not considered by the Crown in 1948. The dominance of perpetual leases over the remaining township sections by that time must have been a factor in the petitioners' appeal to the Crown, since it was unlikely that they or their descendants would ever be able to occupy any of the sections.

318. Crown counsel, closing submissions (paper 3.3.60), p 133

6.7.6 The fate of the reserves

The reserves were not properly protected under the Native Townships Act 1910. The native allotments, which were supposed to be a permanent endowment for the beneficial owners, were not exempt from the 1910 provisions enabling sale of all allotments vested in the Māori land board. These were sold with the consent of the Hemi Matenga Estate trustees. The only exception was the Ruakohatu urupā, which became a Māori reservation in the 1950s. In our view, the sale of the Māori reserves, which should have been available for the permanent use of the beneficial owners, was in breach of the principle of active protection.

In respect of the public reserves, one section was set aside for a school but the Wellington Education Board obtained ownership of three other sections from the Crown, which were not supposed to have been public reserves. The Native Minister accepted the education board's request for these lands and arranged for them to be granted to the education board through section 38 of the Māori Land Laws Amendment Act 1908, with compensation payable to the beneficial owners. The original school section was also conveyed to the education board but, as this had been a public reserve in the original scheme, no compensation was due. The section was not actually needed for a school and the education board divided and sold it to a number of settlers with no compensation for the owners.

We find the Crown in breach of the principles of partnership and active protection for transferring these sections to the education board, including one which was not needed for education purposes, without the consent of the beneficial owner or the Parata whānau. Three of the sections were leasable and had not been set aside for public purposes in the Parata township scheme. The fourth section was set aside for a school but instead simply sold for profit. According to the education board, Hemi Matenga had agreed to the transfer of two sections, but this claim was not confirmed by the Crown.

The two agreed public reserves, sections 8 and 9, were transferred by the Crown to the Horowhenua County Council in 1950. There is no evidence as to why this was done, or whether the new trustees under the 1948 Act were consulted. Following the original township scheme, these public reserves had been vested in the Crown but not on trust for the beneficial owner, as had been the case with all the other township allotments. We do not believe that there was any Treaty breach here as these sections were intended for public use and the township was close to being wound up in any case.

6.7.7 Prejudice

The Parata native township was not of great benefit to the wider body of Te Ātiawa/Ngāti Awa landowners because of the rapid alienation of their remaining lands after 1905 and the lack of Crown assistance with development capital (see chapter 5). A service town for a farming community was therefore of limited benefit to them, contrary to the expectations of Wi Parata.

In terms of direct financial benefit from reserves, this was limited to one owner initially due to the individualisation of title in 1891 (see chapter 4). Rents were sometimes not paid or were delayed, and Hemi Matenga had great problems

actually convincing the Crown and then the board to pay the rents to him. The beneficiaries of his will did obtain financial benefit from the township though mostly indirectly – the rents were used for investment purposes although some distributions were made.

Ultimately, the prejudice to the wider Parata whānau (the first-generation and second-generation heirs of Hemi Matenga) lay in the loss of all control and decision-making over the township and the sale of all its sections. They were prejudiced economically, culturally, and spiritually by the sale of their land without their consent and, in some cases, against their express wishes.

The beneficiaries were prejudiced by the Crown's failure to set aside a full complement of native reserves and by the sale of the two native reserves that were established, which were supposed to have been a permanent endowment.

The Crown deserves credit for enacting the 1941 legislation to prevent any more sales and include beneficiary representation in a new trust but this was undone as a result of the 1948 petition. We found no breach there since the Crown acted in accordance with the wishes of at least some owners – as far as we know from the evidence, no contrary view was expressed to the Crown in 1948. Hauangi Kiwha's evidence shows that some of the will's beneficiaries were still trying to preserve the land as a permanent endowment for future generations, but the terms of Hemi Matenga's will (once restored by the legislation of 1948) inevitably resulted in the sale of the remaining township sections. The Crown was not responsible for Hemi Matenga's decisions but it was responsible for the 1910 legislation, which allowed a permanent endowment to be alienated, and for the individualisation of title which underlay the breaking up of the tribal estate and the alienation of land by individuals without community control or consent, to the significant prejudice of Te Ātiawa/Ngāti Awa.

CHAPTER 7

PUKETAPU AND PARAPARAUMU AERODROME

7.1 Introduction

7.1.1 What this chapter is about

In this chapter, we address claims about Paraparaumu Aerodrome. In 1935, the Crown's power to take land for public works was extended to include the taking of land for aerodromes. This was an era when civil aviation was being developed and more aerodromes were needed. The Crown had also embarked on establishing a series of emergency landing grounds along the main air routes. A site was chosen at Paraparaumu in 1935. The Crown took 228 acres of Māori land compulsorily for an emergency landing ground in 1938–39, although the formal purpose in the taking proclamation was for an 'aerodrome'. Following the outbreak of the Second World War, the landing ground became a Royal New Zealand Air Force (RNZAF) station in 1943 and reverted to civilian use after 1945.

From 1947 to 1959, Paraparaumu Aerodrome served as Wellington's main airport while Rongotai was closed for redevelopment. The Crown took more Māori land for the aerodrome in 1940, 1943, 1949, and 1954 (see table 1). Some 'European' land was also taken. In total, the Crown acquired 259 acres of Māori land and 72 acres of European land. No more Māori land was taken after 1954 and the aerodrome was used mainly for recreational purposes after 1959. This situation had not changed by the late 1980s and early 1990s, when a new era of corporatisation and privatisation led the Crown to dispose of all its aerodromes. Paraparaumu Aerodrome was sold to a privately owned airport company in 1995.

Members of the Puketapu hapū presented three claims in relation to the aerodrome and the individualisation of title in respect of Ngarara West B, which was awarded to eight Puketapu individuals in 1887. These claims were:

- Wai 609 – Anne Colgate, Yvonne Mitchell, Bridget Mitchell, Carol Teira-Capon and Teoti Tangahoe Ropata on behalf of the members of Te Whānau a Te Ngarara;
- Wai 875 – Ngapera Taupiri Teira and 31 others for the direct descendants of the original owners; and
- Wai 1620 – Colleen Walker, Moana Michelle Steedman, Denise Parata, Bernard Lake, Vere Ridler, and Phillip Lake on behalf of Te Whānau a Te Ngarara and Puketapu hapū.

The claimants were distressed about the compulsory taking of their land for the aerodrome and the Crown's alleged failure to offer land back to them under section 40 of the Public Works Act 1981. According to the claimants, a compulsory taking 'override[s] property rights of Māori' and 'tramples on their whakapapa

connection to ancestral land'. The failure to return the land to them meant that 'the whakapapa connection to that land is effectively lost', to their great prejudice.[1] Instead, the Crown sold the aerodrome to private owners in 1995 with no proper consultation or adequate protection of their interests. This deprived the claimants of all the opportunities which would have come from the return of the land:

> the Airport remains as a constant reminder to our whānau of the loss of opportunity for our whānau in terms of the development of Paraparaumu. We have been taken advantage of and we lay the blame for it passing out of our whānau ownership firmly at the feet of the Crown.[2]

The Crown conceded that two takings of land from Ngarara West B4 in 1940 and 1943 breached the principles of the Treaty because the Crown failed to notify the owners of the proposed takings and thus deprived them of any opportunity to make their views known, hence the Crown could not have made an informed decision. According to the Crown, all the other takings were Treaty compliant because the owners were notified and had an opportunity to object (which one trustee did), and therefore the Crown was able to make informed decisions.

In respect of issues relating to the sale of Paraparaumu Aerodrome in 1995, the Crown denied that it failed to offer back the land under section 40 of the 1981 Act, arguing that the aerodrome lands were never surplus to requirements, and therefore the offer-back requirements were never triggered. The Crown also argued that it consulted appropriately with iwi prior to making its final decision to sell the aerodrome to 'airport users'. Further, at the time of hearing, the Crown's position was that the Airport Authorities Act 1966 was amended to ensure that the Crown's offer-back obligations were passed on to the new owners. This gave sufficient protection for the claimants' interests after the sale. The Crown recently changed its position, however, and made a concession of Treaty breach in May 2022 (as explained further below). In sum, the Crown argued that the section 40 offer-back obligations remained with the Crown under the Airport Authorities Act rather than transferring to the airport company. As a result, the Crown conceded that it failed to protect the interests of the former Puketapu owners when the company sold land at Avion Terrace in 1999, in breach of the principles of the Treaty of Waitangi.

Section 40 of the Public Works Act 1981, which imposed offer-back obligations on the Crown if land became surplus to the requirements of a public work, came under heavy criticism from the claimants. In their view, this section of the Act is in breach of the Treaty because:

- it includes exceptions that make it too easy for taking authorities to avoid the offer-back obligations;

1. Claimant counsel (David Stone, James Lewis, and Kelly Davis), closing submissions, 24 October 2019 (paper 3.3.54), p 2
2. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence, 20 January 2019 (doc F5), p 10

Section 40 of the Public Works Act 1981 (as at 28 October 2021)

40 Disposal to former owner of land not required for public work

(1) Where any land held under this or any other Act or in any other manner for a public work—

(a) is no longer required for that public work; and

(b) is not required for any other public work; and

(c) is not required for any exchange under section 105—

the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2), if that subsection is applicable to the land.

(2) Except as provided in subsection (4), the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority, unless—

(a) he or it considers that it would be impracticable, unreasonable, or unfair to do so; or

(b) there has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held—

shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person—

(c) at the current market value of the land as determined by a valuation carried out by a registered valuer; or

(d) if the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority considers it reasonable to do so, at any lesser price.

(2A) If the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority and the offeree are unable to agree on a price following an offer made under subsection (2), the parties may agree that the price be determined by the Land Valuation Tribunal.

. . . . .

(4) Where the chief executive of the department within the meaning of section 2 of the Survey Act 1986 or local authority believes on reasonable grounds that, because of the size, shape, or situation of the land he or it could not expect to sell the land to any person who did not own land adjacent to the land to be sold, the land may be sold to an owner of adjacent land at a price negotiated between the parties.

(5) For the purposes of this section, the term **successor**, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person.

- it enables the taking authority to make a unilateral decision without any consultation; and
- it restricts the offer-back requirement to only one generation of successors, which is contrary to Māori custom.

The Crown did not accept that section 40 is in breach of the Treaty but did provide information about reviews of the Public Works Act in 2000–05 and most recently in 2020, which proposed significant reforms to this section of the Act so as to better protect Māori interests.

7.1.2 General public works issues for a later volume of the report

The claimants and the Crown made submissions about the public works regime in general and the fundamental standards on which the Tribunal should assess whether compulsory takings are in breach of the Treaty. The claimants submitted, in accordance with previous findings of the Tribunal, that Māori land should only be taken compulsorily in exceptional circumstances, as a last resort in the national interest, and only if no other option is available (such as a leasehold or an alternative site that does not affect Māori land). The Crown, on the other hand, submitted that this sets the bar too high and does not 'appropriately balance the guarantee to Māori of rangatiratanga in Article 2 with the Crown's Article 1 right of kāwanatanga'.[3] In the Crown's view, findings of Treaty breach are only appropriate when:

- the Crown did not pay timely and adequate compensation; and/or
- the Crown failed to consult appropriately with the owners by providing them with the relevant information about the proposed taking, giving them sufficient time to discuss it, and 'genuinely and conscientiously considering points made by Māori prior to any decision being made, and willingly considering alternatives'.[4]

It is not necessary for us to make findings on all these matters for this chapter, where we focus on the particular claim issues relevant to Paraparaumu Aerodrome. These matters will be considered further in a later volume of the report.

We turn next to summarise the parties' arguments in more detail.

7.2 The Parties' Arguments

7.2.1 Individualisation of title and Puketapu land loss

7.2.1.1 *The claimants' case*

The claimants argued that the Crown imposed native land laws on them which 'resulted in the fragmentation and individualisation of communally held tribal title' and 'facilitated the alienation of land interests'. While acknowledging the Crown's concessions 'made broadly in relation to the native title system', the claimants emphasised that 'in the case of the Paraparaumu airport lands, the individualisation and the destruction of the tribal estate fundamentally impacted on the

3. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 53
4. Crown counsel, closing submissions (paper 3.3.60), pp 64–65

Notes on Terminology

Aerodrome/airport: At the time of the takings in 1939, the statutory definition of an aerodrome was 'any definite and limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft'. The Airport Authorities Act 1966 defined an airport as 'any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration'. 'Aerodrome' was the word in use in the 1930s. In 1995, however, Paraparaumu Aerodrome was sold to an 'airport company' called Paraparaumu Airport Ltd, so from that point onwards in the chapter we use the term 'airport' and 'Paraparaumu Airport'. Later, the name was changed again to Kapiti Coast Airport.

Airport authority/airport company: In 1966, Parliament enacted the Airport Authorities Act. At that time, all airports were either owned by the Crown, a local council, or both in a joint venture. The Act empowered local authorities to become an airport authority by order in council, which could then exercise certain powers to construct, improve, manage, and operate an airport, to make bylaws governing activities on airport land, to strike rates, to acquire land, and other such matters.

In 1986, the fourth Labour Government brought in an amendment which allowed the Crown or a local authority to establish airport companies under the Companies Act to operate and manage airports. The companies would be designated airport authorities by order in council and exercise some of the powers, such as making bylaws, but ownership of the companies had to remain with the Crown or local authority. This final point was changed in 1990 to allow 100 per cent of the shares in airport companies to be sold to private buyers. Thus, airport companies were established which were airport authorities for certain purposes but which were also considered 'private providers' of public works. In 1992, the Act was amended again to specify that the Crown could transfer airport lands to airport companies without triggering section 40 offer-back obligations, and the companies would then have those obligations 'as if the airport company were the Crown and the land had not been transferred under this Act'. Airport companies are defined as 'network utility operators' under the Resource Management Act 1991 in their capacity as airport authorities.

well-being of tangata whenua, to the extent that those breaches of the principles of the Treaty continue to resonate today'.[5]

7.2.1.2 *The Crown's case*

In respect of individualisation of title and landlessness, the Crown conceded that individualisation of title under the native land laws made Māori land 'more susceptible to fragmentation, alienation and partition' and contributed to undermining tribal structures. The Crown also conceded that the cumulative effect of its acts and omissions 'left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless', and that its failure to ensure that the iwi retained sufficient land for their present and future needs was in breach of Treaty principles.[6] The Crown was not, however, prepared to make any specific concessions about particular hapū, including the Puketapu owners of Ngarara West B. Crown counsel submitted:

> The Crown has not, however, assessed landlessness hapū by hapū and so is not in a position to make a concession on landlessness particularised to Puketapu hapū. As this inquiry phase is focussed on Te Ātiawa/Ngāti Awa ki Kāpiti, the Crown has focussed concessions toward that larger grouping.[7]

7.2.2 The Public Works Act 1928 and acquisition of land for Paraparaumu Aerodrome, 1939–54

7.2.2.1 *The claimants' case*

The claimants argued that the compulsory taking of Māori land under the Public Works Act 1928 was a breach of Treaty principles, as previous Tribunal reports have found. The Crown had Treaty obligations to ensure that Māori 'retained their lands and taonga so long as they wished to do so', and to ensure the full expression of tino rangatiratanga in respect of land.[8] The compulsory taking of Māori land was therefore a breach of article 2 of the Treaty, although the claimants agreed that exceptions were sometimes needed in the national interest, such as for defence purposes. Various Tribunal reports, it was argued, have found that Māori land should only be taken compulsorily as a last resort and in the national interest. The claimants argued that an emergency landing ground and (later) an airforce base during the Second World War were 'unequivocal national interest purposes'.[9] But, the claimants submitted, the Crown breached the principles of partnership and active protection when it (a) failed to give proper notice to Māori owners that land was to be taken, (b) acquired the freehold instead of a lesser interest such as leasehold, and (c) failed to offer the land back when it was no longer required for 'national interest purposes'.[10]

5. Claimant counsel (Leo Watson), closing submissions, 18 December 2019 (paper 3.3.61), p 5
6. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 29
7. Crown counsel, closing submissions (paper 3.3.60), p 61
8. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 12
9. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 17–19
10. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 16, 20–27

In the claimants' view, leasing the land instead of taking the freehold could have 'mitigate[d] the prejudice stemming from the ancestral and spiritual disconnection to the land as the owners, successors and descendants [would] still have mana and rangatiratanga over the land'.[11] The historical evidence of Heather Bassett showed that the Crown had insufficient justification to take the freehold in this case; the freehold was taken compulsorily solely because the land was Māori owned – other emergency landing grounds were leased from Pākehā owners instead.[12] The claimants also submitted that the Crown should have offered the land back when it was no longer required for the national interest purpose it was taken for, yet the Crown failed to do this after the Second World War when the airport became used for 'civilian and recreational purposes', which 'do not constitute national interest purposes'.[13]

7.2.2.2 *The Crown's case*

As noted above, the Crown did not accept the findings of previous Tribunal reports that Māori land should only be taken compulsorily in exceptional circumstances in the national interest and where there is no other option.[14] Rather, Crown counsel submitted that, in the particular case of the airport, the Tribunal should only find a Treaty breach where:

- the Crown did not pay landowners timely or adequate compensation; and/or
- the Crown acquired land for a public work without adequate consultation, which was defined as not providing information about the proposed taking, not giving Māori 'adequate time' to 'fully discuss a public work proposal prior to to any decision being made', and not 'genuinely and conscientiously considering points made by Māori prior to any decision being made, and willingly considering alternatives'.[15]

Based on these criteria, the Crown conceded that two of the seven takings of Māori land were in breach of Treaty principles:

- Ngarara West B4 (part) in 1940: There was no consultation with owners, who were not notified of the taking even though their details were known because they were not registered in the land transfer system. The owners had a right to be informed of the proposed taking and express a view on it, without which the Crown could not make an informed decision. The Crown's failure to engage with the owners may also have damaged their interests in terms of 'achieving adequate compensation'.
- Ngarara West B4 (part) in 1943: There was no consultation with the owners by way of notification and therefore the Crown 'could not have made an informed decision without taking account of the owners' view'. Also, no

11. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 21
12. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 16–17, 21–23
13. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 18–19
14. Crown counsel, closing submissions (paper 3.3.60), p 53
15. Crown counsel, closing submissions (paper 3.3.60), pp 64–65

compensation was paid until nine years after the taking, but Crown counsel submitted that this was not a Treaty breach because the compensation payment was adequate and included interest of 4 per cent from the date the land was taken.[16]

For all the other takings in 1939–54, the Crown's position was that consultation via notification of intention to take the land occurred and was sufficient, and that compensation was duly paid.[17] Also, in the Crown's view, there is no breach arising from the issue of taking the freehold instead of a lesser option such as leasehold. Although previous emergency landing grounds had been leased by the Crown, the prospect of war in 1939 meant that this policy changed and it was necessary to acquire the freehold of such a 'strategic installation'. This submission was based on a report by A F J Gallen.[18]

On the issue of whether the land should have been offered back when it ceased to be used for a 'national interest' purpose, Crown counsel submitted that the aerodrome 'has never ceased to operate as an airport', regardless of whether it was a military or civilian facility, and the decision to dispose of it in 1988–95 was made on the basis that it should continue to function as an airport after the sale.[19]

7.2.3 The Crown's disposal of Paraparaumu Airport, 1988–95

7.2.3.1 *The claimants' case*

On the issue of the Crown's disposal of Paraparaumu Aerodrome, the claimants submitted that the Crown breached the principles of partnership and active protection because:

- the Crown obtained an amendment of the Airport Authorities Act 1966 to dispose of the aerodrome 'in order to specifically avoid [triggering] the offer back provisions of the Public Works Act';[20]
- the Crown justified sale by limited tender as necessary to keep the aerodrome operational, but did not consider alternatives that would protect the claimants' interests, such as returning the aerodrome to them so that it could be leased to airport operators;
- the Crown limited the tender process to local councils, Wellington and Auckland airports, and aerodrome users, without giving the claimants an opportunity to bid;
- the Crown rejected the option of placing a memorial on the title, on the model used in the Treaty of Waitangi (State Enterprises) Act 1988, so that the aerodrome could be privatised but later returned to claimants if the Tribunal found their claims to be well-founded;

16. Crown counsel, closing submissions (paper 3.3.60), pp 69–73
17. Crown counsel, closing submissions (paper 3.3.60), pp 65–76
18. Crown counsel, closing submissions (paper 3.3.60), pp 62–63
19. Crown counsel, closing submissions (paper 3.3.60), pp 77–79
20. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 19

- the Crown failed to offer back land that was surplus to airport requirements prior to the sale, despite numerous instances in which surplus land was identified;
- the Crown's pre-sale consultation was flawed because the Crown consulted the wrong people (iwi groups who had lodged Treaty claims instead of the successors of former owners), even though Ati Awa ki Whakarongotai Inc advised the Ministry to consult the descendants, and the Crown's engagement with the latter was limited in scope as well as too late in the sale process;
- the Crown made repeated assurances during the sale process that their interests would be protected through section 3A(6A) of the Airport Authorities Act, but failed to include any protection mechanisms in the sale, so that the Crown had no power to monitor or enforce the airport company's offer-back obligations; and
- section 40 of the Public Works Act was flawed and provided inadequate protection in the case of Māori land, wrongly restricting the definition of successors to the immediate beneficiaries of the original owners in contravention of tikanga and Treaty rights.[21]

7.2.3.2 *The Crown's case*

The Crown's position in closing submissions was that there have been no Treaty breaches in respect of Paraparaumu Aerodrome since the taking of land from Ngarara West B4 in 1943.

In respect of surplus land, the Crown argued that there was no 'practicable or reasonable way of identifying land that was surplus from the core aerodrome business' before the sale of the aerodrome in 1995.[22] The Crown accepted that there had been indications from Landcorp and the Minister of Transport that there was land surplus to requirements. In the Crown's submission, however, these indications were not acted upon because the aerodrome was not commercially viable, and the Ministry of Transport decided to sell it as a 'going concern', leaving it up to future owners to decide whether any parts of the aerodrome were surplus to requirements. Also, aviation issues required the continued operation of the aerodrome after sale, and any offer-back of land was considered likely to lead to closure due to the layout of the aerodrome, in which the operational parts 'intersected virtually all of the titles' of the former land blocks. Further, the auditor-general's inquiry in 2005 found that some land had possibly been surplus long before the sale, but the auditor-general declined to make a judgement of whether land was surplus as a matter of law.[23] Crown counsel submitted that, similarly,

21. Claimant counsel (Watson), closing submissions (paper 3.3.61), pp 13–21; claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 24–30
22. Crown counsel, closing submissions (paper 3.3.60), p 103
23. Crown counsel, closing submissions (paper 3.3.60), pp 102–106

> it is not for the Tribunal to form a judgement on whether the circumstances were sufficient to have required the Ministry to offer any part of the land back to previous owners. Mr Mouat's evidence was that the assessment by the Ministry was that disposal of virtually any block of land would have the effect of diminishing the airport's operational capacity owing to the layout of the aerodrome's operational area. As for land which appeared unnecessary for the airport's *operational* requirements, the need for those areas to be retained as part of the going-concern to ensure the financial viability of the Airport was deemed, by Ministry officials, to be a matter best left to the successful tenderer. [Emphasis in original.][24]

The Crown also submitted that section 3A(6A) of the Airport Authorities Act 1966 was enacted to ensure that section 40 obligations would apply to the airport company after sale; the Crown denied that it used this amendment to avoid its own section 40 obligations. Rather, the amendment was inserted to protect the interests of the former owners and their successors. In the Crown's view, this gave sufficient protection because the 'original owners and their successors retained the legal remedy of enforcement of their section 40 rights' if those rights were infringed by the airport company. The Crown accepted that it did not include an 'oversight mechanism, or monitoring role' in the sale 'for the Crown to retain the ability to oversee compliance with section 40 obligations'. According to the Crown, such a role was simply not necessary because section 40 obligations were enforceable in the courts. The effectiveness of this was shown in 2012 when the company entered into a settlement with 'eligible successors' after threats of legal action.[25] Thus, it was submitted, the Crown was 'both correct and justified' in the assurances it gave prior to the sale that the 'offer-back rights of the former owners (or their successors) contained in the Public Works Act were protected'.[26]

On the issue of section 40 itself, the Crown argued that it protected the interests of former owners and their immediate beneficiaries, whose rights could not be defeated by the elapse of time once land became surplus to requirements.[27] The Crown later submitted, however, in supplementary closing submissions, that the Public Works Act was under review as at January 2020. There were proposals to 'improve offer-back processes' by 'seek[ing] to protect the interests of former owners of Māori land', aiming to improve recognition of the unique character and significance of Māori land, 'better facilitating' the return of land to Māori so that they have a 'better chance' of regaining ownership, supporting the land retention principles of Te Ture Whenua Māori Act, and re-establishing the connection of Māori with their land.[28]

On the issue of consultation, the Crown submitted that the consultation prior to the sale was appropriate at the time (as per the final conclusions of the

24. Crown counsel, closing submissions (paper 3.3.60), pp 105–106
25. Crown counsel, supplementary closing submissions, 22 January 2020 (paper 3.3.62), pp 10, 14–15
26. Crown counsel, closing submissions (paper 3.3.60), p 107
27. Crown counsel, closing submissions (paper 3.3.60), pp 106–115
28. Crown counsel, supplementary closing submissions (paper 3.3.62), pp 12–13

auditor-general).[29] The Ministry of Transport was aware of its Treaty obligations and was advised to consult with iwi who had filed Treaty claims, which the Ministry did and identified that any successful claims could be settled by other forms of compensation. Memorials on the title were therefore not required. The Crown accepted that the auditor-general criticised the Crown for failing to identify former owners and consult with their hapū, and the Crown also accepted that it could have engaged more with members of Puketapu hapū, and that this has been a source of the claimants' grievances. The Crown did not concede, however, that this was a breach of Treaty principles.[30]

On the tendering process, the Crown submitted that Māori could have submitted a bid to buy the aerodrome but did not do so; while there is oral evidence that an offer of $2 million was made at a meeting with officials, there is no evidence that an eligible tender was made from a consortium including tangata whenua, which the Crown submitted was an option open to them at the time. The criteria for submitting a tender were explained to them at meetings with officials in 1995.[31]

7.2.4 The Crown's protection of Māori interests after the sale

7.2.4.1 *The claimants' case*

The claimants submitted that the Crown breached the principles of partnership and active protection when it 'failed to stop successive airport companies selling off the aerodrome lands'.[32] Claimant counsel referred to statements by the Court of Appeal that the Crown's active protection obligation is not passive but requires 'active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. In the claimants' view, the Crown failed to meet this obligation because it was 'passive and silent when the aerodrome lands were sold throughout the late 90's, 2000's and recently this year 2019'.[33] These sales, according to the claimants, included the sale of Avion Terrace in 1996, the sale of the whole aerodrome to a new company in 2006, the commercial development of the eastern end of the aerodrome, and the sale of the whole aerodrome again in 2019. Despite repeated assurances from the Crown that their rights were protected by section 3A(6A) of the Airport Authorities Act, no offer back of land has occurred. The Crown had been aware since 1991 that any new airport owners were 'likely to have in mind the development potential of surplus lands' yet the Crown did nothing to actively protect Māori offer-back rights in the event of such development.[34]

Claimant counsel submitted:

> As stated throughout these submissions, partnership requires trust and confidence in each other. The Crown created s 3A(6A) AAA 1966 and reassured the descendants

29. Crown counsel, closing submissions (paper 3.3.60), pp 84–85, 101
30. Crown counsel, closing submissions (paper 3.3.60), pp 82–96, 101–102
31. Crown counsel, closing submissions (paper 3.3.60), pp 59–60, 97–98, 102
32. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 30
33. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 30
34. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 31

that this provision would protect their interests. The claimants were forced to rely on the integrity of the Crown to protect their interests.

The Crown's inaction and passivity in the face of the aerodrome lands being sold show that they have no integrity and that they cannot be relied on to protect Māori interests in land.[35]

The claimants accepted that the Ministry of Transport got involved in the airport company's application for a plan change in 2000–01, opposing the proposal 'in support of the rights of the original landowners', but the Ministry's submissions were dismissed as not relevant to an RMA (Resource Management Act 1991) inquiry. Claimant counsel submitted that the 'impotence of the Crown's involvement in the plan change proposal illustrates the complete lack of active protection mechanisms' put in place by the Crown at the time of sale.[36] In reply to the Crown's argument that it relied on the enforceability of section 40 in the courts instead of any oversight mechanisms, the claimants argued:

> With respect, this is not the Wai 875 claimant perspective of a good faith Treaty relationship. The notion of 'if you don't like it, take us to court' (to paraphrase colloquially what is essentially being submitted) does not befit the principle of partnership or equity, and does not equate to the guarantee of tino rangatiratanga of tangata whenua to their whenua and taonga.[37]

On the issue of section 40 of the Public Works Act 1981 (and the Act more generally), the claimants submitted that the Crown is in 'continual breach by ignoring previous Tribunal recommendations that the laws of compulsory acquisition be amended following due engagement with tangata whenua.'[38]

7.2.4.2 *The Crown's case at closing submissions*

The Crown submitted that the sale of shares in the airport company to new owners since 2006 was not a sale of the airport per se, and that the Public Works Act offer-back requirements were not changed by these successive sales.[39] The Crown also submitted that, apart from the sales of Avion Terrace and some land at Kaka Road, the airport company had not declared land surplus or sold any other land. Commercial development of part of the airport did not, in the Crown's view, render that land surplus to the requirements of an airport because that land was used to 'ensure the financial viability of an operational airport'. Thus, the 'offer-back rights of former owners have never been triggered in relation to those remaining parcels of land'.[40]

35. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 33
36. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 22
37. Claimant counsel (Leo Watson), submissions by way of reply, 12 February 2020 (paper 3.3.65), p 6
38. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 23
39. Crown counsel, closing submissions (paper 3.3.60), p 79
40. Crown counsel, closing submissions (paper 3.3.60), p 60

In respect of the sales that have occurred, the Crown submitted that the airport company did offer back the Kaka Road properties (to former European owners). Avion Terrace was not offered back because, acting under section 40 of the Public Works Act, the company determined that this land was exempt because it was impracticable, unfair, or unreasonable to offer it back (the categories of exemption in the Act).[41] Crown counsel noted that the Ministry of Transport tried to get information on the section 40 process followed by the airport company but was unable to do so. Instead, the Crown relied on a media report for why Avion Terrace was not offered back, and a letter from the company's lawyers asserting that the company had carried out its section 40 obligations, for proof that the company had done so.[42] Crown counsel submitted:

> The Crown says that it took appropriate steps to ensure, to the extent it could, that the airport company was complying, or had complied, with its section 40 obligations. The Crown notes that there is no evidence before the Tribunal that the company failed to comply with its statutory obligations.[43]

The Crown also denied that its involvement in the plan change process in 2001 was 'impotent', stating that the Ministry of Transport's three submissions to the hearing commissioners in 2000–01 showed that this was not the case, although the hearing commissioners did ultimately find that they had no jurisdiction to consider the section 40 issues raised by the Ministry. Instead, the hearing commissioners stated that those were issues for another forum, meaning the High Court, which Crown counsel maintained was a legal remedy for the successors at any time since the sale of the airport which they chose not to use. Crown counsel submitted that the Crown had relied on the enforceability of section 40 through the courts as the claimants' remedy rather than inserting any monitoring or enforcement mechanisms in the sale.[44]

Finally, the Crown submitted that the Public Works Act was under review (as at 2020), and that proposals were being developed to

> improve offer-back processes for the return of former Māori land no longer required for public purposes by ensuring that proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand.[45]

41. Crown counsel, closing submissions (paper 3.3.60), p 60
42. Crown counsel, closing submissions (paper 3.3.60), pp 95–97
43. Crown counsel, closing submissions (paper 3.3.60), p 97
44. Crown counsel, supplementary closing submissions (paper 3.3.62), pp 14–15, 17–18
45. Crown counsel, supplementary closing submissions (paper 3.3.62), pp 12–13

7.2.5 The Crown's post-hearing change of position

7.2.5.1 *The Crown's new position on who is responsible for section 40 obligations after privatisation*

In November 2020, Crown counsel filed a memorandum with the Tribunal stating that the Crown no longer accepted that airport companies were responsible for deciding whether land should be offered back under section 40 of the Public Works Act 1981. Instead, the Crown's new position was that the Chief Executive of LINZ was responsible, as was the case for SOE lands acquired for a public work. Crown counsel submitted:

> The Crown's view of the legal position on this has changed following reconsideration. The Crown's view is that it is the Chief Executive of Land Information New Zealand (LINZ) who is responsible for complying with ss 40 and 41 of the Public Works Act and making any decisions under those sections in relation to any land held for a public work by an airport company. That remains the case even where an airport company is privately owned and operated. However, that is not a view shared by the airport company which currently operates the Airport, and the question has not yet been conclusively resolved by the courts.[46]

Crown counsel also noted that, to 'avoid any future ambiguity' on the question of who was responsible, the airport authorities legislation would be amended to 'confirm the role of the Chief Executive of LINZ in undertaking the section 40 offer back process on behalf of airport companies, in line with the Crown's [new] position'.[47] The Crown intended to consult iwi and airport companies on the proposed legislation, including consultation with the airport claimants in this inquiry. Crown counsel submitted: 'With respect to whānau, hapū and iwi with interests at the Kāpiti Coast Airport, it is expected that this consultation is likely to give rise to a wider conversation regarding the airport and past issues associated with the land.'[48]

7.2.5.2 *What were the reasons for the Crown's change of position?*

On the face of it, section 3A(6A) of the Airport Authorities Act 1966 transfers the responsibility of section 40 decisions to airport companies 'as if the airport company were the Crown', and the Act has been interpreted in that way for almost 30 years (1992–2020). Section 3A(6A) of the Act states:

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to an airport company under this Act, but sections 40 and 41 of that Act shall after that transfer apply to the land as if the airport company were the Crown and the land had not been transferred under this Act.[49]

46. Crown counsel, memorandum, 20 November 2020 (paper 3.2.807), pp 2–3
47. Crown counsel, memorandum (paper 3.2.807), pp 3–4
48. Crown counsel, memorandum (paper 3.2.807), p 4
49. Airport Authorities Act 1966, s 3A(6A)

The Tribunal asked the Crown to clarify the reasons for its change of position.[50] Crown counsel advised that the position changed in 2020 when LINZ became aware of a proposed sale of some of the Kāpiti Coast Airport lands. LINZ was aware at that time of the issues about the offer-back process, including those raised in the Tribunal. As part of a re-examination of those issues in 2020, the Crown changed its position on how the requirements of the Public Works Act 1981 and the Airport Authorities Act 1966 interact.[51]

In brief, the situation is governed by three sets of amendments made to the Airport Authorities Act 1966. The first set of amendments was inserted in 1986, when the Labour Government's corporatisation policies resulted in provisions to establish airport companies that would become airport authorities and would manage airports as businesses. The Government maintained, however, that the airport companies would not be privatised. The second set of amendments was inserted in 1988, when the Government changed its mind and decided to provide for privately owned airport companies and the transference of airport lands to those companies (see section 7.6.3 for the details). In 1992, section 3A(6A) was inserted in the Act to specify that the Public Works Act offer-back requirements were not triggered by the transfer of airport lands to airport companies, but continued to apply after the land had been transferred to the companies.

LINZ concluded in 2020 that, when all of these amendments are read together with the Public Works Act, the responsibility for section 40 decisions remained with the Crown after transfer of airport lands to the companies, and not with the privately owned companies (as hitherto supposed). This was because airports owned by airport companies were deemed to be Government works under the 1986 amendments to the Airport Authorities Act,[52] and this was not altered in 1988 when provision was made to privatise the companies. Nor was it altered when the above quoted section 3A(6A) was inserted in 1992. Under sections 40–41 of the Public Works Act, only the Crown can make offer-back decisions for 'Government works', whereas local authorities make the decisions for 'local works'. Crown counsel submitted that, although privately owned airport companies are deemed to be local authorities for certain purposes under the Airport Authorities Act 1966, this does not change the fact that the airport lands owned by those companies are a 'Government work' for the purposes of the Public Works Act. It therefore follows, in the Crown's submission, that section 40 decisions for airport companies should be made by the Crown as they are for all other Government works, and that this is consistent with the wording of section 3A(6A).[53]

The Crown also argued that Parliament deliberately intended to ensure that 'the statutory power of decision to offer back land' remained with a 'publicly accountable body' when the 1988 and 1992 amendments were inserted. Crown counsel submitted:

50. Waitangi Tribunal, memorandum, 22 July 2021 (paper 2.6.142), p 2
51. Crown counsel, memorandum, 13 August 2021 (paper 3.2.1078), pp 4–5
52. Airport Authorities Act 1966, s 3D(b)
53. Crown counsel, memorandum (paper 3.2.1078), pp 4–6

> Airport companies are in a unique position. While they are caught by the definition of local authority under the PWA, they are also clearly caught by s 3D of the AAA. The AAA makes clear that for such entities, which are private, a greater level of oversight with respect to ss 40 and 41 processes is required. As such, the Crown considers its revised interpretation is supported by the purpose of the PWA and the AAA.[54]

7.2.5.3 *The Crown's amended closing submissions and concession of a Treaty breach*

After the Crown changed its position significantly from that advanced in closing submissions (see section 7.2.3 above), the Tribunal asked the Crown to consider whether a concession of Treaty breach was appropriate.[55] On 31 May 2022, the Crown submitted that it no longer relied on three points of its case advanced at closing submissions, namely that:

- upon the sale of the airport lands to Paraparaumu Airport Ltd, section 3A(6A) of the Airport Authorities Act 1966 meant that the Crown's section 40 offer-back obligations had been transferred to the airport company;
- the airport company determined that the sale of land at Avion Terrace was exempt from offer-back obligations under section 40 because it would be 'impracticable, unreasonable, or unfair' to offer the land back; and
- the Crown took 'appropriate steps to ensure, to the extent it could, that the airport company was complying, or had complied, with its s 40 obligations'.[56]

The Crown also offered the following concession, which was specific to the airport company's sale of land at Avion Terrace (see section 7.7.2 for the details of that sale):

> At the time the Crown sold its interests in Paraparaumu Airport in 1995, the Public Works Act 1981 and the Airport Authorities Act 1966 provided protective mechanisms for the rights and interests of the former owners of the land blocks which comprise Avion Terrace, including the requirement in s 40 of the Public Works Act 1981 to endeavour to sell the land back to the former owners or their successors (subject to certain exceptions) if it subsequently were to become surplus to the airport company's requirements.
>
> After selling its interests in the airport company, the Crown took the view that responsibility for considering offer back sat with the company and the Crown failed to take appropriate action to ensure the protective mechanisms in section 40 of the Public Works Act, which protect the former owners' interests, were fulfilled.
>
> The acts and omissions of the Crown regarding the application of the offer back provisions in the Public Works Act to the land at Avion Terrace cumulatively mean that the interests of the former Ngāti Puketapu owners were not properly considered or protected when the airport company sold the land in 1999 on the basis that it was

54. Crown counsel, memorandum (paper 3.2.1078), pp 5–6
55. Waitangi Tribunal, memorandum (paper 2.6.142), p 2
56. Crown counsel, memorandum, 31 May 2022 (paper 3.2.1223), pp 1, 3

surplus to its requirements. This was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[57]

7.2.5.4 *The claimants' response*

Counsel for the Wai 609 claimants filed a submission in response to the Crown's change of position. The claimants welcomed the Crown's concession but considered that the 'concessions could go further', arguing that more parts of the Crown's original closing submissions were incompatible with the new position than the Crown had acknowledged. In particular, the claimants submitted that the Crown's responsibility to exercise its section 40 offer-back obligations was not limited to the company's sale of Avion Terrace in 1999. Rather, in the claimants' view, there were other occasions where airport lands had become surplus but were not offered back by the Crown.[58] Hence, the claimants argued that the Treaty breach was broader than that conceded by the Crown:

> Counsel submit that the actions and omissions of the Crown which failed to declare Paraparaumu airport land surplus to requirements and the subsequent failure to trigger the Section 40 offer back provisions; as well as the Crown's actions and omissions which subsequently followed thereafter, should also amount to a breach of Te Tiriti as these actions and omissions have inadvertently caused prejudice to the claimants.[59]

Counsel for the Wai 875 claimants acknowledged the Crown's concession but argued that it was too late, too narrow, and based on an inappropriate assumption that the Public Works Act offer-back provisions were Treaty compliant. On the first point, counsel submitted that the circumstances of the Avion Terrace sale had been known to the Crown since 1996, and the former owners had protested at the time and subsequently. In the claimants' view, therefore, the Crown's concession is overdue, and the delay has caused 'considerable anguish, stress and cost to former owners in seeking justice over decades'.[60] Claimant counsel also submitted that the Crown's concession was too narrow in terms of both the extent of land involved and the time at which Avion Terrace land was sold without any offer back. On the former point, the claimants argued that the use of airport land for non-airport purposes was much wider than just Avion Terrace. On the latter point, the claimants argued that the Crown proposed to sell Avion Terrace sections back in 1984, indicating that the land was surplus from that point onwards.[61]

Finally, claimant counsel submitted that the Crown's concession was inappropriately based on an assumption that the Public Works Act 1981 protected the rights and interests of the former owners. In the claimants' view, the offer-back provisions do not meet the Crown's Treaty obligations (as discussed above). Rather,

57. Crown counsel, memorandum (paper 3.2.1223), pp 2–3
58. Claimant counsel, memorandum, 7 July 2022 (paper 3.2.1336), pp 1–2
59. Claimant counsel, memorandum (paper 3.2.1336), p 2
60. Claimant counsel (Watson), memorandum, 31 July 2022 (paper 3.2.1258), pp 2–3
61. Claimant counsel (Watson), memorandum (paper 3.2.1258), p 3

those provisions 'simply served to avoid Crown obligations of an offer back to former owners at the time it transferred the land into private ownership'.[62]

7.3 Issues for Discussion

In this chapter, the key issues for discussion are:

- Did the Crown obtain the free and informed consent of the Puketapu owners to the alienation of their land for an aerodrome?
- What options did the Crown consider for how to privatise Paraparaumu Aerodrome?
- Did the Crown, having recognised that consultation was required, consult appropriately before privatisation and make informed decisions?
- Did the Crown protect the rights and interests of the former owners' successors and descendants before privatisation?
- Did the Crown protect the rights and interests of the former owners' successors and descendants after privatisation?

7.4 Individualisation of Title and Land Loss: The Context for the Taking of the Airport Lands

7.4.1 The Puketapu settlement of the Paraparaumu district

Puketapu is a hapū of Te Ātiawa/Ngāti Awa. Puketapu migrated to Waikanae in the heke of the 1820s and early 1830s and settled at the southern end of the Ngarara block at Te Uruhi Pā. This pā was adjacent to what later became the Paraparaumu airport lands.[63] The joint evidence of Poiria Love-Erskine, Hari Jackson, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill noted that Puketapu lived at Kenakena Pā (the main Te Ātiawa/Ngāti Awa pā at the time) as well as at Te Uruhi and Wharemauku Pā.[64] Hira Maeke told the Native Land Court in 1899 that Wharemauku was the southern-most of the Te Uruhi kāinga.[65] Historian Bruce Stirling explained that Te Uruhi was the name of a wider area:

> It was Te Uruhi pa that gave its name to the wider area inland from the Puketapu's main coastal pa. The area known as Te Uruhi was very similar to that later defined as Ngarara West B [see map 12 for Ngarara West B], extending from near Kenakena in the north to Wharemauku in the south, and east towards what is now Paraparaumu township (extending east of the railway line). It has long been considered some of the best land in the district. Ngarara West B included areas of coastal dunes, stabilised inland dunes, waterways, swamp, and areas of fertile soil. The evidence indicates

62. Claimant counsel (Watson), memorandum (paper 3.2.1258), pp 3–4
63. Tony Walzl, 'Ngatiawa: Land and Political Engagement Issues c 1819–1900', December 2017 (doc A194), pp 20, 90; Bruce Stirling, brief of evidence for the Environment Court, 9 February 2009 (doc F5(b)), p [4]
64. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 3
65. Stirling, brief of evidence for the Environment Court (doc F5(b)), p [8]

that Puketapu occupied this land extensively, having pa, kainga, cultivations, and food gathering areas across the block.[66]

Some sources said that the land was allocated to Puketapu by the Ngāti Toa chief Tungia, and that his gift stretched south from Te Uruhi to the Whareroa block and Paekākāriki.[67] We have already discussed Puketapu occupation in the Whareroa block (south of Ngarara West) and the sale of that block in chapter 3.

The principal chief of Puketapu was Te Manutoheroa, who was one of the leaders of Te Rauparaha's attacks on the South Island in the late 1820s.[68] Manutoheroa settled in Queen Charlotte Sound with some Puketapu and other hapū of Te Ātiawa/Ngāti Awa, and he signed the Treaty of Waitangi there on 4 May 1840.[69] He returned to Paraparaumu from time to time and led Puketapu forces in the battles of Haowhenua (1834) and Kuititanga (1839).[70] With Manutoheroa mostly in the South Island, leadership of the Puketapu at Paraparaumu and Whareroa was eventually taken up by Tamati Whakakeke (also known as Whakapakeke).[71]

In 1848, most of the Puketapu at Paraparaumu returned to Waitara with Wiremu Kingi Te Rangitake (see chapter 3). Henry Tacy Kemp, Governor Grey's Native Secretary, toured the district in 1850 and found Te Uruhi 'almost deserted'.[72] At the time of the Whareroa and Wainui purchases in 1858–59, Tamati Whakakeke was living at Whareroa Pā with Ngāti Maru. As discussed in chapter 3, he was a leading non-seller there and received a 50-acre reserve. This was the only cultivation land reserved by the Crown for Puketapu in the Whareroa and Wainui purchases.[73] Ultimately, the Puketapu in occupation had to leave the Whareroa block (see chapter 3 for further discussion of the purchases and reserves). Tamati Whakakeke remained in occupation of the reserve with others of Puketapu in the 1860s but died some time before 1870.[74]

At Paraparaumu, Ihakara Te Ngarara had taken up leadership of Puketapu by the 1870s. Ihakara Te Ngarara was an important tupuna of the Paraparaumu airport claimants. He was the great-grandson of the Te Ātiawa/Ngāti Awa chief Tahuaroa. Ihakara's wife, Heeni Karoro, was the great-granddaughter of another

66. Stirling, brief of evidence for the Environment Court (doc F5(b)), p [4]
67. Walzl, 'Ngatiawa' (doc A194), pp 95, 156; Alan Riwaka, 'Nga Hekenga o Te Atiawa', 2003 (doc A209), p 62; Stirling, brief of evidence for the Environment Court (doc F5(b)), pp [6]–[7]
68. Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 59, 61, 70–81
69. Walzl, 'Ngatiawa' (doc A194), p 111; Riwaka, 'Nga Hekenga o Te Atiawa' (doc A209), pp 118, 142; 'Henry Williams Treaty Copy Signatories' (Apihaka Tamati-Mullen Mack, papers in support of brief of evidence (doc F42(a)), p 3048)
70. Walzl, 'Ngatiawa' (doc A194), pp 116, 130; Wakahuia Carkeek, *The Kapiti Coast: Maori History and Place Names* (Wellington: AH & AW Reed, 1966) (doc A114), pp 55–60
71. Walzl, 'Ngatiawa' (doc A194), p 111; Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report', December 2018 (doc A214), p 39
72. Carkeek, *The Kapiti Coast* (doc A114), p 149
73. Walzl, 'Ngatiawa' (doc A194), pp 111, 279–280
74. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 39

'high ranking' chief, Tautara.[75] Ihakara Te Ngarara was born in Taranaki but spent part of his childhood at Te Uruhi and part at Porirua. Ihakara's whānau were at Arapaoa in the South Island at the time of Kuititanga in 1839, after which he moved with his father to Porirua for 10 years. Ihakara then moved back to Te Uruhi after the main body of Puketapu there had returned to Waitara with Wi Kingi.[76] Many of Te Ātiawa/Ngāti Awa ki Kāpiti moved backwards and forwards in this way between Taranaki and various places that they had settled, including Wellington, the South Island, and the Chatham Islands.

7.4.2 Individualisation of title: the Ngarara block

7.4.2.1 *Ihakara Te Ngarara chooses the Puketapu names for the list of owners*

As discussed in chapter 4, Te Ātiawa/Ngāti Awa applied for title to the Ngarara block in 1872. Te Ātiawa/Ngāti Awa leaders prepared the list of individuals to go into the new title. Some of the details of that process are explained in chapter 4. Wi Parata and Tamihana Te Neke led the preparation of a list of owners for Ngarara which was submitted to the court in Wellington in 1873. Ihakara Te Ngarara decided the Puketapu names for the list of owners, 'assisted' (he said) by another member of Puketapu, Rihi Kapoata.[77] Ihakara explained his part in the process to an inquiry by Judge Mair in 1890:

> I was one who assisted in preparing the list of names, myself & Rihi Kapoata, also Wi Parata, Tamihana, & Te Poihipi who finished it here [at Wellington]. I only had to do with the Puketapu names. The Court called upon Wi Parata & Tamihana to prepare the names. I gave Wi Parata my list and he handed it to the Court.[78]

Ihakara put forward his own name and seven others. These included his wife, Heeni Te Karoro, and two of his sons, Epiha Te Ngarara and Teira Te Ngarara. The other four Puketapu names in the list were: Rihi Kapoata; Reupena Takurua (the son of the chief Wi Takurua);[79] Poharama; and Horomona.[80] As noted, Wi Parata and Tamihana Te Neke accepted these names without question or alteration.

The biggest internal dispute for Te Ātiawa/Ngāti Awa in 1873 was the separation of the Otaraua lands from the rest of the Ngarara block as the 'Muaupoko' block (see chapter 3). This led to a contest over boundaries, resulting in what Tony Walzl called 'the odd shape' of the Muaupoko block, which consisted of 'strangely drawn

75. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill (doc F5), p 3
76. Ihakara Te Ngarara, evidence to the Ngarara commission, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), p 275); Carkeek, *The Kapiti Coast* (doc A114), p 149; Ihakara Te Ngarara, evidence to Judge Mair's inquiry on section 13 application, no date (Tony Walzl, answers to questions in writing, November 2018 (doc A194(d)), p 106)
77. Ihakara Te Ngarara, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), p 106)
78. Ihakara Te Ngarara, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), pp 105–106)
79. Transcript 4.1.18, p 960
80. Walzl, 'Ngatiawa' (doc A194), pp 544–545

angles'.[81] Inia Tuhata, Tamihana Te Karu, and Hira Maeke disputed one part of the boundary line.[82] Ihakara Te Ngarara also referred in 1890 to having 'struggl[ed] with Eruini Te Tupe' of Otaraua at the time the court sat 'about the possessions of the land'. He did, however, come 'to terms with Eruini'.[83] These matters were settled out of court and there was no dispute when Eruini Te Tupe's claim was heard by Judge Rogan in 1873. This claim was presented by Wi Parata, who appeared on behalf of Eruini and stated that Otaraua had the right to the Muaupoko block.[84] The Native Lands Act 1865 thus allowed the exercise of a degree of rangatiratanga in cases where there were no cross-claims or challenges. The Te Ātiawa/Ngāti Awa chiefs decided the boundaries and entitlements to the land within the Ngarara block. Their decisions were rubber stamped by the court (this is discussed more fully in chapter 3).

On the other hand, the implications of the exercise were not well understood by Te Ātiawa/Ngāti Awa, as we discuss next.

7.4.2.2 *Lists of owners froze custom at a point in time: loss of interests by omission*

The chiefs' list of names, based on those who were resident at the time of the court sitting, became the named individuals on the titles to Māori freehold land (the Ngarara and Muaupoko blocks). This new form of title froze custom and cut across the rights of those who were absent at the time, yet it was for their benefit that the home people were keeping the fires alight. Those who found themselves left off the titles could no longer return as they were accustomed to do without the good will and agreement of the new legal owners. One example for Puketapu was Rihari Tahuaroa, who gave evidence to the Ngarara commission in 1888 (see chapter 4 for a full discussion of the commission). Although Rihari lived mainly in the South Island, he had lived at Te Uruhi from time to time and had fought at the battle of Kuititanga in 1839.[85] Rihari believed that his rights there had survived. He hoped to get back into the title through a process like that of the commission itself, which was established to investigate 'whether the decisions of the Native Land Court in relation, among others, to the land known as Ngarara West ought to be given full effect to, or whether sufficient doubt exists as to the correctness of such decisions as to render further inquiry proper'.[86] The commission's minutes record this exchange between Rihari Tahuaroa and counsel for Inia Tuhata, C B Morison:

> Are you a Puketapu? – Yes.

81. Walzl, 'Ngatiawa' (doc A194), p 430
82. Walzl, 'Ngatiawa' (doc A194), p 430
83. Ihakara Te Ngarara, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), p 105)
84. Walzl, 'Ngatiawa' (doc A194), p 430
85. Rihari Tahuaroa, evidence to the Ngarara commission, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 595–626)
86. H G Seth Smith and Robert Trimble, 'Ngarara, Porangahau, Mangamaire, and Waipiro Blocks (Commissioners' Report re Decisions of Native Land Court in Respect of the)', 19 December 1888, AJHR, 1889, G-1, p 1

And you used to live at Te Uruhi? – Yes.
Have you any land there? – Yes, the land given to [Manu]Toheroa my father.
I suppose a part of it is your land? – Yes, I have a right there.
Do you know that your name is not [on] the certificate of title for that land? – Yes I know it.
How do you expect to get the land there? – I'll work it.
Through whom? – Why something like what is going on here [at the commission].[87]

Two years later, at Judge Mair's inquiry, Ihakara Te Ngarara stated: 'I know [Manu]Toheroa, he died at Arapawa. If he had been present no doubt his name would have been added if he had been alive.'[88] Rihari Tahuaroa was not present at the time of the court sitting and his name (like that of others) was left out of a list that reduced Puketapu interests at Te Uruhi to eight names.

In addition to eliminating those whose interests entitled them to return, Puketapu members who were in fact living on the land at the time were also left out of the Ngarara list of owners. In chapter 4, we discussed the inquiries conducted under section 13 of the Native Land Court Acts Amendment Act 1889 (see section 4.6.6). Various Te Ātiawa/Ngāti Awa hapū, whānau, and individuals tried to get back into the title by applying to the chief judge to correct the omission of their names from the 1873 list. Although Rihari Tahuaroa was not one of the applicants, seven members of Puketapu did file applications. Just these applicants would have virtually doubled the Puketapu names on the Ngarara list of owners. The applicants were the grandchildren of Pakewa, also known as Ihipera Nukiahu. She was a Puketapu woman of high rank who signed the Treaty at Wellington on 29 April 1840.[89] Ihakara Te Ngarara, who gave evidence at Judge Mair's inquiry into these applications, acknowledged that Pakewa and her grandchildren lived at Te Uruhi, had cultivations and an orchard, and continued to live there for some time after they were excluded from the title in 1873. This case is discussed more fully in section 4.6.6. Here, we note that Ihakara Te Ngarara told Judge Mair that he left their names out of the list because of a quarrel at a difficult time, while he was trying to sort out a boundary with Eruini Te Tupe.[90] The evidence of the applicants was that they were unaware at the time that their names had been left off the list.[91]

Another possible omission was the name of Te Wharemaru Te Ngarara (also known as Wharemaru Te Teira), the tupuna of the Lake whānau.[92] He was the

87. Rihari Tahuaroa, evidence to the Ngarara commission, 4 December 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 216–217)
88. Ihakara Te Ngarara, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), p 104)
89. Walzl, answers to questions in writing (doc A194(d)), p 4
90. Ihakara Te Ngarara, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), p 105)
91. Mere Pairoke and others, evidence to Judge Mair's inquiry (Walzl, answers to questions in writing (doc A194(d)), pp 102–112)
92. See, for example, Denise Sandra Parata (née Lake), brief of evidence, 8 May 2019 (doc F40).

youngest of Ihakara Te Ngarara's sons,[93] and was not put in the title alongside his mother and elder brothers.[94] The reason for this omission is not known but it had consequences for his descendants, as Te Wharemaru did not receive a block of land when Ngarara West B was partitioned out of Ngarara West in 1886. As noted in chapter 4, the tribal leaders appear to have decided in 1873 that the names of children would mostly be left off the Ngarara list. This included Eruini Te Tupe's son, Karaitiana Te Tupe (see section 4.6.6.4), and it appears to have included Te Wharemaru Te Ngarara as well, though not his brothers. It is possible that Te Wharemaru, who died in 1945, had not been born when title was decided in 1873. Claimant counsel argued that his omission was 'one of the unfortunate and prejudicial consequences of the native title system'.[95] Te Wharemaru Te Ngarara did get back into the title eventually through succession to some pieces of his parents' lands (see below).

The omission of names from titles was common – names could always be left off lists by accident or intentionally because of quarrels or internal politics.[96] Names could also be left off to limit the number of owners and thereby increase an individual's share. The Turanga Tribunal commented: 'The problems of communication and the fact that lists were being drawn up out of court meant that the Crown had to ensure that there was a proper and accessible system of checks.'[97] In the circumstances of the nineteenth century, where it was not possible to notify all owners and the court was ignorant of 'inter-family or inter-hapu politics', it was not sufficient for the court to simply rubber stamp lists if they were not challenged by anyone who happened to be in court on the day. The Turanga Tribunal concluded:

> Thus, while it was reasonable for the court to rely on lists provided by Maori themselves in awarding of title, the dangers of mistake or abuse meant that there had to be a guaranteed right of appeal or rehearing for all who claimed to have been left off by their relatives. The provisions in the Act for rehearing contained no such guarantee. Indeed, it was not until 1894 (30 years after the court was created) that a full right of appeal was introduced.[98]

As discussed in chapter 4, some people did not realise that they were not on the Ngarara list of owners until long after the three-month period to obtain a rehearing[99] had elapsed. Section 13 of the Native Land Court Acts Amendment

93. Muri Stewart, brief of evidence, 6 May 2019 (doc F28), p 2
94. Transcript 4.1.18, pp 960–961
95. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 10
96. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, p 451
97. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 451
98. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 451–452
99. Native Lands Act 1869, s 20. This Act changed the period from six months to three months. It was not three months to *apply* for a rehearing but three months in which an order in council granting one could be issued.

Act 1889 did not provide a remedy. Chief Judge Seth-Smith did not accept that the Puketapu omissions, for example, came within the scope of that Act.

7.4.3 Consequences of individualisation: partitions, fragmentation, alienations

7.4.3.1 *Individualisation and partitioning, 1873–1900*

The Crown's title system cut through a complex web of customary rights and relationships, reducing it to a list of individuals. One reason for this was to provide certainty in any land dealings with settlers: lessees and purchasers could be certain that they were dealing with the correct and legal owners of the land. Thomas Lewis, the under-secretary of the Native Department, explained to the Native Land Laws Commission in 1891:

> the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside. Therefore, in speaking of the Native Land Court, this test to it must, I consider, be applied – viz, that there should be a final and definite ascertainment of the Native title in such a way as to enable either the Government or private individuals to purchase Native land.[100]

Individualisation of customary tenure was a key component in the new title system and a key factor in the alienation of Māori land. As the Crown has conceded, individualisation of title led to partitions, fragmentation, and alienation.[101] In their joint brief of evidence, Hari Jackson and his co-claimants told us:

> Puketapu was severely affected by this shift in how the land was viewed. The advent of identifiable and duly registered title meant that land could be alienated permanently through purchase and did result in large scale transfer of land from Māori to Pakeha.[102]

Citing a report by Dr Robyn Anderson, the claimants added that, as a result of individualisation of title:

> The communal structure of Maori society was broken apart, the relationship between rangatira and hapu undermined, and the capacity of the hapu under the leadership of their rangatira to retain their lands and resources severely weakened.

100. AJHR, 1891, G-1, p145 [187]; see also Robyn Anderson, Terence Green, and Louis Chase, 'Crown Action and Māori Response, Land and Politics, 1840–1900', 2018 (doc A201), pp 790–791.
101. Crown counsel, closing submissions (paper 3.3.60), p 29
102. Poiria Love-Erskine, Hari Jackson, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 6

> The strength of the bundle of rights that constituted customary ownership and unity of purpose was much easier to break once rights were individualised.[103]

For Puketapu, this process accelerated after the partition of the Ngarara West block in 1887. Only a small minority of Ngarara West owners applied for the partition in 1886 and, partly as a result, most of the block remained intact following the hearing under Judge Puckey (see chapter 4 for the details). One exception was the partitioning out of the Puketapu interests as Ngarara West B. No one challenged the Puketapu boundaries or the award of land to them, which was an exception in a bitterly contested process. One reason for this was the establishment of a boundary line back in the 1850s, when the Crown was attempting to purchase the whole of the Kāpiti coast. Ihakara Te Ngarara told the court that a 'Native Committee', of which he was a member, had decided Puketapu's northern boundary at that time. The Puketapu boundaries were also set by the Whareroa purchase in 1858, which abutted Ngarara West B to the south, and by the surveying of the Muaupoko block (which was inside the Ngarara block and granted to Otaraua in 1873). All of this helped to make Puketapu's claim non-controversial.[104]

Ngarara West B was not, therefore, the subject of the rehearing applications that followed Judge Puckey's 1887 decision, nor was it included in the scope of the Ngarara and Waipiro Further Investigation Act 1889.[105] In this sense, Puketapu were fortunate because they escaped the long and expensive litigation that followed the 1887 partition, including petitions, Native Affairs Committee hearings, the Ngarara commission, and the rehearing of 1890–91.[106] Ihakara Te Ngarara was called as a witness at the Ngarara commission but his cross-examination was mostly focused on the whereabouts and doings of the chief, Hone Tuhata, which were at the centre of Inia Tuhata's struggle with Wi Parata.[107]

Dr Barry Rigby described Ngarara West B (see map 12) as 'the smallest of the three portions of Ngarara West. Most of the block covered the area now occupied by Paraparaumu Beach and Pararaparaumu Township. Located west of the railway, it stretches north along the coastal flats in the larger Paraparaumu area.'[108]

Although the original survey was 1,534 acres, the revised Walghan block histories suggested that the actual area of Ngarara West B may have been about 1,410 acres.[109] This block was shared by eight individual owners, four of whom were members of Ihakara Te Ngarara's immediate family. The small number of

103. Poiria Love-Erskine, Hari Jackson, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 6; Anderson, Green, and Chase, 'Crown Action and Māori Response, Land and Politics,1840–1900' (doc A201), p 492

104. Walzl, 'Ngatiawa' (doc A194), pp 430, 432–434, 465–466, 468, 469–470

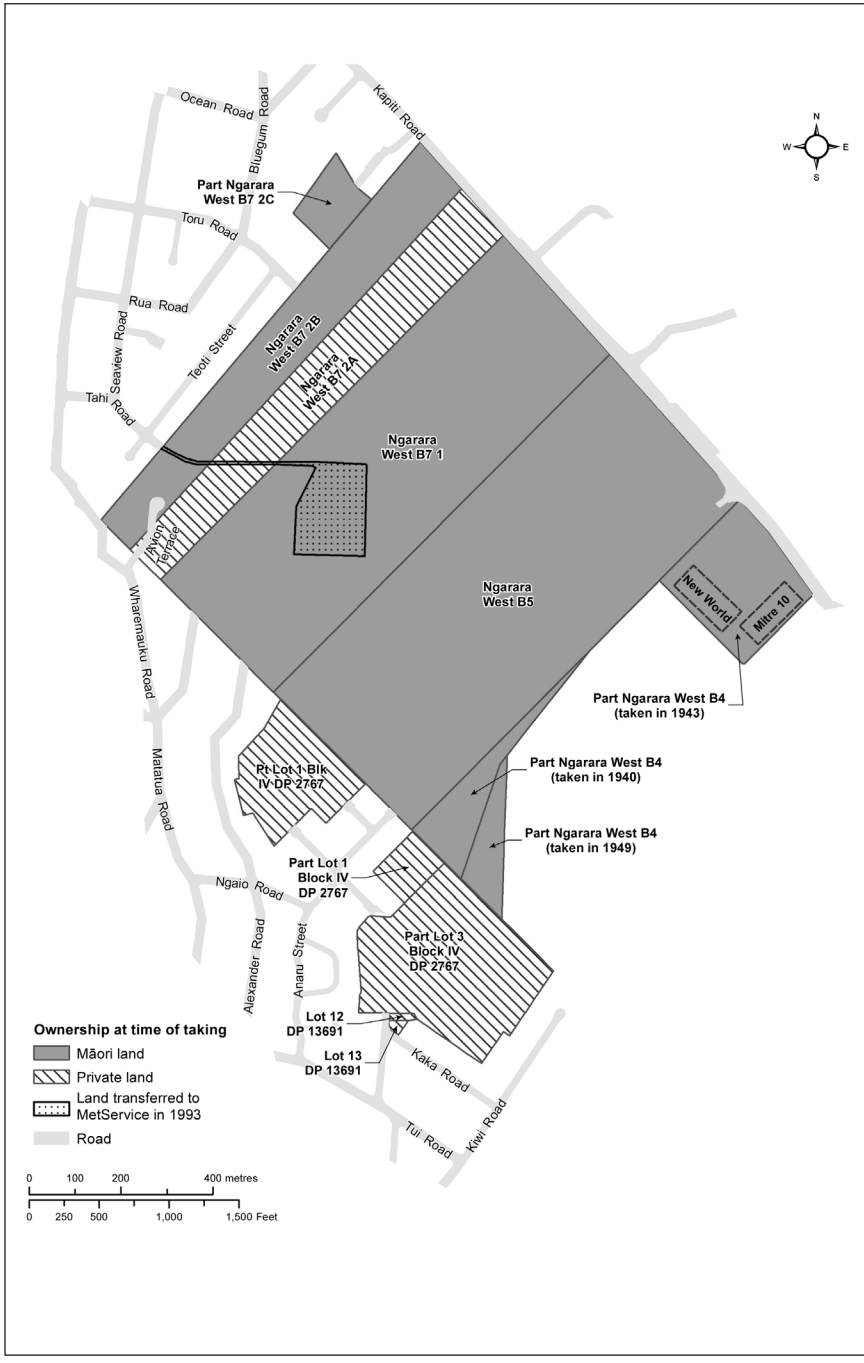
105. Initially, Puketapu did join one of the applications for rehearing, raising two 'minor administrative points', but withdrew before the application was heard by the chief judge: see Walzl, 'Ngatiawa' (doc A194), p 474.

106. Stirling, brief of evidence for the Environment Court (doc F5(b)), pp [4], [6], [14]

107. Ihakara Te Ngarara, evidence to the Ngarara commission, 22 November 1888 (Walzl, papers in support of 'Ngatiawa' (doc A194(a)), pp 274–287)

108. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 26

109. Walghan partners, 'Block Research Narratives', vol 3, November 2018 (doc A212(b)), p 40



Map 12: Paraparaumu Aerodrome / Airport, showing land acquired under the Public Works Act 1928.

owners, their close relationships, and the relatively few expenses of title determination (compared to the rest of Ngarara West), helped keep the block intact longer than Ngarara West A and C. Also, the B block was not subject to the Ngarara and Waipiro Further Investigation Act 1889, which resulted in the division of the A and C blocks into 79 and 41 subdivisions respectively in 1891 (see chapter 4).[110]

Puketapu had cultivations, including kumara, and food-gathering areas across Ngarara West B, which was mostly land of a high quality. Bruce Stirling explained that Puketapu also began to develop the land for pastoral farming:

> As the district was settled, Puketapu adapted the usages of their land to suit the developing pastoral economy. Initially they ran horses, cattle, and pigs on Ngarara West B, as well as planting some areas out as orchards. From the mid-1870s they began sheep farming. As titles to the subdivisions of the land began to be defined in the 1890s, development work increased, particularly in what is now the Airport area. With the encouragement of settler neighbours to the south, drainage work and fencing was put in place and sheep numbers increased. Settlers and, subsequently, a land valuer observed that Puketapu's land was fertile and valuable.[111]

The owners partitioned Ngarara West B into 10 divisions in 1896–1900, possibly so that parts of it could be leased by the different owners to neighbouring settlers. There were at least two informal leases of land prior to the court's final orders in 1900.[112] Eight of the subdivisions (B2–9) were awarded as single-owned blocks to the eight owners. All of those subdivisions were to the west of the railway. B1 was located to the 'immediate west of the railway line and was adjacent to the Pakeha settlement at Paraparaumu,'[113] which had been first established in 1888 on the part of the Muaupoko block purchased by the Crown. Ngarara West B1 was 86½ acres and it was jointly owned by seven of the eight owners (Horomona was not in B1).[114] Ngarara West B10 was a four-acre urupā site.[115] The title to B10 was not properly finalised until 1959, when it was awarded to 85 owners.[116] Mr Walzl and Paula Berghan set out the ownership of the blocks and the single owners (future airport blocks are in italics):

B2	89[a] 3[r] 9.3[p]	Ihakara Te Ngarara (m)
B3	139[a] 1[r] 35.6[p]	Heni Te Karoro (f)
B4	*150[a] 0[r] 6.2[p]*	*Teira Te Ngarara (m)*
B5	*202[a] 3[r] 18.7[p]*	*Epiha Te Ngarara (m)*
B6	250[a] 1[r] 25.7[p]	Rihi Kapoata (f)

110. Ngarara and Waipiro Further Investigation Act 1889, ss 2, 4
111. Stirling, brief of evidence for the Environment Court (doc F5(b)), p [5]
112. Stirling, brief of evidence for the Environment Court (doc F5(b)), pp [9]–[10]; Walghan partners, 'Block Research Narratives', vol 1, 2018 (doc A212), p 273
113. Walzl, 'Ngatiawa' (doc A194), pp 544–545
114. Walzl, 'Ngatiawa' (doc A194), pp 508, 545
115. Stirling, brief of evidence for the Environment Court (doc F5(b)), pp [9]–[10]
116. Walzl, answers to questions in writing (doc A194(d)), p 34

B7	*295[a] 3[r] 16.1[p]*	*Reupena Takurua (m)*
B8	295[a] 3[r] 16.2[p]	Poharama (m)
B9	20[a] 0[r] 0[p]	Horomona (m). [Emphasis added.][117]

7.4.3.2 *Partitioning and alienations, 1901–50*

Further partitions soon followed that of 1900, accompanied by leases, and then sales. Some partitioning occurred as a result of the division of land between successors. All of the early leases were to William Howell and the Maclean family. Howell, who owned adjoining farmland, leased 257 acres in 1907 for a term of 42 years (Ngarara West B4 and the larger part of Ngarara West B5). The Macleans leased a larger share: 797 acres for 21 years in 1903 and an additional 95 acres in 1907 (the smaller part of B5). As with Ngarara West A and C, leases were converted into purchases. The first purchases were small in scale. Nine acres were sold in 1905 and 1906, some of it for railway purposes. But the Macleans purchased the whole of B6 (1908) and B8 (1912) and half of B7 (1910 and 1924). A total of 675 acres had been sold to local settlers by 1912. Most of the purchasing occurred in a four-year period, 1908–12. There were only two more small purchases (1923 and 1924) in the first quarter of the twentieth century. When this first burst of private purchasing was over by 1925, about 42 per cent of the original Ngarara West B block had been sold, leaving 826 acres in Māori ownership.[118]

According to the Walghan block research, there were only two small private purchases in the second quarter of the twentieth century: B1 subdivision 4 (about 16 acres) in 1931 and the whole of B9 (20 acres) in 1934.[119] Most of the land loss in this period came about through the Crown's acquisition of 228 acres for an aerodrome in 1939 and another 26 acres between 1940 and 1949.[120] The purchases and public works acquisitions between 1925 and 1950 reduced Māori ownership of Ngarara West B to 536 acres (35 per cent of the original area (using 1,534 acres as the area of Ngarara West B)). The Crown's acquisitions under the Public Works Act were therefore a very important factor in Puketapu land loss, coming as they did at a time when significant inroads had already been made in the Puketapu owners' land base. The public works acquisitions will be discussed further in section 7.5.

7.4.3.3 *Partitioning and alienations, 1951–75*

The situation for the remaining Puketapu owners worsened significantly in the third quarter of the twentieth century. Apart from the Crown's acquisition of another five acres for Paraparaumu Aerodrome in 1954, land was lost mostly as a result of further fragmentation and private purchases. Also, a new Crown policy was introduced in 1967 which resulted in the compulsory conversion of Māori

117. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), pp 49–50
118. Walghan partners, 'Block Research Narratives', vol 1 (doc A212), p 273; Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), pp 68–69, 83–85; Stirling, brief of evidence for the Environment Court (doc F5(b)), pp [10]–[11]
119. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), p 85
120. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 26; Crown counsel, closing submissions (paper 3.3.60), pp 63–64

land into 'European' (later 'general') land. This had a significant impact on the remaining sections of Ngarara West B. Dr Barry Rigby summarised the situation between 1950 and 1975:

> Land loss from Ngarara West B accelerated rapidly after 1950 with the development of Paraparaumu town and private purchasing. This land was then subdivided and onsold to meet the demand for small suburban sections. In addition, Walghan Partners note that 'between 1967 and 1972 several Ngarara West B sections were subject to the compulsory Europeanisation of title', which involved 156¾ acres of land. Europeanisation together with private purchasing resulted in 210¼ acres of Ngarara West B remaining in Māori ownership by 1975. This represented just 13.9 per cent of the original land area.[121]

Thus, about one-quarter of the land still held in Māori ownership in 1950 was affected by Crown compulsion: compulsory taking under the public works legislation (five acres); and compulsory Europeanisation under the Māori Affairs Amendment Act 1967 (130¾ acres).[122] The 1967 Amendment Act had its genesis in two Crown inquiries into Māori land use, the Hunn report of 1960 and the Prichard–Waetford inquiry of 1965. Their emphasis was on assisting Māori to use lands that had become fragmented, and making Māori land productive 'to assist the growth of the New Zealand economy'. The Crown developed 'coercive solutions' to ensure that land was used and made productive. Compulsory measures were enacted in 1967 to enable officials to amalgamate Māori land blocks, confiscate 'uneconomic interests', and turn Māori land into European land, all without the consent of the Māori owners.[123] These compulsory provisions will be discussed in more detail in later volumes of this report. Here, we note Dr Rigby's analysis of the Europeanisation provisions in part 1 of the 1967 Act:

> This feature of the 1967 Act created a storm of Maori protest until it was repealed in 1973. All the Act required was a cursory MLC administrative survey of Maori land 'owned by not more than four persons' that a registrar regarded as 'suitable for effective use and occupation'. A Status Declaration turning Maori into General land required neither public notification nor judicial confirmation. Section 11 of the Act required only that the registrar notify the Maori owners that their land [had] ceased to be Maori land when it was registered with a new General title at the Land Transfer Office.[124]

121. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 27
122. Walghan partners calculated 156¾ acres but this figure should not have included 26 acres acquired from B4 for the airport.
123. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 6, pp 2685–2686
124. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land' (doc A214), p 394

Ngarara West B4 (150 acres) was awarded to Teira Te Ngarara in 1900 and passed to Te Newhanga Teira in 1922. The succession orders show that B4 was then transferred to four owners in 1929 after her death: Mouti Erueti Mira Teira; Ngahina Metapere Teira (for whom the Ngahina Trust is named); Ngapera Taupiri Teira; and Maikara Karo Teira, each of whom had a one-quarter share.[125] In 1949, Maikara Kararaina Tapuke (née Teira) succeeded her mother, Maikara Karo Teira.[126] Importantly, 26 acres of B4 had already been acquired in three pieces (in 1940, 1943, and 1949) for Paraparaumu Aerodrome,[127] so it was not the full quantity of B4 that was Europeanised. Even so, the remainder of B4 (124 acres) was the largest part of Ngarara West B that was Europeanised. As per the Act, this would have been an administrative exercise that was done by the registrar without the knowledge or consent of the Teira whānau owners.[128] Seven other parcels of land were also Europeanised compulsorily under the 1967 Act. They were all small pieces of land, indicating the extent to which the land closest to the railway had been subdivided.

The Europeanised land continued to be owned by Māori individuals, but it no longer had the status of Māori freehold land and was no longer subject to the provisions of the Māori Affairs Act 1953 and its successors. This was a highly significant matter for Māori, given that Māori land held the status of taonga tuku iho and was fast disappearing from Paraparaumu. The Te Ture Whenua Māori Act 1993 gave greater protection to both Māori land and general land owned by Māori, but even then the level of protection was higher for Māori land. The compulsory Europeanisation of title, therefore, has had long-term consequences.

In addition to compulsory Europeanisation of title, a significant component of the remaining Māori land was sold to private buyers in the third quarter of the twentieth century. This was mostly due to the expansion of Paraparaumu township and its surrounding suburban land. There were a 'dozen series of partitions', especially among the B1 and B2 blocks, which comprised the land closest to the railway line and the state highway. Most of the new sections were smaller than five acres and, by the 1960s, the new partitions were smaller than an acre. Successions also increased the number of owners in the titles as the descendants of the original eight owners became owners in their turn.[129]

Alongside the partitions there were 21 private purchases, many as a result of the commercial development of the township rather than local settler farming:

> The names of several of the purchasers indicates the acquisition of land around a township for suburban or commercial purposes. Purchasers include Puteuru

125. Ngarara West B block succession order, schedules 1–8 (Denise Parata, papers in support of brief of evidence (doc F40(a)), pp 2, 4)

126. Ngarara West B block succession order, schedules 1–8 (Denise Parata, papers in support of brief of evidence (doc F40(a)), p 8); Maikara Kararaina Tapuke, brief of evidence, 18 January 2019 (doc F17), pp [3], [6]

127. Heather Bassett and Richard Kay, 'Public Works Issues', 2018 (doc A211), pp 362–374

128. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), p 89

129. Walghan partners, 'Block Research Narratives', vol 1 (doc A212), p 275

Timberyards, Lumsdon Homes, Paraparaumu Developments Ltd, Coastal Freighters Ltd and the Roman Catholic Archdiocese.[130]

Denise Parata explained that urbanisation affected Māori at Paraparaumu in two ways; urban drift drew people away to the cities while the expansion of Paraparaumu township pushed them out. She told the Tribunal about how these processes affected her whānau, the Lake whānau, in this period:

> Farming was a necessity to sustain our way of life, and to put kai on the table. However, through the urban drift 1950s and 1960s, developing businesses, residential and population growth created further challenges for our whanau to maintain our livelihood on the farm.[131]

Ngarara West B10, the four-acre urupā block, was sold during this period. As noted above, the title to this block had only just been finalised properly when it was granted to 85 individuals in 1959. It was not made a Māori reservation, however, and was sold in 1961 to Gilbert Jack Daniel.[132] We have no evidence about the circumstances of this sale or why the urupā block was not reserved. According to the research of Heather Bassett and Richard Kay, B10 had clearly been 'marked as a cemetery' on plans ML1886 and DP22985.[133]

Another block purchased in this period was B1 3B4, which was discussed in chapter 5. This block showed the difficulties that Puketapu owners of Ngarara West B were experiencing in this period. In 1973, the Hutt County Council wanted this seven-acre block, which was located in the hills above Paraparaumu, for water supply purposes. Rates were accumulating on the block every year and the land had not been occupied or developed because there was no access. Although access was finally arranged in the early 1970s, the council now wanted the land but could not locate most of the 10 owners. The council therefore applied to have it vested in the Māori Trustee for sale under section 438 of the Māori Affairs Act 1953. The court sitting in 1973 revealed that six of the 10 owners had died without successions having been arranged. As noted in chapter 6, the court vested the land in the Māori Trustee with none of the surviving owners present at the hearing. The rates arrears were deducted from the purchase price but the trustee had great difficulty finding and paying the supposed sellers.[134]

Lack of access, lack of development finance, and title difficulties were thus affecting some of the remaining Ngarara West B blocks, similar to other situations around the country at the time. Also, as Paraparaumu expanded, more and more land was zoned 'residential', as in the case of B1 3B4, which meant that the owners had to pay higher rates, regardless of whether their land could be accessed or

130. Walghan partners, 'Block Research Narratives', vol 1 (doc A212), p 275
131. Denise Parata, brief of evidence (doc F40), p 3
132. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), p 86
133. Bassett and Kay, 'Public Works Issues' (doc A211), p 395 n
134. Suzanne Woodley, 'Local Government Issues Report', June 2017 (doc A193), pp 735–742

developed. Only 1.4 acres of B1 3B4 was actually level enough to develop as residential sections.[135]

Among the other purchases, it is notable that the larger-scale purchasing occurred in 1964–70, comprising four blocks totalling about 128 acres. Otherwise, the purchases were of small sections with the two largest being B2A2C (11 acres) and B2A2D2 (11 acres).[136]

Our calculations, which differ slightly from those of Dr Rigby cited above, show that only about 195 acres of Māori land was left in 1975. This was 12.7 per cent of the original 1,534-acre area of Ngarara West B (although some of the Europeanised land was later converted back to Māori land, as we discuss below). By 1975, many Puketapu owners had little or no land left at Paraparaumu.

7.4.3.4 *Alienation and retention, 1976–2010*

The Walghan block research shows two further sales in the decades after 1975: B5B (40a 3r 30p) in 1998 and B3B (46a 1r 38p) in 2008.[137] We have no information about these sales. The Walghan research also shows that there is no Ngarara West B land left today, although their research did not show how any remaining land was alienated.[138] The evidence of Heather Bassett and Richard Kay, however, stated that 'the Ngarara West B blocks between the airport and the main road, and includ[ing] the residue of Ngarara West B4 which had had parts taken for the airport', were consolidated as a new block, Ngarara West E.[139] This land, which amounted to 68.892 hectares (170 acres), was vested in a trust created under section 438 of the Māori Affairs Act 1953, the Ngahina Trust.[140] This trust was established in 1981. It was named after Ngahina Metapere Teira, one of the former owners of B4.[141] This means that the Europeanisation of title was reversed for any remaining parts of Ngarara West B4, the status of which were changed back to Māori land.

Using the trust structure provided under the Māori Affairs Act 1953 and Te Ture Whenua Māori Act 1993, the owners have acted collectively to manage and (where possible) develop their last pieces of land. In their joint brief of evidence, Poiria Love-Erskine, Hari Jackson, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill – who are all descendants of Epiha Te Ngarara – told us:

> Because of the comparatively small number of whānau involved in Paraparaumu we have maintained close association and familiarisation with our interconnecting

135. Woodley, 'Local Government Issues' (doc A193), pp 738, 845
136. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), p 78. The difference is due to the subtraction of B4 land taken for the airport before 1967 from Mr Walzl's figure of 150 acres (the original acreage of B4) as Europeanised.
137. Walghan partners, 'Block Research Narratives', vol 3 (doc A212(b)), p 88
138. Walghan partners, 'Block Research Narratives', vol 1 (doc A212), p 277
139. Bassett and Kay, 'Public Works Issues' (doc A211), p 388
140. Oakley Moran to Acting General Manager, Department of Transport, 16 May 1991 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2580)
141. Kura Marie Teira Taylor, 'Te Atiawa Paake: Reflections on the Playgrounds of my Life' (doctoral thesis, Victoria University of Wellington, 2018), p 153

whakapapa. At this time the whānau which we are representing today are involved in at least 6 Trusts formed to address issues arising from the Crown's failure to safeguard our rangatira right over our lands:

- Epiha Kararo me ko Renata Te Munu Ahu Whenua Trust;
- Ngahina Trust;
- Wellington Tenths Trust;
- Palmerston North Maori Reserves Trust;
- Te Whanau a Te Ngarara Inc;
- Epiha Te Ngarara Whanau Trust.

In addition, there are other individual whānau Trusts formed to ensure all descendants are included in obtaining benefit from land interests that are shared by an ever growing number. The most obvious consequence is the dissipation of whānau energies, finances and focus achieving little and which is certainly discouraging to the younger generations who move away to find more accessible pathways of achievement and acknowledgement. Even when land can be retained, development of that land most often depends on finding a willing and able business partner.[142]

One such example of finding a 'willing and able business partner' was the partnership between the Ngahina Trust and the Alpha Corporation over the development of the 'Coastlands Shopping Town' at Paraparaumu. The Ngahina Trust is 'partners with Coastlands being the land owners of 50% of the area on which the Shopping Town is located'.[143] For those who still retained some parts of Ngarara West B by the end of the 1970s, the Ngahina Trust has allowed them and their descendants to maintain connections to the land and gain some benefit from economic development. For others, there have been no such opportunities, and even the Ngahina Trust's development has been limited by the amount of land still in Māori ownership at Paraparaumu. This is partly why the Paraparaumu airport lands are so important to the claimants. In their joint brief of evidence, Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill told us: 'It is useful to compare the situation of the Coastlands shopping centre in Paraparaumu, where our land was retained, with the situation at Paraparaumu airport, where our land was taken.'[144] Compared to Coastlands,

> the Airport remains as a constant reminder to our whānau of the loss of opportunity for our whānau in terms of the development of Paraparaumu. We have been taken advantage of and we lay the blame for it passing out of our whānau ownership firmly at the feet of the Crown.[145]

142. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 7
143. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), pp 9–10
144. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 9
145. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 10

Date	Block	Area	Owner or owners	Purpose
1 April 1939	B7 2B	30a	Hoani Ihakara successors*	Aerodrome
1 April 1939	B7 1	90a	Kaiherau Takurua	Aerodrome
1 April 1939	Part B5	107a 3r 9p	Pirihira Te Uru, Takiri Akuhata Eruini, and successors of Irihapeti Retimana Pitiro†	Aerodrome
23 July 1940	Part B4	6a 3r 14.5p	Teira Te Ngarara successors‡	Aerodrome
23 November 1943	Part B4	15a or 22.4p	Teira Te Ngarara successors	Defence
19 September 1949	Part B4	4a 1r 11.1p	Teira Te Ngarara successors	Aerodrome
13 November 1954	Part B7 2C	5a 1r 7.5p	Teoti Tapu Ropata	Aerodrome

* Te Wanikau Teira, Tahu Wiki Teira, and Utiku Heketa Teira.
† Te Korenga-o-te Tanga Tare Rangikauhata, Peti Tare Rangikauhata, and Ropata Tare Rangikauhata.
‡ Mouti Erueti Mira Teira, Ngahina Metapere Teira, Ngapera Taupiri Teira, and Maikara Karo Teira.

Table 11: Public works takings of Māori land for Paraparaumu Aerodrome.
Source: Bassett and Kay, 'Public Works Issues' (doc A211), p 378

Apart from the lands retained as Ngarara West E, which (at the time of the trust's establishment) amounted to 12 per cent of the original Ngarara West B area, the evidence before this Tribunal is that the Puketapu owners have been rendered entirely landless. The land at Paraparaumu that they do have is tied up in the trust, and they have 'no gathering place' there 'for us to link together as a hapu on our own land, to hold tangihanga, have hui, celebrate birthdays, weddings and anniversaries, to practice our waiata, to spend time recognising the ancestors who have gone before, and to learn about them, and their deeds, our history and our whakapapa.'[146]

As noted above, most of the land alienated from Ngarara West B in the second quarter of the twentieth century was acquired by the Crown for the airport. We turn to these public works takings in the next section.

7.5 Public Works Takings, 1939–54

7.5.1 Introduction

The land acquired by the Crown for Paraparaumu Aerodrome was taken under the Public Works Act 1928 and its amendments. This Act was still operative in 1954 (the date of the last taking of Māori land for the aerodrome) and was not replaced until a new Public Works Act was passed in 1981. The Crown had three options for acquiring Māori freehold land for a public work: negotiate a voluntary purchase

146. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 10

Date	Area	Owner or owners	Purpose
1 April 1939	30a	G W MacLean	Aerodrome
30 May 1949	0a or 32p	E Rowland	Aerodrome
30 May 1949	0a or 33.42p	H F Rowland	Aerodrome
30 May 1949	0a or 34.55p	F Brown	Aerodrome
19 September 1949	2a 3r 26.8p	J A Simpson	Aerodrome
19 September 1949	26a 1r 39p	E J Hand	Aerodrome
4 October 1954	12a or 0.6p	J A Simpson	Aerodrome

Table 12: European land taken for Paraparaumu Aerodrome, 1939–54.
Source: Bassett and Kay, 'Public Works Issues' (doc A211), p 378

or lease; negotiate a taking by agreement; and a compulsory taking. Most of the land for the aerodrome was taken compulsorily in 1939 although the decision-making in relation to why the land was required and how it should be acquired was made in 1935–38. More pieces of Māori land were taken compulsorily after the outbreak of the Second World War, although only one was taken for defence purposes when the aerodrome was a Royal New Zealand Air Force (RNZAF) station. In addition, more Māori land was taken in 1949 and 1954 as the aerodrome boundaries were expanded. The acquisition of part of Ngarara West B7 2C in 1954 was the only taking by agreement. All the takings of Māori land are set out in table 11. A smaller area of European land was also acquired for the aerodrome over the same time period (see table 12).

Due to changes in the purpose and functions of the aerodrome, the reasons for taking Māori land differed over the 15-year period, although the formal purpose given in the taking proclamations was almost always for 'aerodrome':

- 1939: compulsory takings for an emergency landing ground ('aerodrome');
- 1940: compulsory taking to correct a mistake on the part of the Public Works Department as to the location of the lessees' cowshed ('aerodrome');
- 1943: compulsory taking when Paraparaumu was a RNZAF station ('defence');
- 1949: compulsory taking to extend a runway due to the landing of heavier aircraft while Paraparaumu replaced Rongotai temporarily as Wellington's airport ('aerodrome'); and
- 1954: taking by agreement to protect the approach to a runway ('aerodrome').

In total, 259 acres of Māori land was taken from the Ngarara West B block, the great majority of it in 1939 for an emergency landing ground.

The Crown also took 72 acres of land from European owners over the same period. The 30-acre Ngarara West B7 2A block, which had been sold to the European lessee in 1924, was included in the takings for an emergency landing ground in 1939.[147] Otherwise, about 30 acres was taken from across five titles in 1949 and 12 acres in 1954 (see table 2).[148] The 1939 taking was negotiated with the European owner, who was also the lessee of part of the Māori land taken at that time. The department 'entered negotiations with the Pakeha owner of Ngarara West B7 Subdivision 2A, for both the taking of the block, and for their leasehold interests in the other Māori-owned blocks.'[149] As discussed below, this differed from the procedure undertaken with the Māori owners. The Bassett–Kay report has no details about how the additional pieces of European land were acquired by the Ministry of Works in 1949 and 1954.[150]

In total, Paraparaumu Aerodrome contained an area of 331 acres after the final takings in 1954.[151]

In this section, we discuss each taking of Māori land, assessing:

- whether another site was considered for the aerodrome that did not require the taking of ancestral Māori land;
- whether it was necessary for the Crown to acquire the freehold instead of some lesser form of title such as a lease;
- the reasons why the Crown used its compulsory powers to take the land instead of using the Act's provisions for taking by agreement (except in 1954);
- whether the owners were notified of the taking and had an opportunity to object and, if an objection was filed, how it was addressed by the Crown;
- whether the Minister applied to the Native Land Court for compensation to be awarded in a timely fashion, and whether compensation was paid; and
- whether the Crown acted fairly and equitably as between the Māori owners and the European lessees of their land.

We begin our assessment with the first takings in 1939.

7.5.2 The 1939 takings: Ngarara West B7 2B, B7 1, B5 (part)

7.5.2.1 *Why was a particular site at Paraparaumu chosen for an 'aerodrome'?*

Most of the Māori land acquired for Paraparaumu Aerodrome was taken in 1939 (see table 1). Three blocks amounting to 227a 3r 9p were taken: Ngarara West B7 2B; Ngarara West B7 1; and part Ngarara West B5. The first issue for us to consider in respect of the 1939 takings is the question of whether an alternative site was available for the purpose of an 'aerodrome' that might have enabled the Crown to avoid taking Māori land.

147. Bassett and Kay, 'Public Works Issues' (doc A211), pp 352–353
148. Bassett and Kay, 'Public Works Issues' (doc A211), pp 372, 378
149. Bassett and Kay, 'Public Works Issues' (doc A211), pp 355–356
150. Bassett and Kay, 'Public Works Issues' (doc A211), pp 372, 378
151. Bassett and Kay, 'Public Works Issues' (doc A211), p 379

In 1936, the Crown set up a committee to 'report on the suitability of Rongotai Aerodrome as a main airport for Wellington.'[152] The committee and the Controller of Civil Aviation both recommended the establishment of an emergency landing ground at Paraparaumu. The Government anticipated in 1938 that this emergency field would later be developed as an 'alternative landing ground' for when the weather prevented the safe use of Rongotai in Wellington.[153] The Paraparaumu initiative was part of a general scheme developed in 1934 to establish emergency landing grounds 'at various sites around New Zealand', and the Public Works Department had already started looking for sites in the Kāpiti district in 1935, before the committee reported on the need for such a site at Paraparaumu.[154]

The question then arises: why did the department select the particular site at Paraparaumu for an emergency landing ground in 1935–36? This is relevant because, as the Te Rohe Pōtae Tribunal stated, public works that have 'no vital link to a specific site and can readily be located elsewhere than Māori land' are unlikely to meet the test of takings that are made as a last resort in the national interest (see above).[155] The primary requirement for the network of landing grounds was location on a 'main air route'. The 'location and inspection of suitable sites' was carried out by 'specially qualified engineers of the Public Works Department, working in close collaboration with the Controller of Civil Aviation.'[156] In November 1935, the district engineer reported to the head of the department that 'a number of areas in the Paraparaumu district have been inspected but most of them had objectionable features except one situated near Paraparaumu Beach'. This piece of land (estimated at 150 acres) was identified as 'Native land' leased to a European farmer, R G McLean, and was described as

> well clear of the hills, and the power lines on Beach Road and Wharemoukou Road would not be troublesome.
>
> The surface is broken up into low grass-covered sand hills and small swampy areas, the height from swamp to top of sand hills being six or seven feet. The swampy areas have a good bottom, unlike most of the swamps in the locality which have several feet of spongy peat.

152. J Wood to Minister of Public Works, 31 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, DSCF5288); Bassett and Kay, 'Public Works Issues' (doc A211), p 351

153. J Wood to Minister of Public Works, 31 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, DSCF5288)

154. A F J Gallen, 'A History of the Taking of Land for the Core Paraparaumu Aerodrome Under the Provisions of the Public Works Act 1928' (commissioned research report, Paraparaumu: Paraparaumu Airport Ltd, 2008) (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2076)

155. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pt 4, p 146

156. *The New Zealand Official Year-Book, 1938*, https://www3.stats.govt.nz/new_zealand_official_yearbooks

> The area is used for grazing sheep and dry cattle, being too dry in summer for dairying.[157]

Unlike a post office or police station, for example, an emergency landing ground had specific engineering and other requirements. The district engineer inspected a number of sites and selected what was considered to be the only feasible location.

A plan of the desired site at Paraparaumu was prepared in 1936, after which the department sought information from the district land registrar as to the titles and owners of the affected land.[158] No further action was taken until 1938, however, when the committee report was cited as the reason for proceeding with an emergency landing ground at Paraparaumu (see below).[159] Cabinet approved the establishment of this emergency landing ground in September 1938,[160] although the phrase 'for the purposes of an aerodrome' was used for the notices of intent to take the land.[161] The Transport Licensing (Commercial Aircraft Services) Act 1934 defined an 'aerodrome' as 'any definite and limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft'.[162] This Act was passed at a time when the Crown had just started to regulate civil aviation and promote the establishment of aerodromes,[163] and it was followed in 1935 by legislation to enable the Crown or local authorities to take land for aerodromes under the Public Works Act 1928.[164] The statutory definition of 'aerodrome' was very broad at the time and could be used to cover the taking of land for emergency landing grounds.

We turn next to consider why the Crown decided to take the land compulsorily rather than enter into the usual lease agreements for emergency landing grounds.

7.5.2.2 *Why did the Crown decide to acquire the freehold instead of a lease, and to take the land compulsorily?*

Systemic discrimination against Māori landowners was rife throughout the public works regime in the first half of the twentieth century, both as a matter of law and of Crown policy and practice. This has been well established in previous Tribunal

157. District engineer to permanent head of the Public Works Department, 11 November 1935 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers, IMG2658)

158. A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2077)

159. J Wood to Minister of Public Works, 31 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5288)

160. Bassett and Kay, 'Public Works Issues' (doc A211), p 352

161. G Wakelin to under-secretary, 12 October 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5286)

162. Transport Licensing (Commercial Aircraft Services) Act 1934, s 2(1)

163. Civil Aviation Authority, 'History of Civil Aviation Regulation in New Zealand', no date, https://www.aviation.govt.nz/about-us/who-we-are/history-of-civil-aviation-regulation-in-new-zealand

164. Public Works Amendment Act 1935, ss 2–6

inquiries.[165] The compulsory taking of land for Paraparaumu Aerodrome was no exception.

According to the report by A F J Gallen, who was the office solicitor for the Ministry of Works head office from 1977 to 1988, and who had 'much practical experience in the operation of the PWA 28 [Public Works Act 1928]',[166] the Paraparaumu takings were 'in no way unusual or exceptional – they were by and large "run of the mill" dealings for the time'. With hindsight, he suggested, aspects of the 1928 Act as they applied to Māori were 'less than satisfactory in many regards', and some provisions were 'discriminatory', but the Native Land Court had provided compensation in all cases and had 'served Maori compensatees very well'.[167] In terms of discrimination, Mr Gallen suggested that Māori 'did not have the ability to legally object to a proposed compulsory taking of land', they did not need to be given notice of a proposed taking, and they were 'in many cases not even approached to discuss compensation until *after* their land had been compulsorily acquired.' (Emphasis in original.) Mr Gallen also stated that Māori landowners were not allowed to negotiate a sale of their land by agreement under section 32 of the Public Works Act 1928 as an alternative to a compulsory taking. Māori land had to be taken, and compensation had to be awarded by the Native Land Court. All of these discriminatory provisions were in contradiction to how European (later 'general') land was treated under the Act.[168]

Discrimination of the kinds identified by Mr Gallen often arose from the Public Works Department's practice and not from the legal requirements of the 1928 Act.

The Crown's policy in the 1930s was to lease emergency landing grounds, which were essentially open fields with no buildings or runways. When work began to level the land for a 'landing strip' at Paraparaumu in June 1939, the *Evening Post* explained:

> It is not proposed to erect buildings; the field will presumably return to grazing and will simply be one of the chain of passive fields set out by the aerodrome branch of the Public Works Department from end to end of the Dominion, preferably not used at all by passenger and mail machines but essential should emergency arise.[169]

165. See, for example, Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 846–853; Waitangi Tribunal, *Te Mana Whatu Ahuru*, pt 4, pp 162, 305–311; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 748–750.

166. A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2075)

167. A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2109)

168. A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2105)

169. *Evening Post*, 17 July 1939 (Bassett and Kay, 'Public Works Issues' (doc A211), p 358)

According to Mr Gallen, the taking of this land under the Public Works Act was an exception to the rule in respect of that kind of airfield because of the possibility of war and not because of discrimination against Māori landowners:

> Initially the policy on emergency landing grounds was to lease them out on a peppercorn rental with the owners able to graze the land in return for improvements such as fencing, levelling and grassing. But with the possibility of war breaking out this policy subsequently changed to one of outright acquisition of land to secure control of what were considered strategic installations.[170]

Based on this evidence from Mr Gallen, Crown counsel argued that, 'with the prospect of war', the aerodrome was 'considered a "strategic installation", which necessitated securing the freehold'.[171]

Mr Gallen was certainly correct that the Crown's policy was to lease emergency landing grounds rather than to acquire the freehold or to take the land compulsorily. In August 1938, the Public Works Department referred to the 'usual "Agreement"' to lease land when it was considering the Paraparaumu site.[172] But Heather Bassett, who wrote the public works report for this inquiry, considered that 'Gallen's explanation above [about leasing emergency landing grounds] *only applied to European land*, and there was no mention of defence considerations factored into the decision to acquire the freehold' at Paraparaumu. (Emphasis added.) Instead, the department had decided to acquire the freehold rather than a lease specifically because it was Māori land.[173] Crown counsel questioned Ms Bassett on this point:

> **Q:** What you were saying to Mr Lewis I think was that there was an assumption by the Crown that if it was Māori-owned land you really need to get the ownership?
> **A:** Yes, that's how it operated. I mean I'm familiar with another example in the Wairoa area where it was an emergency landing ground and they took land from the Māori owner but the neighbouring Pākehā owner was allowed to retain the freehold for his land. So, it was a reasonably common practice around the country.[174]

Emergency landing grounds had a dual purpose, regardless of whether the Crown acquired a leasehold or the freehold. This purpose was to 'increase the mobility and defensive power of the Royal New Zealand Air Force' as well as to 'provide for the development and safety of civil aviation'.[175] In December 1936,

170. A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2077)
171. Crown counsel, closing submissions (paper 3.3.60), pp 62–63
172. Minute for land purchase officer, 11 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott folder, IMG2544)
173. Bassett and Kay, 'Public Works Issues' (doc A211), pp 351–352
174. Transcript 4.1.18, p 802
175. *The New Zealand Official Year-Book, 1938*, https://www3.stats.govt.nz/new_zealand_official_yearbooks

Wing Commander Ralph Cochrane of the Royal Air Force had prepared a report for the New Zealand Government, advising that New Zealand was not at risk of invasion so long as Singapore remained a major British base and the Royal Navy could be sent to the Pacific in the event of war. But Cochrane also advised the establishment of a separate RNZAF (which was carried out in 1937) and, among other things, the further development of civil aviation to provide transport and a 'valuable backing to the regular air force'.[176]

The dual purpose of emergency landing grounds was noted in respect of Paraparaumu. The *Manawatu Standard* reported in July 1939:

> Emergency landing grounds in modern aviation, both for military and commercial purposes, represented the safety valve, said Mr Semple [the Minister of Works], who was introduced by the member for Otaki, Mr L G Lowry. Every country in the world had been taught that lesson and had paid very dearly for it in lives. The closer one could have the grounds the greater was the degree of safety for the aviator and those he carried. The Paraparaumu ground would be a valuable contribution in the link of emergency landing grounds throughout the country, not only in commercial aviation, but if needs be for defence purposes.[177]

But this underlying defence purpose was not considered a barrier to a lease agreement for other emergency landing grounds. In the case of Paraparaumu, the 1936 report on Rongotai Aerodrome at Wellington was cited in August 1938 as the reason for establishing an airfield on the site selected back in 1935:

> It is proposed to proceed with the provision of an emergency landing ground at Paraparaumu to serve the air routes from the North to Wellington and from Palmerston to the South Island.
>
> The development of such a field at this point was recommended by the expert Committee set up by the Government to report on the suitability of Rongotai Aerodrome as a main airport for Wellington and the site has been recommended also by the Controller of Civil Aviation. It is also very probable that this field would be later extended to form a licensed alternative landing ground to serve Wellington when conditions of bad visibility or high winds prevent the safe use of Rongotai by aircraft.[178]

In August 1938, the Public Works Department instructed its land purchase officer:

176. John Macaulay Sutherland Ross, *Royal New Zealand Air Force: Official History of New Zealand in the Second World War, 1939–45* (Wellington: Department of Internal Affairs, 1955), pp 25–26
177. 'Modern Machinery', *Manawatu Standard*, 17 July 1939, p 2
178. J Wood to Minister of Public Works, 31 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, DSCF5288)

> It is considered desirable to acquire the freehold of this area, taking it under the Public Works Act if necessary, and to make it a Reserve for aerodrome purposes. *As much of the area is native owned land, the usual 'Agreement' for the use of the land for aerodrome purposes over a period of years does not seem practicable*. [Emphasis added.][179]

The question of whether to take the land compulsorily under the Act was then decided two months later after Cabinet approved the establishment of the landing ground. The department under-secretary was advised on 12 October 1938: 'Cabinet has approved of the acquisition of the land at an estimated cost of £5,000. *As native owners are concerned it is necessary to proceed under the compulsory provisions of the Act*.' (Emphasis added.)[180] The under-secretary, J Wood, recommended that the Minister approve the taking for this reason, and the Minister, Robert Semple, duly initialled his agreement.[181]

These two documents show that the Crown's decisions to (a) acquire the freehold instead of a leasehold and (b) to acquire the land compulsorily were motivated by the fact that it was Māori land. Apart from the underlying defence purpose of *all* emergency landing grounds, there is no indication in the sources that the compulsory acquisition of the freehold at Paraparaumu was driven by the 'prospect of war', as the Crown argued.[182]

At the hearing, Crown counsel asked Heather Bassett why the Crown would have considered it 'more impractical to lease native land which is owned by Māori as opposed to General land', to which Ms Bassett replied that the 'perceived complications of multiple ownership' was usually the reason given for not trying to negotiate with Māori. Ms Bassett added: 'I don't think this really applied here either. No.'[183] That was because the Māori land at Paraparaumu had comparatively few owners (in some cases, only one owner).

Historian Cathy Marr's report for the Rangahaua Whanui project explained further why the 'enormous fragmentation of Maori title' made it seem easier to officials to take the land than negotiate a lease or purchase:

> Maori title was an alternative system of land holding guaranteed in the Treaty and in theory entitled to the same respect as the general land holding system. However, in the absence of any provisions to overcome the problems associated with fragmented title for most of this time, taking authorities were able to simply abandon the procedures routinely applied for general land. They could move straight to applying compulsory provisions for Maori land on the grounds that procedures such as negotiation

179. Minute for land purchase officer, 11 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott folder, IMG2544)

180. G Wakelin to under-secretary, 12 October 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5286)

181. J Wood and 'R S', minutes on G Wakelin to under-secretary, 12 October 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5286)

182. Crown counsel, closing submissions (paper 3.3.60), p 63

183. Transcript 4.1.18, p 802

> and notification were 'too difficult' where there were multiple owners. This in effect made Maori land taking much easier and the fact that taking authorities could use this justification so easily, appears to have been an influence in their decision making.[184]

Also, it was always open to the Crown to have used the defence provisions of the Public Works Act 1928 to take the land if the prospect of war had been the reason for a compulsory acquisition of the freehold rather than the usual lease agreement. Those provisions were not used for Paraparaumu Aerodrome, however, until 1943, after an RNZAF base was established there in 1942.[185] A 1940 taking was for aerodrome rather than defence purposes, even though the war was actually underway at that time. Heather Bassett explained:

> In line with common practice throughout the war, the purpose of the acquisition [in 1943] was only given as 'for public works'. This was presumably for security reasons, so that the enemy would not be so readily able to identify the location of new strategic infrastructure. In these cases, after the war ended new gazette notices were issued which retrospectively applied the specified purpose to the taking. In the case of Ngarara West B4 a gazette notice was issued in December 1945 which declared the purpose of the taking as for 'Defence purposes'.[186]

It is interesting, therefore, that this 'common practice' was not used for the 1940 taking but only after the air force base was actually established at Paraparaumu.

The Crown was first empowered to acquire land for aerodromes under the Public Works Amendment Act 1935, which stated that the Governor-General or a local authority could 'take or otherwise acquire' land for aerodrome purposes. This 1935 Act specified that '[a]ll the provisions of the principal [1928] Act shall apply'.[187] Under Part 2 of the Public Works Act 1928, which applied to Māori freehold land, the Crown had the power to either negotiate an agreed acquisition or to take land compulsorily.[188] There was no legal requirement for the land at Paraparaumu to be taken compulsorily. The Crown sought to acquire the freehold in 1938, and to take the land compulsorily rather than try to negotiate a purchase or a voluntary agreement, because it was 'native owned land'.

The compulsory taking of about 228 acres of Māori land in 1939 for an emergency landing ground at Paraparaumu was therefore a discriminatory act on the part of the Crown.

There was an opportunity for the Crown's decision to be reconsidered after an objection was filed, asking the Crown to accept a lease rather than taking the land. By that point, it would have been clear to the department that there were not very

184. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), pp 169–170
185. Bassett and Kay, 'Public Works Issues' (doc A211), pp 366, 369
186. Bassett and Kay, 'Public Works Issues' (doc A211), p 369
187. Public Works Amendment Act 1935, ss 2–3; Marr, *Public Works Takings*, p 157
188. Public Works Act 1928, ss 10–12, 32, 102, 103(1)(b); Bassett and Kay, 'Public Works Issues' (doc A211), pp 32–33; Marr, *Public Works Takings of Maori Land*, pp 133–135

many owners involved, and that leasing was entirely practicable from that perspective. The objection was lodged by Paoka Hoani Taylor. Ms Taylor was the trustee for the three children of her deceased husband, Hoani Ihakara, who owned Ngarara West B7 section 2B (30 acres). She was sent the notice of intention to take in October 1938 and lodged the objection on 6 January 1939:

> I regret that it is your department's intention to take my children's land at Paraparaumu being Ngarara West B7 Subdivision 2B Block for their father left for them this piece of land to provide a living for them. This is the only piece of land from which my children obtain any revenue. I would like to know whether instead of taking the land you would take a lease of same. If this proposition does not meet with your approval what are you offering as the sale price? . . . Your intention to take this land I consider an injustice to my children.[189]

Under section 22(f) of the Public Works Act 1928, the Minister was obliged to hear objectors in person or appoint a delegate to hear them but P H Taylor's objection was not accorded a hearing – perhaps because it arrived after the 40-day period or it was not considered an official objection. The evidence is not clear on that point. The Minister simply replied by letter, stating:

> I duly received your letter of 6th January, in which you state your views concering the Department's intention to take Ngarara West B7 Subdivision 2B Block for the purposes of the Paraparaumu Emergency Landing-ground.
>
> I have carefully considered your suggestion that the Crown should take a lease of the land instead of acquiring the freehold. I regret, however, that as a considerable amount of work will be carried out by the Government on the land, and for other reasons, it is essential that the freehold be acquired and the Department must, therefore, adhere to its decision to take the land outright.[190]

The Minister only gave one specific reason as to why the Crown insisted on acquiring the freehold, which was the 'considerable amount of work' that would need to be carried out.[191] Since the stated intention was still to establish an emergency landing ground (that is, an open field with no buildings), the work required would include levelling, fencing, and grassing. This was no different to other such landing grounds which the Crown had agreed to lease.[192] Heather Bassett pointed out that this kind of work was also not much different from the improvements that a European lessee would make in farming land.[193]

189. P H Taylor to Minister of Public Works, 6 January 1939 (translation) (Bassett and Kay, 'Public Works Issues' (doc A211), p 354)

190. Minister of Public Works to P H Taylor, 20 January 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5272)

191. Minister of Public Works to P H Taylor, 20 January 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5272)

192. Bassett and Kay, 'Public Works Issues' (doc A211), p 351

193. Transcript 4.1.18, p 727

The Minister did state that there were 'other reasons' without explanation. These 'other reasons' could potentially have included the 'prospect' or 'possibility of war breaking out'[194] by the time the objection was lodged at the beginning of January 1939. Alternatively, in light of the explicit statements by officials in 1938 (quoted above), the Minister may have wanted to avoid telling Ms Taylor that the land was being taken simply because it was Māori land. Crown counsel submitted that 'the objection/alternative proposal by the Trustee was considered by the decision maker, who provided reasons for rejecting it'.[195] In our view, the Minister did not in fact provide adequate reasons for rejecting the objection and refusing to lease instead of take the land.

On 31 January 1939, the proclamation taking the land was issued, to take effect from 1 April 1939.[196] This ended a five-year period involving the identification of a suitable site at Paraparaumu (1935), the Rongotai Aerodrome report (1936), the decision to proceed and to acquire the freehold compulsorily (1938), and the proclamation (1939). In September 1939, five months after the proclamation took effect, the Second World War began. The proximity of the actual taking in April 1939 and the outbreak of war led some claimants to believe that the land was taken for the purposes of the Second World War.[197]

7.5.2.3 *Notification*

One of the main reasons for the discrimination against Māori landowners in the public works regime was the 'known and horrendous difficulties of the Maori land title system'.[198] As discussed in chapter 5, the title problems that plagued multiply owned Māori land in the twentieth century arose from the nineteenth-century native lands laws and the individualisation of title. The consequence for the public works regime that was that the work to identify Māori owners was usually considered too difficult and was not undertaken until the end (the compensation phase) rather than at the beginning when owners of general land were notified and given the opportunity to file objections or to negotiate a section 32 agreement to take the land. This practice was even codified in the Public Works Act 1928, which only required notification to be served on owners if land was registered in the land transfer system, in the knowledge that the majority of Māori land was either on

194. Bassett and Kay, 'Public Works Issues' (doc A211), p 351; A F J Gallen, 'A History of the Taking' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2077)

195. Crown counsel, closing submissions (paper 3.3.60), p 66

196. Bassett and Kay, 'Public Works Issues' (doc A211), p 356

197. Norma Materoa Ellison, brief of evidence, 14 February 2019 (doc F24), p [2]; see also Carmen Lake, brief of evidence, 6 May 2019 (doc F27), p 3; George Jenkins, brief of evidence, 8 May 2019 (doc F41), p 6; claimant counsel (Watson), closing submissions (paper 3.3.61), p 13; Moana Steedman, brief of evidence, 8 May 2019 (doc F39), p 7; Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 10

198. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 850; see also Marr, *Public Works Takings*, pp 193–194.

the provisional register (which did not suffice for notification purposes) or was only recorded in the Native Land Court.[199] Section 22(3)–(4) stated:

> (3) The provisions of this section requiring the names of the owners and occupiers of the land to be shown on the plan thereof, and requiring copies of the notice and description referred to in this section to be served upon the said owners and occupiers and upon all other persons having an interest in the land, shall have no application to any Native who is an owner or occupier of the land or has an interest therein unless his title to the land is registered under the Land Transfer Act, 1915. Entry on the Provisional Register shall not be deemed to be registration within the meaning of this subsection.
>
> (4) When any Native is an owner or occupier of the land or has an interest therein and his title is not so registered under the Land Transfer Act, 1915, a notice to the same effect as the notice gazetted in accordance with the foregoing provisions of this section shall at the same time or as soon thereafter as practicable be published in the *Kahiti*, but no proceedings for the taking of land shall be invalidated by any failure to conform to the requirements of this subsection.

The Ngarara West B blocks taken in 1939, however, were an exception to this form of discrimination because the number of owners was relatively few and their titles were registered under the Land Transfer Act, although the names of the registered owners were not fully up to date. Some recent successions had not been recorded.[200] The trustee for Ngarara West B7 subdivision 2B (30 acres), the trustee for Ngarara West B7 subdivision 1 (90 acres), and the five owners of part of Ngarara West B5 (about 108 acres) were all sent notices of the intention to take the land. The option of making objections – denied to many Māori landowners – was therefore available to them. As noted above, P H Taylor's objection was rejected by the Minister without a hearing.[201]

Of the other Māori owners, Kaiherau Takurua was the sole owner of Ngarara West B7 1. This land was currently leased to a local European farmer but Kaiherau wanted to lease it to her children once all the debts on the land had been paid off – she did not want to lease it to 'a Pakeha' if her children could farm the land.[202] Kaiherau's ill health in the 1930s, however, meant that the court had appointed the Native Trustee to manage her land, with powers limited to leasing it for a maximum of 10 years. The notice of intent was therefore sent to the Native Trustee, who made no objections, despite the limited nature of the trust. There is no evidence as to whether Kaiherau was consulted by the trustee, although it is clear that

199. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 769–771, 847–850; Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), pp 244, 247, 285; Marr, *Public Works Takings of Maori Land*, pp 138, 193–194; Bassett and Kay, 'Public Works Issues (doc A211), p 34

200. Assistant Land Registrar, Lands and Deeds Registry, to Assistant Under-Secretary, Public Works, 2 October 1936 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5291-DSCF5292)

201. Bassett and Kay, 'Public Works Issues' (doc A211), pp 352–355

202. Bassett and Kay, 'Public Works Issues' (doc A211), p 353

she wanted to preserve the land for her children.[203] Claimant counsel submitted that, where a Māori landowner did not have 'legal capacity to make decisions', the Ministry should have notified the whānau of the proposed taking, due to the significance of Māori land and of whānau connections to that land.[204]

The third taking of Māori land in 1939 was 108 acres of the Ngarara West B5 block, which had five owners at the time: Pirihira Te Uru, Takiri Akuhata Eruini, and the children of Irihapeti Retimana Pitiroi (Korenga o te Tangata Tare Rangikauwhata, Peti Tare Rangikauwhata, and Ropata Tare Rangikauwhata). These owners did not file an objection although one of them, Peti Tare Rangikauwhata, did ask for the Government valuation of the land.[205] They were likely aware that their cousin's objection had been rejected by the Minister.

In their joint brief of evidence, Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill stated that these owners wanted to retain their land, and there were no meetings or proper recognition of them in the notification process:

> We still have the letter to Pirihira [Te Uru] dated 28th October 1938 from the Public Works Department forwarding the Notice of Intention to take Land dated 13th October 1938. The letter is headed Emergency Landing Ground – Paraparaumu. There is no such reason given in the Public Notice to take Land. Pirihira and Takiri [Akuhata Eruini] were given four weeks to advise the Minister of Public Works if they objected to the taking. We are not aware of any attempt by the Crown officials to meet with them, to discuss the situation, to look for alternatives, or to acknowledge the rangatiratanga of these kuia. They both had expressed their desire to retain their land at the time that compensation was being discussed after the Proclamation had come into effect.[206]

Although other owners did not file a formal objection, the oral traditions of the Lake whānau recalled that there were protests when the Public Works Department carried out the work to level the land in 1939. Muri Aroha Valery Stewart (née Lake) told us that her grandfather, Wharemaru Te Ngarara, had to be 'removed off the land by force'.[207] George Jenkins explained that Wharemaru was 'trying to maintain unity of his people, [and] the loss of land in what became the largest public works taking in the Wellington region was too much to bear'.[208] Mr Jenkins added that 'Wharemaru's protest should have been the expected norm' but that individualisation had impacted strongly on the Paraparaumu commu-

203. Bassett and Kay, 'Public Works Issues' (doc A211), p 353; Heather Bassett and Richard Kay, answers to questions in writing, 5 February 2019 (doc A211(e)), p 1
204. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), p 17
205. Bassett and Kay, 'Public Works Issues' (doc A211), pp 353–355; claimant counsel (Watson), closing submissions (paper 3.3.61), pp 7–8
206. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 12
207. Muri Stewart, brief of evidence (doc F28), p 4
208. George Jenkins, brief of evidence (doc F41), p 6

nity.[209] Wharemaru was the youngest son of the rangatira Ihakara Te Ngarara. Wharemaru's grandchildren though his first wife, Meri Takurua, were the three minors on whose behalf P H Taylor had protested to the Minister and requested a lease instead of a taking. Moana Steedman stated that Wharemaru's second wife, Mahora Te Teira (from whom the Lake whānau are descended), took him away from Paraparaumu afterwards because he was being mistreated.[210]

7.5.2.4 *Compensation*

Compensation arrangements for Māori land under the Public Works Act 1928 were often discriminatory. Compensation for all Māori land (whether customary or Māori freehold) had to be determined by the Native Land Court. Māori owners could not apply to the Native Land Court for the compensation to be determined, only the Minister could do so, and there was no timeframe specified in the Act for the Minister to file an application. Also, compensation would be decided on the application of the Minister, and the court could decide compensation regardless of how many Māori owners (if any) were present or represented in court. Section 104(2) of the Act empowered the court to hear compensation applications regardless of whether the sitting had been advertised. Technically, compensation for lessees of Māori land also had to be determined by the court but, in reality, the Crown usually negotiated compensation with lessees. Compensation for European land was determined by a special Compensation Court only if agreement could not be reached between the parties. This court consisted of a Supreme Court judge and assessors appointed by the parties. Compensation could not, therefore, be awarded by the court without the involvement of the owners of European land.[211]

In practice, the Crown did not usually negotiate with Māori owners in the same manner as it negotiated with European owners and lessees. P H Taylor, for example, asked the Crown to name a 'sale price' if it insisted on acquiring the freehold instead of leasing the land.[212] The Minister was not prepared to do this, the Government having determined that this Māori land must be taken compulsorily rather than by agreement. Nor would he negotiate compensation for the taking, replying that the 'question of compensation for your children's interests will be a matter for the Native Land Court and you may be quite sure that their rights will be considered fully by the Court'.[213] This was in stark contrast to how the Crown negotiated with the European lessees and with the European owners of Ngarara West B7 2A.[214]

209. George Jenkins, brief of evidence (doc F41), pp 6–7
210. Moana Steedman, brief of evidence (doc F39), pp 5–6
211. Public Works Act 1928, s 104; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 848–849, 850; Bassett and Kay, 'Public Works Issues' (doc A211), pp 32–33, 358–362; Marr, *Public Works Takings of Maori Land*, pp 140–142
212. Paoka Hoani Taylor to Minister of Public Works, 6 January 1939 (Bassett and Kay, 'Public Works Issues' (doc A211), p 354)
213. Minister of Public Works to P H Taylor, 20 January 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5272)
214. Bassett and Kay, 'Public Works Issues' (doc A211), pp 355–356

The Crown did sometimes negotiate compensation for Māori land, for example if Māori owners had been identified and had legal representatives, and this was the case for both Ngarara West B7 2B and Ngarara West B7 1. The Ministry refused to negotiate an agreement with the trustee P H Taylor, but was prepared to negotiate an out-of-court offer with their solicitor and ask the court to confirm it. The same occurred with Ngarara West B7 1, where Kaiherau was represented by the Native Trustee. The court accepted the agreed sums in both cases. For Kaiherau Takurua, the Native Trustee's solicitor submitted that she would be in as good a position whether she received rent or a compensation payment, but this ignored Kaiherau's stated wish to have her whānau farm the land.[215]

The owners of Ngarara West B5, Pirihira Te Uru, Takiri Akuhata Eruini, and the children of Irihapeti Retimana Pitiroi (Korenga o te Tangata Tare Rangikauwhata, Peti Tare Rangikauwhata, and Ropata Tare Rangikauwhata), also had a solicitor represent them in the Native Land Court. An out-of-court agreement could not be reached in this case, which was contested at a hearing in June 1939. The valuations produced by the parties were widely divergent and the court 'found more generally in line with the owners' valuations', ordering payment of £2,426 11s.[216]

In the case of Ngarara B7 1, the court ordered the compensation paid to the Native Trustee. In the other two, the court ordered payment to the district Māori Land Board under section 552 of the Native Land Act 1931.[217] Payments were regularly made to the boards for distribution to Māori owners, which meant that fees were deducted from the compensation, but this section of the 1931 Act enabled the boards to keep and administer compensation payments as trust funds.[218] The owners of Ngarara West B7 2B were minors so it is understandable that the court awarded the compensation under section 552.[219] It is not clear why this section was used for the owners of Ngarara West B5. One of the former owners, Korenga o te Tangata Tare Rangikauwhata, tried to obtain part of her share of the money (£264) to buy furniture for the family home but the registrar refused to pay it out to her.[220] Her husband, Mr H Jackson, wrote to the Minister of Works, Robert Semple:

> Two weeks ago my wife paid a visit to the Trust Office, she was told she could have no money. Then she asked if she could have an order on furniture, double bed etc, the answer was no to that, my wife was there all day battling for what is hers, & all she got was two single beds, worth £8. Mr Fordham is the gentleman who supervises the Native Trust Office [Māori Land Board registrar].

215. Bassett and Kay, 'Public Works Issues' (doc A211), pp 353, 358–360
216. Bassett and Kay, 'Public Works Issues' (doc A211), pp 360–361
217. Bassett and Kay, 'Public Works Issues' (doc A211), pp 359, 361
218. Native Land Act 1931, ss 550, 552
219. Bassett and Kay, 'Public Works Issues' (doc A211), p 359
220. Bassett and Kay, 'Public Works Issues' (doc A211), pp 361–362

> My wife and I are asking you what right has Mr C V Fordham to tell my wife that second hand furniture is good enough for her . . . it makes my wife feel ashamed when she is told that second hand stuff will do her.[221]

The Ministry of Works inquired with the registrar for a report on this case. The registrar, C V Fordham, replied that Korenga o te Tangata Tare Rangikauwhata lived in an old family home with borer, and that she wanted money to repair the home and buy furniture. The registrar had told her it would be better to wait for a 'better and more permanent home before buying new furniture', and gave her an 'order for second hand furniture to the value of £8'. Fordham commented: 'It is, of course, understood, that all compensation moneys must be subject to a degree of restriction in order to ensure that some lasting benefit may be conferred by its expenditure.'[222]

Frank Langstone wrote back to the Jacksons on behalf of the Native Minister, Michael Joseph Savage, stating:

> It appears to me that there has been a little misunderstanding between Mrs Jackson and the Registrar of the Maori Land Board. Apparently his chief concern was that it was inadvisable to put a quantity of new furniture into a house which was borer-ridden and so allow the borer to spread to it, and to delay purchase, other than urgent requirements, until the housing question was solved.
>
> It is desired by the Board that the compensation moneys be used in a way that would ensure some lasting benefit on the owners.[223]

Langstone, who assisted Savage with his work as Native Minister,[224] advised that 'the purchase of good furniture is a commendable proposal', and the president of the board (the Native Land Court judge) would 'give every consideration to any request for payments from these moneys for a purpose which is for a real and lasting benefit'.[225]

It is not clear how often section 552 of the Native Land Act was used in this way, but this example underlines the powerlessness of Māori landowners when their land was taken compulsorily under the Public Works Act. The compensation part of the public works regime disempowered them in various ways, although these owners were relatively fortunate; they had received notification and they also had

221. H Jackson and Korenga Rangikauhata to the Minister of Works, 28 November 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF0742-DSCF0743)

222. Registrar to under-secretary, Native Department, December 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF0739)

223. Frank Langstone for Native Minister to H Jackson, 20 December 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF0738)

224. David Verran, 'Frank Langstone', in *The Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/4l3/langstone-frank

225. Frank Langstone for Native Minister to H Jackson, 20 December 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF0738)

some say in the compensation because they could afford a solicitor to represent them. The Minister and the board registrar indicated that protection of the former owners' interests was the motive in controlling how compensation monies could be spent, but this protection was administered in an authoritarian manner and without any input from Māori (as discussed in chapter 5, all Māori representation on the boards was removed between 1905 and 1913). It is not evident on the face of it why section 552 was used in the case of the Ngarara West B5. As noted, this section authorised the court to order public works compensation monies paid into a trust fund administered by the board.

7.5.3 The 1940 taking: Ngarara West B4 (part)

In 1940, an area of almost seven acres (6a 3r 14p) was taken from Ngarara West B4. This was the first taking of land from B4, which lay to the south-east of the lands taken in 1939 for the emergency landing ground. The Crown's justification for taking this additional piece of land is difficult to understand. When part of Ngarara West B5 was taken in April 1939, the Public Works Department understood that the cowshed belonging to the Pākehā lessees of B5, the Howell brothers, was situated on the B4 block. When the department discovered that the cowshed spanned the boundary between B5 and B4 and was therefore located in both blocks, it decided to take 'a small area of B4' in exchange for the part of B5 containing the cowshed, which would then be returned to the former owners and remain available to the Howells. The proclamation covering that part of B5 would be revoked.[226] Heather Bassett and Richard Kay explained: 'However, when it was realised that compensation had already been awarded for the area taken from B5, this meant it was no longer possible to partially revoke the proclamation.'[227]

The bizarre situation then arose that, in order to take the other half of the lessees' cowshed, the Public Works Department took almost seven acres of Māori land.[228] We have not seen any explanation as to why it was necessary to take so much land in order to fix a small mistake that was not the responsibility of the Māori owners of either block. As soon as the department became aware in March 1940 that compensation had already been paid to the owners of Ngarara West B5, the Crown ought to have revoked the notice of intention to take land from B4 (except for the small portion necessary to fix the mistake about the cowshed).

In the event, it appears that the interests of the Māori owners were not given any consideration, and the taking of almost seven acres from B4 occurred as a result of negotiations between the department and the lessees. It was reported later in 1943 that a deal had been reached where the Howells would be able to continue to use 'as part of the settlement' 10 acres of aerodrome land. This was the land

> on which the cowshed was partially situated and access ways (sandy ridges adjacent to low-lying areas) on the aerodrome side of the cowshed, and as a make-weight for this

226. Bassett and Kay, 'Public Works Issues' (doc A211), p 362
227. Bassett and Kay, 'Public Works Issues' (doc A211), pp 363–364
228. Bassett and Kay, 'Public Works Issues' (doc A211), pp 363–364

> 10 acres[,] approximately 7 acres additional land was taken from their leasehold property in the line of the north-south runway and the runway has now been extended on such area.[229]

Thus, the land taken from B4 as a 'make-weight' for the lessees' continuing to use land taken from B5 was simply treated as part of the lessees' leasehold property, and the fact that it was a separate Māori land block with different owners was not even considered. Nor was any consideration given to the interests of those owners.

To make matters worse, the Māori owners were not even notified about the taking and had no opportunity to object. This was because the registered owner in the land transfer system, Teira Te Ngarara, had died prior to 1940. The present owners, Mouti Erueti Mira Teira, Ngahina Metapere Teira, Ngapere Taupiri Teira, and Maikara Karo Teira, had succeeded in the Native Land Court but were not registered under the Land Transfer Act. Even though the department had contacted the court and ascertained the names and addresses of these four owners, it decided not to serve notice on them and give them an opportunity to object.[230] The district engineer informed the head of the department:

> As advised verbally by the Proclamation Branch the Notices of Intention are not being served on the present unregistered owners and the above information is forwarded merely for the possible use of the Land Purchase Officer [for compensation purposes].[231]

This approach was lawful; the department was not legally obliged to serve notice on owners of Māori land who were not registered under the Land Transfer Act, as stated above.[232] This discriminatory provision affected the 'large proportion' of Māori land and remained in force until 1974.[233] By contrast, the lessees were served notice of the intention to take the land from B4 in April 1940.[234] The lessees were also, as noted, permitted to continue using the cowshed (which was left where it was despite the taking) as well as about 10 acres of aerodrome land as part of a negotiated agreement with them.[235]

229. Chief land purchase officer, Public Works, to private secretary of Minister of Finance, 4 November 1943 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5124)
230. District engineer to permanent head of Public Works Department, 23 April 1940 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5243); Bassett and Kay, 'Public Works Issues' (doc A211), p 364
231. District engineer to permanent head of Public Works Department, 23 April 1940 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5243)
232. Public Works Act 1928, s 22(3)
233. Marr, *Public Works Takings of Maori Land*, p 138
234. Bassett and Kay, 'Public Works Issues' (doc A211), p 364
235. Bassett and Kay, 'Public Works Issues' (doc A211), p 368

The Minister of Public Works applied to the court for compensation to be paid to the owners, as required under the Act. Ms Bassett and Mr Kay stated that there was no record of the land purchase officer contacting the owners, who were living at Waitara at the time. They may still have been unaware that their land had been taken by proclamation in July 1940 because the owners were neither present nor represented when the court sat to determine compensation. The Crown's valuation was accepted by the court, even though the valuer had assigned no value to half the land taken 'because it was full of stumps and lumber'. Judge Gilfedder questioned this point but noted that, since there had been no evidence from the owners, the court had to accept the valuer's evidence. The judge also directed that the compensation payment of £149 9s 10p be paid to the Māori Land Board under section 552 of the Native Land Act 1931. This meant that the owners, who were never involved at any stage of the process, would also not receive their compensation payment, which would be held as a trust fund by the board.[236]

The Crown conceded in our inquiry that this 1940 taking breached the principles of the Treaty for the following reasons:

> The Crown accepts that a finding of a well-founded claim is appropriate and the Crown makes a Treaty breach concession in relation to this taking for the following reasons:
>
> - It appears that there was a complete absence of consultation with the owners. The owners were not sent copies of the notice of intention to take despite their details being known, albeit not registered. While the taking occurred during World War II and consequently resources might have been strained, the Crown accepts this factor does not mitigate the breach.
> - The owners had a right to be informed of the Crown's intention to take the land and to have an opportunity to express their view as to whether they were agreeable to the taking or not. The Crown could not have made an informed decision without taking account of the owners' view.
> - The Crown's failure to engage with the owners may have significantly damaged the interests of the owners in terms of achieving adequate compensation (presuming that the reason they were not present at the compensation hearing was because they were not aware of the taking).[237]

We agree that these are valid reasons for a concession of Treaty breach but there are also others (discussed further below).

7.5.4 The 1943 taking: Ngarara West B4 (part)

The Crown took a further 15 acres from Ngarara West B4 in 1943. By the time of this taking, the RNZAF had established a station at Paraparaumu Aerodrome. In 1939, the Crown's intention was that no buildings would be constructed, and the emergency landing ground would remain a 'passive' field on which grazing would

236. Bassett and Kay, 'Public Works Issues' (doc A211), pp 364–366
237. Crown counsel, closing submissions (paper 3.3.60), pp 70–71

still be possible.[238] This changed with the establishment of the RNZAF station in 1942. Two 'stabilised airstrips were laid down, at a length of 1250 yards each', and 'accommodation was built for 100 men of an Aerodrome Defence Unit'.[239] Work began on 'landing strip extensions' in April 1942, and the acting aerodrome engineer reported that the 'extension of the NW–SE runway necessitates the purchase of approximately 11 acres of land'. The engineer asked the department to 'please take the necessary action to acquire the land'.[240] Although the engineer suggested a purchase, the compulsory powers of the Public Works Act 1928 were used. This was may have been because the land required for the runway extension was Māori land but, if so, it was not stated explicitly in the department's documentation.

Under the Public Works Act 1928, takings of Māori land for defence purposes were governed under the same provisions as for European land.[241] Under section 254, the taking of land for defence required the preparation of a map showing the land, certification of the map by the surveyor-general, and a proclamation of the taking. There were no notification requirements and no opportunities for objection. Even without those special provisions, the owners of Ngarara West B4 were still not registered under the land transfer system – the registered owner was still recorded as Teira Te Ngarara. Further, due to 'wartime emergency powers there was no requirement to issue a notice of intention'.[242] There was thus no legal requirement to notify the Māori owners on three grounds, and 'there is no record of any contact being made with the Māori landowners either before the taking or soon after'.[243]

Once again, the European lessees received favourable treatment compared to the owners. The department served notice on the Howells and then entered into negotiations with them that were 'concluded prior to the taking'.[244] The earlier arrangement allowing the lessees to continue to use the cowshed was ended, which required the department to move the shed and rebuild it. The lessees negotiated compensation of £500 for 'the impact of the taking on their dairy farm and piggery, and the adverse impact on the six acres used for spoil', in addition to the removal of farm buildings and construction of a new access way (which cost the department an additional £663).[245] After the Minister approved the agreement between the department and the lessees, the proclamation taking the land was issued in November 1943. The stated purpose was 'public works', a wartime mechanism to

238. *Evening Post*, 17 July 1939 (Bassett and Kay, 'Public Works Issues' (doc A211), p 358)
239. 'Wings over Cambridge: Wartime North Island RNZAF Stations, Airfields and Depots: RNZAF Station Paraparaumu', no date, http://www.cambridgeairforce.org.nz/RNZAF%20Stations%201.htm
240. Acting aerodrome engineer to Wakelin, 30 April 1942 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5342)
241. Public Works Act 1928, ss 103(2), 252–259
242. Bassett and Kay, 'Public Works Issues' (doc A211), p 369
243. Bassett and Kay, 'Public Works Issues' (doc A211), p 369
244. Bassett and Kay, 'Public Works Issues' (doc A211), pp 367–369
245. Bassett and Kay, 'Public Works Issues' (doc A211), p 368

disguise defence takings, and a second notice was issued in December 1945 (after the end of the war) stating that the land was taken for defence.[246]

Compensation for the Māori owners of Ngarara West B4 was not paid until 1952, nine years after the taking. According to Ms Bassett and Mr Kay, the Minister did make an application to the court in December 1943 but it was not prosecuted during the war and then appears to have been forgotten. It was not until 1951, when compensation was awarded for a further taking from B4, that 'officials realised that compensation had never been awarded for the 15 acres taken in 1943'.[247]

Crown counsel conceded that the Treaty was breached in respect of this taking:

> The Crown accepts that a finding of a well-founded claim is appropriate and the Crown makes a Treaty breach concession in relation to this taking:
>
> - As with the first taking from this block, it appears that there was a complete absence of consultation with the owners.
> - The owners had a right to be informed of the Crown's intention to take the land and to have an opportunity to express their view as to whether they were agreeable to the taking or not. The Crown could not have made an informed decision without taking account of the owners' view. Consultation with the lessees does not remedy this breach.[248]

The Crown did not accept, however, that the failure to provide compensation for nine years was a Treaty breach.[249] The Public Works Department obtained a special Government valuation in 1952, which valued the 15-acre piece of B4 at £2,230.[250] The ownership of B4 had changed in the meantime. Maikara Karo Teira had died in 1945 and been succeeded by her daughter, Maikara Kararaina Teira.[251] The Crown's representative at the 1952 court hearing accepted that 1943 values should not be used to determine the valuation, and there was broad agreement between the Crown and the owners' solicitor as to a sum of £3,500 in compensation. The Māori Land Court duly awarded this sum (plus £78 for legal and valuation fees). The Crown's view at the time was that this payment included 4 per cent interest since 1943, whereas the owners' solicitor had argued that interest was not included in the agreed sum. The court presumably accepted the Crown's argument because no interest was awarded for the late payment.[252]

Crown counsel submitted in this inquiry that any prejudice from the late payment of compensation was

246. Bassett and Kay, 'Public Works Issues' (doc A211), p 369; transcript 4.1.18, pp 734–735
247. Bassett and Kay, 'Public Works Issues' (doc A211), p 370; Crown counsel, closing submissions (paper 3.3.60), pp 71–72
248. Crown counsel, closing submissions (paper 3.3.60), pp 72–73
249. Crown counsel, closing submissions (paper 3.3.60), p 73
250. Bassett and Kay, 'Public Works Issues' (doc A211), p 370
251. Maikara Kararaina Tapuke, brief of evidence (doc F17), pp [5]–[6]
252. Bassett and Kay, 'Public Works Issues' (doc A211), pp 370–371

> fully mitigated by the total sum of compensation paid by the Crown which reflected land values in 1952 (rather than 1943) and also included funds to 'reasonably' cover any compensation claim as well as interest of 4% from the date the land was taken. The Crown says the delay in payment of compensation in this instance is not, of itself, sufficient to warrant a finding of Treaty breach.[253]

We accept that 1952 land values were used and that this compared favourably with a 1946 valuation of £425.[254] The question of whether interest should have been paid for the nine-year gap between the taking and the payment was contested. The Crown's view at the time was that the compensation sum agreed between the Ministry and the owners included the interest; the owners' solicitor disagreed. As noted, the court presumably agreed with the Crown because it did not order an additional interest payment. In any case, we have no reason to consider that the compensation paid in 1952 was unfair or that the owners were significantly disadvantaged by the delay in payment.

7.5.5 The 1949 taking: Ngarara West B4 (part)

Following the Second World War, Paraparaumu Aerodrome came under civilian control. Rongotai in Wellington was closed for development work from 1947 to 1959 and Paraparaumu served as Wellington's main airport during that period. Claimant Raymond Lake explained that it was the 'busiest airport in the country', and they used to 'drive our tractors underneath the planes when they were coming in to land'.[255] This change in the nature of the aerodrome's purpose and functions resulted in the taking of a further piece of Ngarara West B4. In 1948, the Air Department obtained Cabinet approval for the acquisition of more land 'to extend the north-south runway at Paraparaumu Aerodrome to Wharemauku Stream, to enable heavier types of passenger and freight planes to operate'.[256]

As previously, a compulsory taking was used instead of attempting to negotiate a sale because of Māori ownership of the land. The district engineer reported to the Commissioner of Works in June 1948: 'The area required is approximately 5½ acres of Maori-owned land and as there are several parties with interests in the land a Notice of Intention is proposed to be issued to take the area immediately south to Wharemauku Stream'.[257] The 'several parties' necessitating a compulsory taking were the three Māori owners, the lessees (the Howell brothers), and a sharemilker that the lessees had placed on the land. In fact, the department had already dealt with the lessees amd the sharemilker, as the district engineer explained: 'the lessees have consented to the Crown entering for construction purposes and the

253. Crown counsel, closing submissions (paper 3.3.60), p 73
254. Bassett and Kay, 'Public Works Issues' (doc A211), p 370
255. Raymond Lake, brief of evidence, 6 May 2019 (doc F30), p [5]
256. District engineer to Under-Secretary, Māori Affairs, 16 June 1948 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5317)
257. District engineer to Commissioner of Works, 26 June 1948 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5316)

Sharemilker on the property has no objection provided his crop is allowed to be removed and this can be done before construction commences.'[258]

This left the three Māori owners, who were now registered under the Land Transfer Act and whose names and addresses the department already held, as the 'several parties' who necessitated a compulsory taking. As noted above, the fourth owner of Ngarara West B4 at the time of the previous taking, Maikara Karo Teira, had died in 1945 but her daughter, Maikara Kararaina Teira, was not yet a registered owner in the land transfer system.[259]

In this particular taking, the district engineer advised that there were no 'Maori burial grounds' on the land, though whether this information came from the owners, the lessees, or the Māori Affairs Department is not clear.[260] According to historian Cathy Marr, the Public Works Department had a 'long-standing policy of making inquiries about the existence of possible burial sites on the land it proposed to take', which in practice 'almost always meant contacting the department of Maori Affairs to see if it knew of sites, rather than the owners'.[261] The Ministry of Works[262] did consult the Māori Affairs Department about this taking, which responded: 'There seem to be no reasons of policy or expediency why this land should not be taken, particularly as the owners are absentees and the land is leased.'[263] Historians Heather Bassett and Richard Kay commented that this was a 'standard sort of response from Māori Affairs which did not account for any Māori concerns about retaining ancestral land'.[264] Claimant Maikara Kararaina Tapuke, daughter of Maikara Kararaina Teira, told us that her mother grew up in Waitara but that the Paraparaumu land had 'cultural significance' and was of great importance to her whānau. She stated: 'This area is land tūturu, papakainga for me and my family.'[265]

For the first time in respect of Ngarara West B4, the notice of intention to take the land was served on the owners, described as 'the Teira family at Waitara', because they were now registered in the land transfer system. The owners consented to the Ministry's entry on the land before it was taken to carry out construction work. Also, no objections to the taking were filed within the requisite time period.[266] The Ministry had, however, actively worked with and negotiated

258. District engineer to Commissioner of Works, 26 June 1948 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5316)
259. Bassett and Kay, 'Public Works Issues' (doc A211), pp 371–372
260. District engineer to Acting Commissioner of Works, 17 August 1948 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5312)
261. Marr, *Public Works Takings of Maori Land*, p 179
262. The Public Works Department's name was changed to Ministry of Works in 1948.
263. Under-Secretary, Māori Affairs, to Commissioner of Works, 14 July 1948 (Bassett and Kay, 'Public Works Issues' (doc A211), pp 371–372)
264. Bassett and Kay, 'Public Works Issues' (doc A211), p 372
265. Maikara Kararaina Tapuke, brief of evidence (doc F17), p [6]
266. District engineer to acting commissioner of works, 17 August 1948 (Bassett and Kay, 'Public Works Issues' (doc A211), p 372)

with the lessees and obtained their consent to the taking.[267] The total amount of land taken from B4 this time was about four acres. Two areas of European land adjoining B4 (about 24 acres) were also taken at this time.[268]

The manner of taking this piece of Ngarara West B4 in 1949 had some improvements over the two previous takings: notice was served on three of the four owners and they had an opportunity to object; the department ascertained whether there were any urupā on the land; and the department also consulted Māori Affairs about the taking. More care was shown over the interests of the Māori owners than in any of the other Paraparaumu Aerodrome takings. Disappointingly, the department still resorted to a compulsory taking because B4 was Māori-owned land whereas the Ministry negotiated with the lessees and obtained their consent, which gave the lessees a greater say in the taking than the owners of the land. Crown counsel submitted that, while the Ministry 'did not engage with the Māori owners in relation to this taking but rather with the non-Māori lessees, the [Ministry] did shortly thereafter consult the absentee owners'.[269] We do not consider that serving a notice of intention on the owners equates to consultation, in comparison with the agreement reached with the lessees, although we accept the Crown's point that the owners consented to the Ministry's entry on the land and did not file an objection to the taking.[270]

The land was formally taken by proclamation in September 1949 and the Ministry lodged an application for compensation with the Māori Land Court in December 1949. The application was not heard until August 1951, after the owners approached the Ministry about the delay. The Crown obtained a special Government valuation, which valued the land at £150, while the owners' valuation was £216. As often occurred at that time, the court's award was a compromise between the two: £185 plus £15 for legal fees.[271]

7.5.6 The 1954 taking: Ngarara West B7 2C (part)

The acquisition of 5a 1r 7.5p from Ngarara West B7 section 2C in 1954 was different in character from the previous takings of Māori land for the aerodrome. This particular taking was negotiated and agreed between the Ministry of Works and Teoti Tapu (George) Ropata, the sole owner of B7 2C, who was a (mostly) willing seller.

Ngarara West B7 2C was a 29-acre block which 'ran the full length of the north-western boundary' of the aerodrome.[272] Plans to expand the aerodrome in the early 1950s naturally targeted this block, and the Ministry of Works proposed to acquire just over one-third of it (10.5 acres) where it abutted the north-south runway.[273]

267. Acting Commissioner of Works to district engineer, 13 September 1948 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5311)
268. Bassett and Kay, 'Public Works Issues' (doc A211), p 372; Crown counsel, closing submissions (paper 3.3.60), pp 63–64
269. Crown counsel, closing submissions (paper 3.3.60), p 74
270. Crown counsel, closing submissions (paper 3.3.60), p 74
271. Bassett and Kay, 'Public Works Issues' (doc A211), pp 372–374
272. Bassett and Kay, 'Public Works Issues' (doc A211), pp 372, 374
273. Bassett and Kay, 'Public Works Issues' (doc A211), p 374

The Ministry believed wrongly that this land was not Māori land, and had recommended that the 10.5 acres be purchased. Regardless of whether the Minister in Charge of Civil Aviation approved the full expansion plans, the aerodrome engineer recommended the acquisition of this land to protect the seaward approach to the runway. If the land was not purchased, then the Ministry would have to use its powers to prohibit the construction of any buildings on it, which would likely result in compensation almost equivalent to the 'outright purchase cost'.[274]

Unlike the other blocks taken for the airport, Ngarara West B7 2C was not leased to a local European farmer. The land was in its 'natural state of sand-dune country in tussock and lupin etc' until 1951, when T T Ropata began to cultivate the flatter part of it. Mr Ropata wanted to develop the section for a residential subdivision.[275] He was a returned serviceman who wanted to use the purchase money to build a house but, like many other twentieth-century sales of Māori land, rates charges on this undeveloped land were an important factor in motivating the sale.[276] In any case, the subdivision could not go ahead until 'a decision was made on possible aerodrome requirements'.[277]

The Air Department and the Minister in Charge of Civil Aviation, T L Macdonald, rejected the proposed expansion of the aerodrome in 1952. The Minister wanted to 'restrict the areas of new land to be acquired for aerodrome purposes to a minimum'. As a result, the Ministry of Works proposed to halve the acquisition of land from Ngarara West B7 2C to about five acres, 'leaving a one chain strip of land along the beach side' to preserve the owner's access to the part of his land furthest from Beach (now Kāpiti) Road and to facilitate the planned subdivision. T T Ropata had contacted the Prime Minister, 'requesting some decision about his land and whether any of it will be required for aerodrome purposes' so that he could get on with the subdivision.[278] On 5 June 1952, the Minister of Works wrote to Ropata's land agent to inform him that, whatever else was decided about the aerodrome, five acres of B7 2C would be required to ensure that the approaches to the runway were 'kept clear of buildings or other obstructions' for safety reasons.[279] At the same time, the Ministry asked the Hutt County Council to alert officials if T T Ropata submitted a subdivisional plan and to take no action on it until the Crown's purchase had been arranged.[280]

274. Aerodrome engineer to Commissioner of Works, 12 May 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5430)

275. Aerodrome engineer to Commissioner of Works, 12 May 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5430)

276. Bassett and Kay, 'Public Works Issues' (doc A211), pp 376–377; Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5177, DSCF5412

277. Bassett and Kay, 'Public Works Issues' (doc A211), p 374

278. Commissioner of Works to Air Secretary, Air Department, 4 June 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5425)

279. Minister of Works to L W Morrah, 5 June 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5424)

280. Commissioner of Works to county clerk, 11 November 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5422)

There was no consideration given to a compulsory taking, partly because the Ministry believed that Ngarara West B7 2C was not Māori land and partly because the owner was clearly willing to sell. On 25 November 1952, the Commissioner of Works wrote to the land agent:

> Although portion of this property is not definitely required at the present time for aerodrome purposes, the Government might be prepared to purchase this area of approximately 5 acres provided a reasonable price could be agreed upon with Mr Ropata.
>
> In order that the matter may be further considered, will you kindly advise what price he places upon this area.[281]

The Director of Civil Aviation approved the purchase of five acres in December 1952 but any further action was delayed for budget reasons. A special Government valuation was carried out the following year, estimating the capital value at £2,000, whereas T T Ropata was asking for £4,000 – he wanted to 'build a house with the payment, and planned to sell the residue of subdivision 2C as a potential residential subdivision once the Crown's plans were confirmed'.[282] Ropata did not want to be involved in litigation and, if the Crown would not accept his price, he was prepared to go to arbitration.[283]

In the meantime, the Ministry of Works must have discovered that B7 2C was still Māori land. The Ministry negotiated an agreement to sell in 1953 but then reported to the Director of Civil Aviation that the price would in fact have to be 'fixed by the Maori Land Court'.[284] Even with takings made by agreement under section 32 of the Public Works Act 1928, the Minister had to apply to the Māori Land Court to determine compensation where Māori land (or any land owned by Māori) was concerned.[285] This would require a proclamation taking the land to be issued so that the court could assess compensation, which in turn might involve compensation for 'injurious affection of the balance of the block by the taking of this particular area' in addition to the capital value of the land taken.[286] In January 1954, the Minister in Charge of Civil Aviation approved a taking 'by agreement with the owner'.[287] This was the first time that the provisions of the Public Works

281. Commissioner of Works to L W Morrah, 25 November 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5421)

282. Bassett and Kay, 'Public Works Issues' (doc A211), p 376; Commissioner of Works to district commissioner of works, 17 December 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5418)

283. L W Morah to Commissioner of Works, 6 December 1952 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5177)

284. Commissioner of Works to Director of Civil Aviation, 21 August 1953 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5415)

285. Public Works Act 1928, s 104

286. Commissioner of Works to Director of Civil Aviation, 21 August 1953 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5415)

287. Director of Civil Aviation to Commissioner of Works, 6 January 1954 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5414)

Act 1928 for negotiated agreements were used instead of a compulsory taking for a Māori owner of Paraparaumu Aerodrome lands.

In June 1953, T T Ropata had already signed a letter consenting to the Crown acquiring five acres of his land and for the compensation to be decided by the Māori Land Court.[288] When nothing had been completed a year later, Ropata's land agent complained to the Prime Minister in July 1954. It was at this point the urgency behind Ropata's attempts to sell was revealed: 'Ropata, a labourer, owes over £300 for arrears of rates to the Hutt County Council who have threatened to sue for recovery.' The land agent noted that Ropata 'cannot pay until settlement is effected by the Crown'. Nor could the agent proceed with the rest of the subdivision until the land taken by the Crown had been surveyed.[289] As discussed in chapter 5, rates arrears on undeveloped Māori land were a significant factor in sales, even where land was not sold directly for the payment of rates.

Due to the fact that this was an agreed rather than a compulsory taking, there were two options for executing it:

- Ropata could sign an agreement to the taking for the Māori Land Court, and the Ministry of Works could then apply to the court to confirm the alienation under sections 222 and 224 of the Māori Affairs Act 1953; or
- the Ministry could issue of a notice of intent to take with a 40-day period for objections (the process for compulsory takings where ownership was registered under the Land Transfer Act), with the understanding that the opportunity to object would be a formality in this case.[290]

T T Ropata signed the agreement for the taking of his land and the Ministry then applied to the court for confirmation of the alienation in September 1954.[291] As discussed in chapter 5, the court had to assess a number of criteria before confirming an alienation, including that the alienation was not 'contrary to equity or good faith, or to the interests of the Maori alienating'.[292] The protection against landlessness, however, that had been included in the previous major Act (the Native Land Act 1931) was no longer contained in the 1953 Act.[293] In any case, these protections could (and should) have been incorporated in the special provisions for the taking of Māori land in the Public Works Act 1928, as we discuss further below.

Following the court's confirmation, the Governor-General issued a proclamation taking the land for aerodrome purposes in November 1954. Because Ngarara

288. Bassett and Kay, 'Public Works Issues (doc A211), p 377

289. L W Morrah to Prime Minister, no date (Commissioner of Works to District Commissioner of Works, 22 July 1954 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5412))

290. Bassett and Kay, 'Public Works Issues (doc A211), pp 377–378; District Solicitor, Ministry of Works, to the Māori Land Court, 8 September 1954 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5165)

291. District Solicitor, Ministry of Works, to the Māori Land Court, 8 September 1954 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5165)

292. Māori Affairs Act 1953, s 227

293. See Native Land Act 1931, s 273(1)(c).

West B7 2C was Māori land, compensation could not be decided until the Minister applied to the Māori Land Court for a compensation hearing. In May 1955, the parties reached a settlement out of court for £2,635 in compensation plus £36 for legal and valuation fees, which the court endorsed on 27 May 1955.[294] In respect of developing the residue for a residential subdivision, T T Ropata was not able to carry it out, perhaps due to financial considerations although that is not known. The residue of B7 2C (24 acres 2 roods 32.5 perches) was sold as a single block a decade later in 1966.[295]

Crown counsel submitted that the claim in respect of this land is not well-founded because the owner was a willing seller who 'in fact had been proactively approaching the Crown about whether it would be prepared to buy the land', and the 'sale was effectively one entered into by agreement'. Also, the compensation was agreed between the parties and the Minister applied to the court in a timely fashion for an award.[296]

Claimant counsel submitted that this land was taken compulsorily for a purpose that did not meet the test of being a last resort in the national interest,[297] but this submission is not correct.

7.5.7 Treaty findings

As discussed in the introduction, we do not make general findings about the public works regime in this chapter. Our findings are focused only on the specific matters of concern in respect of Paraparaumu Aerodrome (see section 7.1).

7.5.7.1 *The 1939 takings: Ngarara West B7 2B, Ngarara West B7 1, and Ngarara West B5 (part)*

On the 1939 takings, the evidence showed that it was not necessary for the Crown to acquire the freehold or to take the land compulsorily for an emergency landing ground. Normally, land required for that purpose was leased from its owners. Crown counsel submitted that the 'prospect of war' meant that 'an aerodrome was considered a "strategic installation"', and so it was necessary for the Crown to acquire the freehold. This submission was based on information in a report prepared for the airport company by A F J Gallen.[298] It is correct that one of the underlying purposes of the emergency landing scheme was defence, but the documentary sources clearly show that (a) the Crown decided in 1938 to acquire the freehold instead of a leasehold solely because the land was Māori-owned,[299] and

294. Bassett and Kay, 'Public Works Issues' (doc A211), pp 377–378; Land purchase officer to District Commissioner of Works, 13 July 1955 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5160)

295. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition', 7 June 2018 (doc A203), p 109

296. Crown counsel, closing submissions (paper 3.3.60), pp 75–76

297. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 5, 19

298. Crown counsel, closing submissions (paper 3.3.60), p 63

299. Minute for land purchase officer, 11 August 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott folder, IMG2544)

(b) to take the land compulsorily instead of by agreement solely because the land was Māori-owned.[300] Strategic issues were not a factor in either decision.

We therefore find that the Crown's acquisition of the freehold instead of a leasehold was discriminatory and in breach of the Treaty principle of equity, which required the Crown to deal fairly between its Māori and settler citizens. Also, article 2 of the Treaty required the Crown to protect Māori ownership of, and authority over, land for so long as Māori wished to retain it. The Crown's decision to take this land compulsorily *solely because it was Māori land* was an inversion of the article 2 guarantee and a breach of the principle of active protection.

We accept that the owners or their trustees were notified and had an opportunity to object. This was a relatively rare occurrence in the public works regime. It is not necessary for us to make a finding at this stage on the Crown's general proposition that notification with an opportunity to object was sufficient consultation for the Crown to make an informed decision. We simply note here that an objection was filed, stating that the taking was an injustice and asking the Crown to take a lease instead. The Minister replied that, 'as a considerable amount of work will be carried out by the Government on the land, and for other reasons, it is essential that the freehold be acquired'.[301] Ms Bassett pointed out that the kind of work needed to prepare an emergency landing field (thus requiring the freehold) was in reality little different from the work a lessee would carry out to prepare the land for farming.[302] Although the 'other reasons' were not explained, the evidence is clear that the Crown's usual approach was to lease emergency landing grounds, the only reason for acquiring the freehold in this case was because it was Māori land, and the Crown was not prepared to change its mind on this when a trustee for some of the owners objected. In our view, this compounds the breach.

We also agree with the claimants that the Crown's Treaty obligations required it to notify the whānau in the case of Kaiherau Takurua, who did not have 'legal capacity to make decisions,'[303] given the central importance of ancestral land to Māori and the extreme action of taking Māori land compulsorily, which affected not only the immediate owner or owners but all the generations to come. The failure to obtain their views was a breach of the principle of partnership. It was not sufficient for the Crown to notify the Native Trustee and rely on any objections that the Trustee might make.

There were no delays in the Minister's application for compensation, and there was also some negotiation with the owners' representatives in reaching out-of-court agreements for two of the three blocks. General issues about compensation will be considered in a later volume of this report.

Although monetary compensation was paid at the time, the owners of these blocks (and their hapū community) were prejudiced by the loss of this land.

300. G Wakelin to under-secretary, 12 October 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5286)

301. Minister of Public Works to P H Taylor, 20 January 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5272)

302. Transcript 4.1.18, p 727

303. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 16–17

7.5.7.2 *The 1940 taking: Ngarara West B4 (part)*

The Crown has conceded that the compulsory taking of Māori land in 1940 was in breach of Treaty principles because the owners were not notified even though the Crown had actually identified them. Thus, the owners had no opportunity to 'express their view as to whether they were agreeable to the taking or not', and 'the Crown could not have made an informed decision without taking account of the owners' view'. Further, the Crown's 'failure to engage with the owners may have significantly damaged the interests of the owners in terms of achieving adequate compensation (presuming that the reason they were not present at the compensation hearing was because they were not aware of the taking)'.[304]

We agree that this concession of Treaty breach is appropriate. The owners were not notified because of section 22(3) of the Public Works Act 1928, which provided that it was not necessary to notify 'any Native who is an owner or occupier of the land or has an interest therein unless his title to the land is registered under the Land Transfer Act, 1915'. We find that this subsection of the Act was in breach of the principles of partnership and equity, and it was applied to Ngarara West B4 in 1940 even though the owners had been identified. Those owners were clearly prejudiced by the use of the application of this subsection, which deprived them of the right to be notified and file an objection which was available to all owners of European (later general) land.

We also find that the Crown had no valid reason for acquiring this piece of Ngarara West B4 at all, let alone by compulsion. As discussed in section 7.5.3, the Crown intended to take this land to fix a mistake about the location of the lessees' cowshed. The Public Works Department negotiated an agreement with the lessees to take this land and return a piece taken earlier (from the owners of Ngarara West B5) in 1939. When the swap could not be carried out because compensation had already been paid, however, the Crown persisted in taking almost seven acres of land from Ngarara West B4 to fix the problem about the cowshed. This justification for taking the land – and such a large area of land – was indefensible and in breach of the principle of active protection, especially since the owners were not consulted or involved in any way in the deal that the Crown negotiated with the lessees.

7.5.7.3 *The 1943 taking: Ngarara West B4 (part)*

The Crown conceded that the taking of land compulsorily from Ngarara West B4 in 1943 was in breach of Treaty principles. This was because there was a 'complete absence of consultation with the owners', who had a 'right to be informed of the Crown's intention to take the land and to have an opportunity to express their view as to whether they were agreeable to the taking or not'. Thus, the Crown could not have made 'an informed decision without taking account of the owners'

304. Crown counsel, closing submissions (paper 3.3.60), pp 70–71

view'.[305] The Crown noted that there was negotiation with the lessees but this did not 'remedy this breach.'[306]

We agree that this compulsory taking was a breach of the principles of partnership and active protection, and that the loss of this land prejudiced its owners.

The Crown did not concede that the nine-year delay in applying to the court to determine the compensation was a breach, due to the fact that full compensation was paid in 1952 along with 4 per cent interest from the date of the taking. The statute disempowered Māori owners because they could not apply to the court for compensation to be paid, only the Minister could do so for Crown takings. We agree, however, that this particular delay did not prejudice the owners.

The Crown submitted that the department's negotiations with the lessees did not remedy the Crown's failure to consult the owners. We would go further and note that, for this taking, the 1940 taking, and the 1939 takings, the Crown recognised the lessees' authority over the land rather than that of the owners, negotiating with them prior to the takings in every instance, in stark contrast to the way in which the owners were treated. This was a breach of the article 2 guarantee of tino rangatiratanga and the principle of equity. The owners' mana and interests were prejudicially affected by this breach.

7.5.7.4 *The 1949 taking: Ngarara West B4 (part)*

Another piece of land was taken compulsorily from Ngarara West B4 in 1949. As in 1939, the Crown took this land compulsorily because it was Māori land. The Crown negotiated with the lessees but not the owners. The Ministry of Works consulted the Māori Affairs Department, which advised: 'There seem to be no reasons of policy or expediency why this land should not be taken, particularly as the owners are absentees and the land is leased.'[307] Neither department consulted the owners, although three of the four owners were at least notified and given an opportunity to object. Compensation was delayed for three years but the owners do not appear to have been prejudiced by the brief delay.

We find that the taking of this land compulsorily because it was Māori land was in breach of the article 2 guarantee of tino rangatiratanga and the principles of equity and active protection. The failure to deal directly with the owners while nonetheless dealing with the lessees and the Māori Affairs Department was a breach of the partnership principle. We accept the Crown's point, however, that no objection was filed.

The owners were prejudiced by the loss of this land but there was potential for the situation to be remedied by a low-price or no-price offer back of the land once the Public Works Act 1981 was enacted. We discuss this in the following sections.

305. Crown counsel, closing submissions (paper 3.3.60), pp 72–73
306. Crown counsel, closing submissions (paper 3.3.60), p 73
307. Under-secretary, Māori Affairs, to Commissioner of Works, 14 July 1948 (Bassett and Kay, 'Public Works Issues' (doc A211), pp 371–372)

7.5.7.5 *The 1954 taking: Ngarara West B7 2C (part)*

About five acres of Ngarara West B7 2C was taken by agreement from the Māori owner, who wanted to subdivide his land for residential purposes but was aware of the Ministry's plans to expand the aerodrome. The owner pressed this sale on the Crown so that he could obtain certainty for the subdivision but also because of the urgent need to pay rates arrears (rating issues are addressed in chapter 5). It should be noted that the Crown negotiated an agreement rather than taking the land compulsorily partly because the owner wanted to sell but also because the Ministry did not realise until late in the negotiations that the land was Māori land.

The transaction was a voluntary arrangement and was therefore presented to the Māori Land Court for confirmation, subject to the same criteria for other Māori land transactions, such as whether the sale was equitable or in the owner's best interests. The compulsory takings in 1939–49, on the other hand, had not been subjected to Māori Land Court scrutiny or any other protective criteria. This meant that the Public Works Department did not have to meet any of the standards used to protect Māori interests in voluntary sales or leases of Māori land.

In the 1954 voluntary taking, a price could not be negotiated between the Crown and the owner because Ngarara West B7 2C was Māori land, but compensation was agreed by the parties in an out-of-court agreement.

We do not find any Treaty breaches in respect of this agreed taking of land from Ngarara West B7 2C in 1954.

We turn next to consider the privatisation of Paraparaumu Aerodrome and the extent to which the Crown protected Māori interests, including public works offer-back rights, in the 1995 sale of the aerodrome.

7.6 The Crown's Sale of Paraparaumu Airport

7.6.1 Introduction

In this section, we discuss the Crown's decision to dispose of its aerodromes in 1988, and the process that resulted in the sale of Paraparaumu Aerodrome to a privately owned airport company in 1995. Key issues to consider in this section are:

- the options considered by the Crown for disposal of the aerodrome in 1988–93, and the extent to which those options took account of and protected Māori interests;
- the reasons for the Crown's choice to sell the aerodrome as a 'going concern' by way of a restricted tender of airport company shares to 'user groups';
- the issue of whether any land was surplus to airport requirements and therefore should have been offered back to former owners or their successors prior to the sale of the aerodrome;
- the Crown's consultation with Māori prior to the decision to go ahead with the sale in December 1994;
- the Crown's engagement with the former owners' representatives and the nature and extent of assurances given to the successors/descendants of the former owners; and

- the extent of protection provided by section 40 of the Public Works Act, and the issue of whether some monitoring or enforcement mechanisms should have been included in the sale.

Some of these issues are also addressed further in section 7.7.

We begin with a brief description of the offer-back requirements of the Public Works Act 1981 and the policy of corporatisation which transformed the public sector in the 1980s and 1990s.

7.6.2 Paraparaumu Aerodrome, 1950s – 1980s, and offer-back requirements

When it was first established in 1939, Paraparaumu Aerodrome sat in the middle of farmland. The growth of Paraparaumu township in the 1950s and 1960s, however, meant that the aerodrome became 'surrounded largely by residential properties', and its 'suitability' for further expansion was 'therefore limited'.[308] Once the redevelopment of Rongotai was completed and Wellington International Airport opened in 1959, Paraparaumu Aerodrome

> subsequently became a minor facility. It continued to be used for some government aviation functions – for example, the Civil Aviation Flying Unit (responsible for flight calibration) was based there for many years. But mostly it was used by aero clubs, flying schools, and small aircraft operators. Some aerodrome land was leased for other uses, both residential and commercial.[309]

For all these reasons, the Crown did not acquire more land for Paraparaumu Aerodrome. Nor was any land offered back to former owners, however, even when the purpose of the aerodrome changed and some aerodrome land was now being leased for 'other uses'.[310] This was a matter of concern to the claimants in this inquiry.[311] In April 1995, Te Whānau a Te Ngarara, representing many of the former owners, told the Ministry of Transport that

> they believed that the Crown had changed the use of the aerodrome and deprived them of their offer back rights. Their argument centred on the issue that the aerodrome had been taken for 'defence' or 'emergency airport' purposes and was now being used as a recreational airfield ie offer back should have taken place.[312]

308. 'Report of the Controller and Auditor-General: Inquiry into the Sale of Paraparaumu Aerodrome by the Ministry of Transport', September 2005, p 16 (Nigel Mouat, papers in support of brief of evidence (doc G7(a)), p 16)

309. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 16)

310. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 16)

311. Claimant counsel (Stone, Lewis, and Davis), closing submissions (paper 3.3.54), pp 20, 25, 34

312. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 33)

Section 35 of the Public Works Act 1928 provided that, if it was 'found that any land held, taken, purchased, or acquired at any time under this or any other Act . . . for any public work is not required for such public work', then the Governor-General 'may' cause that land to be sold. If so, the Crown was required to offer the land first, at a price fixed by special valuation, 'to the person then entitled to the land from which such land was originally taken'. The Te Rohe Pōtae Tribunal observed that, prior to the mid-1930s, it was a 'standard principle of earlier public works takings' that 'if land was required for a public work it would be offered back once it was no longer required'.[313] The offer-back requirement was removed from the Public Works Act 1928 in 1935 and was not restored until a new principal Act was passed in 1981.[314]

What this means is that between 1939 (when land was first taken) and 1981, the Crown was not legally required or indeed empowered to offer any land back to former owners if it was not required for the public work for which it was taken. The question of whether an offer back should have been made at the time of the aerodrome sale in 1995 is addressed later.

By the 1980s, the use of the aerodrome had declined further and it was operating at a loss. The Civil Aviation Flying Unit stopped using the aerodrome and 'the landing charges were not meeting the airport's full operational costs'. The other source of revenue came from leases, including land for 'residential (Avion Terrace), grazing and commercial purposes (along Kapiti Road)'.[315] Approximately four acres were leased for the houses at Avion Terrace and about 7.5 acres were leased to the Meteorological Service. Some lessees were clearly airport users, such as the Wellington Aero Club, while others were not (such as a car sales business).[316] Rentals brought in about $40,000 a year in 1989.[317] The question of whether some of this leased land was no longer actually required for airport purposes was a significant issue to the claimants in this inquiry.

Some small pieces of aerodrome land were declared surplus and sold in the period 1977 to 1984. In 1977, the Ministry of Transport decided to dispose of a house section on the south-west corner of the aerodrome (38 and 42 Wharemauku Road), where an old house built in 1946 was in a dilapidated condition. This site was originally taken from Ngarara West B7 subdivision 2A, which had belonged to the MacLean family at the time it was taken in 1939.[318] The Ministry of Transport later decided in 1983 that all the house sites at Avion Terrace were surplus to aero-

313. Waitangi Tribunal, *Te Mana Whatu Ahuru*, pt 4, p 287

314. Public Works Amendment Act 1935, s 14 (which inserted a new section 35(b) into the principal Act); Waitangi Tribunal, *Te Mana Whatu Ahuru*, pt 4, p 287; Public Works Amendment Act 1954, s 4(1); Public Works Act 1981, ss 40–41

315. Bassett and Kay, 'Public Works Issues' (doc A211), p 380

316. Heather Bassett, answers to questions in writing, 3 April 2019 (doc A211(q)), p 10

317. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal for Air Transport', December 1989 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, IMG1475)

318. Assistant Land Purchase Officer to District Commissioner of Works, 27 June 1977; Adviser Airport Administration to DOSLI, 27 November 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1855-IMG1856, IMG1860-IMG1861)

drome requirements and should be surveyed and sold.[319] By that time, however, the Public Works Act 1981 with its offer-back requirements had been enacted.

Under section 40 of the Act, any land held for a public work that was (a) no longer required for that work or (b) not required for an essential work (later amended to 'any other public work'), the Crown shall 'offer to sell the land by private contract to the person from whom the land was acquired or to the successor of that person, at a price fixed by a registered valuer' or by the Land Valuation Tribunal.[320] We address the Act's definition of 'successor' later. Section 40 specified that exceptions to offering the land back could be made if the Crown considered it 'impractical, unreasonable, or unfair to do so'.[321] Also, if the land could only be sold to an adjacent owner due to its 'size, shape, or situation', an exception could be made.[322]

The offer-back provision, and the exceptions to the requirement to offer land back, were significantly amended in 1982. The word 'impractical' was changed to 'impracticable', and a second ground for exception was added. The Crown did not need to offer to sell the land back if there had been a 'significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held'. The 1982 amendment also allowed the Crown to offer the land back at 'any lesser price' than its current valuation, which was an important change.[323]

In 1984, the Ministry of Transport decided that tenants should be offered the opportunity to buy their house sites at Avion Terrace, and that it would be 'impractical' to offer the land back under section 40 of the Public Works Act because 'the Crown has erected a number of fully serviced dwellings on the land'.[324] The Assistant Commissioner of Works approved the offer-back exemption in March 1984.[325] The land had previously been taken from Ngarara West B7 2A (the Macleans) and Ngarara West B7 2B (the successors of Hoani Ihakara). In the event, the sale was reduced to three properties, of which it appears that only lots 2 and 3, Avion Terrace, were actually sold. The rest remained the property of the Ministry of Transport. It is not clear why most of the house sites were not sold as planned at this point. It may be that only a limited number of tenants were interested in acquiring the freehold. The house sites that were sold were located on the

319. Bassett and Kay, 'Public Works Issues' (doc A211), pp 407–408; Assistant Land Purchase Officer, Ministry of Works, to Secretary for Transport, 23 February 1984 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, DSCN5634-DSCN5636)

320. Public Works Act 1981, s 40(1)–(2)

321. Public Works Act 1981, s 40(2)

322. Public Works Act 1981, s 40(4)

323. Public Works Amendment Act 1982, s 2, which inserted a new section 40(2) into the Public Works Act 1981.

324. Assistant Land Purchase Officer to Secretary for Transport, 23 February 1984 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCN5634-DSCN5635)

325. Minute on Assistant Land Purchase Officer to Secretary for Transport, 23 February 1984 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCN5636)

former Ngarara West B7 2B block.[326] According to Nigel Mouat, the houses had been needed as accommodation for the Ministry's rescue fire service when the aerodrome was operating as the replacement Wellington airport, and after that they had been leased to the public.[327] There was no consultation with the former Māori owners of this land or the descendants about the sale or the question of whether an exception to making an offer back was justified. Although the Ministry had decided that the land at Avion Terrace was surplus to requirements, no further attempts were made to sell the house sites at this stage. They were leased to members of the public instead.

7.6.3 Why did the Crown decide to dispose of Paraparaumu Aerodrome?

In 1984, the fourth Labour Government was elected and began a programme of economic and governmental reforms later dubbed 'Rogernomics' (named after Roger Douglas, the Labour Minister of Finance). Many Government departments were split into policy and regulatory bodies on the one hand and operational or commercial enterprises on the other. The legal architecture for this change was created by a suite of legislation, including the State-Owned Enterprises Act 1986 and various sector-specific arrangements. The Ministry of Transport had a number of its 'regulatory and operational functions' vested in new entities, including the Airways Corporation (which took over operation of air traffic control) and the Civil Aviation Authority (which regulated licensing and air safety).[328] The new approach to the state sector also affected Crown-owned airports, as Ms Bassett and Mr Kay explained:

> At this time the overall policy framework factors which decided the [Paraparaumu] aerodrome should be sold were that civil aerodromes should be run as businesses; government departments should not be running businesses; profitable state-owned businesses should be corporatized and either operated by the state or privatised; and that state owned businesses that were not commercially viable should be offered for sale on the open market.[329]

From 1929 to 1986, New Zealand's airports operated under the ownership and control of either the Crown or local government, often by way of 50:50 joint ventures between the Crown and municipal or county councils. The Airport Authorities Act 1966 governed the operation of airports, including the power of airport authorities to lease 'concessions and property and other items of an airport

326. Bassett and Kay, 'Public Works Issues' (doc A211), p 408; Adviser Airport Administration to DOSLI, 27 November 1995; Assistant Land Purchase Officer to Secretary for Transport, March 1984 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1855-IMG1856; Archives New Zealand folder, DSCN5630-DSCN5632)

327. Transcript 4.1.21, pp 293, 333

328. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 16)

329. Bassett and Kay, 'Public Works Issues' (doc A211), p 380

which are to the advantage of users and operators of the airport and/or of the airport authority itself'.[330]

In 1986, the Crown provided the legislative basis for corporatising the ownership and management of airports, arguing that New Zealand taxpayers were 'entitled to have their commercial investments managed on a profitable and effective basis'. The Airport Authorities Amendment Act 1986 allowed airports to be operated by airport companies but restricted shareholding in those companies to the Crown and local authorities. This was to ensure that airports remained 'firmly in the public sector', putting 'beyond any doubt suggestions that the Government intends to "privatise" New Zealand airports'. The position at that time was that there was 'no market for airports in New Zealand' and no basis for commercial competition because the 'facilities are monopolies', and that 'public control guarantees responsible management of those enterprises'.[331] For these reasons, there was no problem with section 3D (inserted in 1986), which stated that an 'airport operated or managed by an airport authority which is not a local authority' was, for the purposes of the Public Works Act, 'deemed to be a Government work'.[332]

The Government's policy changed dramatically in 1988, however, when it decided to have the Airport Authorities Act amended to allow airport companies to have private shareholders. This enabled the Crown to establish an airport company and then sell 100 per cent of its shares to private buyers.[333] In the same year, the Crown decided that 'there was no justification' for the Ministry of Transport to continue operating Paraparaumu Aerodrome, and that 'it should be disposed of as a surplus asset'.[334]

It is important to note here, however, that operation of public works as businesses by the private sector for profit, an essential underpinning of corporatisation and asset sales, did not result in amendments to section 40 of the Public Works Act 1981. This had a general significance; the Public Works Act was not designed for public works that were owned and operated by 'private providers' for profit, and which could cease to operate at the private providers' will.

In specific terms, the 1988 amendment repealed section 3A(2)–(3), so that airport companies could have private shareholders, but did not repeal section 3D.[335] This meant that privately owned airport companies were airport authorities, but the airport lands owned by these privately owned companies were still deemed

330. 'Airport Authorities Bill', 30 August 1966, 29 September 1966, NZPD, vol 348, pp 2332–2333, 2959

331. 'Airport Authorities Amendment Bill', 18 November 1986, NZPD, vol 475, pp 5407–5408; Airport Authorities Amendment Act 1986, s 4, inserting section 3A(2) into the Airport Authorities Act 1966.

332. See Airport Authorities Amendment Act 1986, s 4, which inserted sections 3A-3D in the Airport Authorities Act 1966.

333. See Finance (No 2) Act 1988, s 27, which inserted a new section 3A(2) into the Airport Authorities Act 1966; Nigel Mouat to D N Howden, 23 May 1995 (Nigel Mouat, papers in support of brief of evidence (doc G7(c)), p 15).

334. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 17)

335. Airport Authorities Act 1966, ss 3A, 3D; Finance (No 2) Act 1988, s 27

to be Government works. This was the critical legislative feature which caused LINZ to reinterpret the issue of who was responsible for making section 40 offer-back decisions in the case of private airport companies that owned 'Government works'.[336] This is discussed further below.

We turn next to assess the options considered by the Ministry of Transport and various other Crown agencies in respect of how best to dispose of Paraparaumu Aerodrome.

7.6.4 What options did the Crown consider for disposing of Paraparaumu Aerodrome?

As noted, the Labour Government instructed the Ministry of Transport to dispose of Paraparaumu Aerodrome in 1988. There were a number of obstacles to carrying out this directive, however, with the result that 'the disposal had not proceeded by the time of the 1990 general election'.[337] The various Government departments involved had to consider several options for how to privatise the aerodrome while also taking Māori and other interests into account. At the same time, the Crown had to address such issues as:

- the marginal state of the aerodrome in commercial terms and the 'high value of the land if converted to other uses';
- the offer-back requirements of the Public Works Act 1981 if the Crown wanted to dispose of land that was no longer required for a public work;
- the potential need to retain Crown assets for use in Treaty settlements or provide some form of memorial on the title so that assets could be available for settlements after disposal; and
- the question of whether Paraparaumu should remain an aerodrome after the Crown disposed of it and, if so, how to ensure that the new owners would be willing and able to maintain it as an aerodrome.[338]

7.6.4.1 *Financial difficulties in disposing of Paraparaumu Aerodrome*

One of the key problems that the Crown had to face was financial in nature: how was the Ministry of Transport to dispose of an asset that was uneconomic? In 1989, the Ministry hired the recently established Landcorp to 'manage the leases at Paraparaumu Aerodrome and to identify ways in which to increase the profitability of the Aerodrome'.[339] Landcorp's report identified a significant quantity of land that was surplus to airport requirements.

Landcorp considered the question of what was necessary to make the aerodrome commercially viable. It noted that the aerodrome was 'required to reach a

336. Crown counsel, memorandum (paper 3.2.1078), pp 4–6

337. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 17)

338. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 17–18)

339. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal for Air Transport', December 1989 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, IMG1475)

profitability of 10% on asset value'.[340] Landcorp recommended that income from the existing leases be maximised but acknowledged that this was problematic due to rent review clauses in the leases. The alternative was to develop parts of the aerodrome for commercial purposes. This proposal included closing the 29/11 runway (used for crosswind landings) and relocation of existing lessees so that the land nearest to Kapiti Road could be developed as an 'industrial park subdivision' or to 'sell to a developer'. Although the local council was not 'eager' to see that area developed as an 'industrial strip', Landcorp considered that 'this hurdle could be overcome by selling the idea as one runway or none at all'. In addition, the western side of the airport presented a 'good opportunity to redevelop surplus land into a residential subdivision'. Landcorp argued that noise would not be an impediment due to the low frequency of flights, the small (less noisy) aircraft using the aerodrome, and a night-time curfew on flights. Also, the official requirements for distance of housing from runways meant that 'considerable' airport land on the western side could be made available for a residential subdivision. The proposed residential subdivision would include the area leased for grazing.[341]

In all, Landcorp identified about 30 per cent of the aerodrome land as 'surplus to airport requirements',[342] although Crown counsel submitted in this inquiry that 'Landcorp was not in the business of operating airports' and therefore was not 'qualified to determine what land was or was not required for the operational needs of the Paraparaumu Airport'.[343] Many of Landcorp's suggestions, including closing the 29/11 (north-west–south-east) runway, were later duplicated by Paraparaumu Airport Ltd in its land development proposals.[344] Although Landcorp expressed interest in carrying out the development work as a joint venture in 1989,[345] its programme to make the aerodrome commercially viable was rejected because 'it was not government policy at the time to undertake land development'.[346]

7.6.4.2 *Offer back requirements under the Public Works Act 1981*

Following Landcorp's report in 1989, the Ministry of Transport continued to explore options for disposal of its aerodromes. In the case of Paraparaumu Aerodrome, the Ministry had to assess whether any land was required to be offered back to its former owners or their successors under the Public Works Act 1981 before it could dispose of aerodrome land on the open market. At this point,

340. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, IMG1475)

341. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, IMG1475-IMG1478)

342. Bassett, answers to questions in writing (doc A211(q)), p 11

343. Crown counsel, further closing submissions (paper 3.3.62), p 8

344. *Cammack v Kapiti Coast District Council* Environment Court Wellington, W69/2009, 3 September 2009 (Leo Watson, casebook of decisions (doc F5(h)), pp 38–39)

345. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, IMG1479)

346. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 17)

it is helpful to consider the meaning of 'successor' as defined in the Public Works Act, which proved to be a crucial issue for the claimants.

Section 40(5) of the Act states:

> For the purposes of this section, the term *successor*, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person. [Emphasis in original.]

A successor in title is thus limited to the 'immediate beneficiary' who was 'entitled to receive the land, or an estate that would have included the land, from the original owner(s) under their will or intestacy at the time of their death'. Crown counsel submitted that, if the obligation to offer the land back arose while a successor was still alive (but no offer was made at that time), then 'the principle that the passage of time should not be allowed to defeat the purpose of the Public Works Act will arguably apply to permit a claim to an offer back on behalf of the deceased successor'.[347] For these reasons, a lot of emphasis was placed in the evidence and submissions as to when land became surplus to airport requirements, and what precisely made land surplus to airport requirements. This is discussed throughout the rest of the chapter. Another important issue is whether the Ministry of Transport ever referred to this limit to the offer-back requirement in the assurances made to descendants of the former owners during the sale process (see sections 7.6.5–7.6.6).

Crown counsel summarised the case law on the meaning of 'successor' in closing submissions. The term 'immediate beneficiary' in the above paragraph is not used in the statute but rather in the Court of Appeal's decision in *Williams v Auckland Council*.[348] In that case, the court determined that Parliament 'only intended to allow one level of succession' – the successor's beneficiaries are not entitled to receive an offer back of the land. The question of whether someone is an 'immediate beneficiary' is a question of fact to be determined by examining the original owners' will. Also, the purpose of the Public Works Act should not be '*defeated by the lapse of time*'. (Emphasis in original.) That is, agencies must offer land back (noting the exceptions to the offer-back requirement in section 40) when it is surplus and not 'wait for Public Works Act obligations to expire on the death of the original owner and their successor'.[349]

Section 40(5) has never been amended.[350] In 1977, the committee reviewing the Public Works Act 1928 received submissions from the New Zealand Māori Council and the Māori Affairs Department. They advocated for offer-back requirements to

347. Crown counsel, closing submissions (paper 3.3.60), pp 108–109
348. *Williams v Auckland Council* [2015] NZCA 479 (Crown counsel, closing submissions (paper 3.3.60), p 110)
349. Crown counsel, closing submissions (paper 3.3.60), pp 109–115
350. Crown counsel, closing submissions (paper 3.3.60), p 109

the original Māori owners or their 'heirs' and, if they were not able to take it up, then the land should be offered to 'other Maori or sold and the profits distributed to the original owners or their heirs'.[351] These submissions were not acted upon in the Public Works Act 1981. Māori remained dissatisfied, and there was a proposal to change the offer-back regime in 2003–05 as a result of a full-scale review of the 1981 Act. The Minister for Land Information proposed to Cabinet that, in the case of Māori land, the definition of successors would no longer be limited to one generation but would include present-day successors. Also, if the successors could not or did not accept the offer back, a second offer would be made to the whānau or hapū. These proposals were intended to recognise the principles of the Treaty and the importance of ancestral land to Māori, but unfortunately these reform proposals lapsed with no action taken (see section 7.7.6).

In 1989, the Ministry asked the Department of Land and Survey Information (DOSLI)[352] to investigate the former ownership of the aerodrome lands. DOSLI 'advised the Ministry that, were any aerodrome land to be declared surplus, the Public Works Act would have to be invoked "because of the highly coercive nature in which Paraparaumu land was compulsorily acquired from previous owners"'.[353] This was an important point because the Ministry of Transport was well aware at the time that it had responsibilities towards Māori under the principles of the Treaty of Waitangi, but no consideration was ever given as to whether the use of the Public Works Act to take the land for the aerodrome compulsorily was relevant to how the Ministry interpreted its Treaty obligations.[354] We discuss this point further below.

In February 1990, the DOSLI district office reported to the Ministry on the offer-back requirements for the aerodrome (a section 40 investigation). The district office responded with approval for all the former European-owned land to be offered back except for two sections. In respect of the former Māori-owned land, however, the district office was only prepared to make a series of recommendations to the DOSLI head office. It is unclear why this distinction was drawn. The district office recommended that Ngarara West B7 subdivision 1, the three parts of Ngarara West B4, and part Ngarara West B5 be offered back to the former Māori owners.[355]

In the case of Ngarara West B7 2C, however, the district office recommended an exemption from the offer back requirement because it would be 'unreasonable' to offer it back. For Ngarara West B7 2B, the question of whether the land could be offered back was uncertain because 'it forms part of the Avion Terrace

351. Marr, *Public Works Takings of Maori Land*, p 148

352. As part of the corporatisation programme, the Department of Lands and Survey was split in 1987 into DOSLI and Landcorp.

353. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 22)

354. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 21–22)

355. DOSLI District Manager/Chief Surveyor to Secretary for Transport, 23 February 1990 (Crown counsel, document collection (paper 3.2.451(a)), pp 1–2)

housing area and part is occupied by the Meteorological Service'. The same reasoning applied to the B7 2A block, which had been European land at the time of its acquisition. On these two blocks, the DOSLI district office commented that, 'until clear directions are given as to what is to be declared surplus no decision can be made'.[356] As noted above, Landcorp had classified about 30 per cent of the aerodrome land as surplus to airport requirements, but there was also the question of whether an airport would continue to operate at all (that is, whether the whole of the land was surplus).

Overall, DOSLI advised that most of the aerodrome land would have to be offered back if Paraparaumu Aerodrome was declared surplus and disposed of (as the Government had in fact already directed):

> As discussed with you [the Secretary for Transport] if the airport is to be declared surplus by your Ministry the provisions of Section 40 of the Public Works Act 1981 automatically apply and the above decisions [as to offer back] implemented. This would mean the end of the airport. In this case with the wide publicity that has already been given and the compulsory nature to many of the Maori land acquisitions a 'blanket exemption' to the provisions of Section 40 cannot be given. In effect Government would, if it declares the land surplus, state that there is no further need to have an airport on this site ie: that land is not required for that particular public work. I also believe any attempt to force a 'blanket exemption' to enable a bulk sale as an airport would cause a considerable adverse reaction.[357]

Thus, if the Government wanted to dispose of Paraparaumu Aerodrome, it would have to offer most of the land back to its former owners or their successors. DOSLI considered that this created an 'impasse' for the Government's intention to dispose of the aerodrome. DOSLI advised, therefore, that the objects of state sector reform could still be achieved, and the Ministry could withdraw from the 'day to day running or the continued administration of the airport', if the Crown were to lease the 'entire area for airport purposes' under section 48 of the Land Act 1948. This provision in the Land Act allowed the Crown to lease land taken for public works as if it were ordinary Crown land. The sale of a lease to private operators would not obtain as much of a return as an outright sale of the freehold (another objective of state sector reform) but a lease could provide an income for the Crown while ensuring the future retention of the land as an aerodrome. DOSLI provided the Ministry with examples of such leases having been used in the past.[358] No consideration was given at this stage to the possibility of returning the land to former owners so that *they* could lease it for airport purposes.

356. DOSLI District Manager/Chief Surveyor to Secretary for Transport, 23 February 1990 (Crown counsel, document collection (paper 3.2.451(a)), pp 1–2)

357. DOSLI District Manager/Chief Surveyor to Secretary for Transport, 23 February 1990 (Crown counsel, document collection (paper 3.2.451(a)), p 2)

358. DOSLI District Manager/Chief Surveyor to Secretary for Transport, 23 February 1990 (Crown counsel, document collection (paper 3.2.451(a)), pp 2–3)

By July 1990, the DOSLI head office had approved all of the district office's recommendations: most of the Māori land taken for the aerodrome would be offered back if declared surplus. The exceptions were Ngarara West B7 2C, where it would be considered 'unreasonable' to do so, and Ngarara West B7 2B, where a decision could not be made because of the presence on that land of the Avion Terrace houses and the meteorological station.[359] DOSLI advised in the case of B7 2C that it was considered 'unreasonable' to offer the land back because 'the owner actively pursued the Crown to purchase his land'.[360] The Public Works Act 1981 did not distinguish between land that was 'acquired' or 'taken' for a public work in mandating an offer-back prior to any other method of disposal. It was the policy of DOSLI (and later its successor, Land Information New Zealand) to treat as 'unreasonable' the requirement to offer land back if it had been acquired voluntarily rather than taken.[361]

7.6.4.3 *Desire to keep the aerodrome operational after sale*

In September 1990, the Government brought section 87 of the Finance (No 2) Act 1988 into force through an order in council, which meant that airport companies could now be privatised. This was followed soon after by the election of a National Government in October 1990, which accelerated the previous Government's programme of corporatisation and asset sales by introducing a 'capital charge on Crown assets'.[362] The purpose of this charge was to 'create an incentive for departments to dispose of under-performing or unnecessary assets'. This effectively forced the Ministry of Transport to try to dispose of the Crown's aerodromes as soon as possible. The Ministry reported to Cabinet in March 1991: 'Expedited disposal of [the Crown's] aerodromes has become imperative because the Ministry does not believe it can generate sufficient revenue from the aerodromes to meet return requirements expected to be set under the proposed capital asset charging regime.'[363]

At that point, the fate of the aerodrome after sale became a crucial factor in deciding how to dispose of the aerodrome: would disposal mean the closure of the aerodrome, in which case the 15 pieces of land acquired for the aerodrome could be offered back to the various original owners or their successors, or did the Crown consider it *necessary* for the aerodrome to continue in operation after disposal? A related question was whether any land in one or more of those 15 pieces

359. District Manager/Chief Surveyor to General Manager, Ministry of Transport, 26 June 1990 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Rawhiti Higgott papers folder, IMG2551-IMG2552)

360. Summary attached to District Manager/Chief Surveyor to Air Transport, 27 May 1991 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1926)

361. LINZ, departmental report to Local Government and Environment Committee, February 2010, p 61, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLGE_ADV_00DBHOH_BILL8033_1_A35197/land-information-new-zealand-departmental-report

362. Bassett and Kay, 'Public Works Issues' (doc A211), p 380

363. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 17–18)

was surplus to aerodrome requirements and could be offered back prior to the sale/disposal of the aerodrome. Nigel Mouat, who was the controller of domestic air services in the Ministry of Transport at the time (1983–96), gave evidence for the Crown on this issue. Mr Mouat linked the position of retaining the aerodrome after sale to restricted options for its disposal, including the impossibility of any section 40 offer backs to former owners:

> It is necessary to explain the Ministry's conclusion that it was, at the time the process for the sale of the aerodrome was being developed, not feasible to offer back any of the originally acquired parcels of land under the Public Works Act. The fact is that the runways and associated clearways and approach slopes at each end, as well as the taxiways and operational infrastructure of the airport intersected virtually all of the titles. . . . It was not considered feasible to offer back land on which operational areas and airport infrastructure was located and it was considered that if the Crown offered back any one land block, this would have almost certainly diminished the capacity of the airport to continue to operate as an airport and there was a reasonable concern within the Ministry that it could have quite possibly resulted in the closure of the airport. Neither the Government nor the local community wanted closure of the airport to be the outcome.[364]

The issue was not so clear-cut at the time. As noted above, the Ministry had decided in 1983 that the land at Avion Terrace was surplus to requirements, although most of the house sites were not actually sold at that time. In 1989, Landcorp had identified areas that could be developed further and sold, including the land at Avion Terrace – only one of Landcorp's proposals involved closing a runway (on the principle that the local community could be convinced to accept 'the idea [of] one runway or none at all').[365] The Ministry of Transport advised Cabinet in March 1991, however, that the closure of Paraparaumu Aerodrome would have aviation consequences. It would increase the strain on aviation traffic in the Wellington region as well as increase safety risks at Wellington Airport. This meant that a way might have to be found to convince new operators to keep the aerodrome going after it was sold despite its poor economic performance. We note, however, that Ministry officials told the auditor-general's inquiry in 2005 that the aviation concerns had made it 'desirable' but not 'critical' for Paraparaumu to remain operational after sale.[366] Officials also explained in 2005 that the Government had 'wanted the aerodrome to continue operating if it was commercially viable, but that it did not want to make the decision about viability itself'.

364. Nigel Mouat, brief of evidence, 8 July 2019 (doc G7), pp 4–5
365. Landcorp Services Ltd, 'Paraparaumu Aerodrome Proposal' (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Archives New Zealand folder, IMG1475-IMG1478)
366. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 18–19)

Instead, the intention was to sell the under-performing aerodrome and 'let the market (and/or the local community) decide about its continued operation.'[367]

Coupled with the fact that Paraparaumu Aerodrome was not commercially viable at the time of the sale, and that the Crown itself was not prepared to carry out the development and sale of 'surplus' land recommended by Landcorp, we have to conclude that the Crown was aware that any future owners of Paraparaumu Aerodrome would have to do something of that kind to make the aerodrome viable. This is confirmed by the Minister of Transport's report to Cabinet in July 1991, which stated:

> Paraparaumu is unlikely to be commercially viable although it could be after an extensive land rationalisation programme. However, there has been interest shown in its purchase for continued use as an aerodrome but prospective purchasers are also likely to have in mind the development potential of the surplus land. On balance, I believe that the best option for Paraparaumu would be sale on an open market basis.[368]

7.6.4.4 *Consideration of Māori interests in deciding how to dispose of the aerodrome*

On 21 March 1991, the Minister of Transport issued a press release informing the public that the Crown was about to sell all its aerodromes in conformity with the state sector reforms:

> Aerodromes owned by the Ministry of Transport are to be sold.
>
> Transport Minister Rob Storey says it's no longer appropriate for the Air Transport Division of the Ministry of Transport, which runs the seven aerodromes, to continue operating them.
>
> 'These days the Air Transport Division of the Ministry of Transport has a safety and regulatory role as the country's civil aviation authority,' Mr Storey said.
>
> 'Administering aerodromes isn't consistent with that regulatory function.'
>
> 'As well, aerodromes are commercial undertakings, and managing them absorbs resources.'[369]

The Minister's press release also stated that 'the government wanted to consult with interested parties before making firm decisions on future management structures for the aerodromes'. The Minister hoped that 'the private sector can be involved with the more commercial aerodromes' or, alternatively, local

367. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 18–19)

368. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 4); 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 19)

369. Office of the Minister of Transport, press release, 21 March 1991 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), NZTA folder, IMG1984)

communities could 'control and run their airports in a way best suited to their needs'. Possible options included: corporatisation of 'viable' airports, followed by sale of shares in the airport company to private buyers, or the 'direct sale of an aerodrome to an airport company or local authority'. Either way, the Minister stated that the 'rights of former owners under the Public Works Act 1981' would be 'preserved' if 'the new owners wish to dispose of aerodrome land in future'.[370] In other words, the Public Works Act offer-back requirements would not apply to the initial corporatisation or sale of the aerodromes. Instead, offer backs would only be required if the new owners wanted to on-sell any aerodrome lands.

The Minister's press release referred to consultation with 'interested parties', which seems to have meant potential buyers. In March 1991, mindful of the aviation concerns about overloading of Wellington Airport, Cabinet authorised the Ministry to hold discussions with Wellington International Airport Ltd. The Ministry hoped that the Wellington airport company would be interested in buying Paraparaumu Aerodrome.[371] Any discussions that were held must have been unsuccessful because Cabinet reconsidered the matter in July 1991. As noted above, the Minister of Transport recommended sale of the aerodrome on the open market. This was done in the knowledge that Paraparaumu Aerodrome could only be commercially viable 'after an extensive land rationalisation programme', and that any 'prospective purchasers' who wanted to keep the aerodrome going were also 'likely to have in mind the development potential of the surplus land'.[372]

The Minister recommended an open market sale on a 'going concern basis'. In order to avoid any offer back under the Public Works Act, the Crown would need to form an airport company under the Airport Authorities Act 1966:

> This Act allows the transfer of land acquired under the Public Works Act to airport companies without activating s 40 offer-back by deeming the land to be a 'Government Work' for the purposes of the Public Works Act even where land is being transferred to a privately owned company.[373]

DOSLI recommended, however, that 'the provisions of the Airport Authorities Act should be strengthened to make it absolutely clear that s 40 applies to the on-sale

370. Office of the Minister of Transport, press release, 21 March 1991 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), NZTA folder, IMG1985)

371. Bassett and Kay, 'Public Works Issues' (doc A211), pp 381–382

372. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 4); 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 19)

373. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 6)

of land by publicly or privately owned airport companies.'[374] This recommendation was later carried out in 1992 (see below).

The Minister of Transport's recommendation in July 1991 was not supported by Manatū Māori.[375] By that time, iwi representatives had contacted the Ministry on behalf of the former owners, apparently in response to an advertisement seeking expressions of interest in the purchase of the aerodrome. The Tumuaki (chair) of Ati Awa ki Whakarongotai Inc wrote to the Ministry in May 1991:

> We lodged claims ([Wai] #88 and 89) with the Waitangi Tribunal in 1989 which included the airport and it comes as a surprise that you were not aware of that fact. . . . The [?] whanau approached the marae for assistance in this matter as they are one of a number of whanau who are the descendants of the original owners whose land was taken under the Public Works Act.
>
> Under this Act the land is to be offered back to the descendants if it is no longer used for the purpose it was taken originally so any alienation of this land by way of transfer will be strenuously opposed.[376]

In addition to this letter, Huirangi Lake and Poiria Love-Erskine contacted the Ministry to express their concerns directly. Claimant George Jenkins explained Huirangi Lake's role:

> She . . . explained to me that her work was to protect all of the land because her father [Wharemaru Te Ngarara] was a rangatira as was her grandfather [Ihakara Te Ngarara] and as such they maintained an interest in all Puketapu Hapu land. She therefore sought clarification on the Crown's intention as to the actual use of that land given that clearly there were sizeable portions of now prime real estate being used for purposes other than that which was intended at the time the land was taken. Her correspondence was over many years but essentially she was given the excuse that the land was still required as an airport.[377]

Poiria Love-Erskine quoted her 1991 letter in her joint brief of evidence:

> Recent publicity regarding the proposed sale of the Paraparaumu Airport has prompted me to write to your Department. I am a descendant of the original owners of Ngarara West B 5 Block and have been waiting for some correspondence or

374. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 6)

375. In 1989, the state sector restructure resulted in the dissolution of the Department of Māori Affairs and its replacement by Manatū Māori (the Ministry of Māori Affairs) and the Iwi Transition Agency.

376. Tumuaki of Ati Awa ki Whakarongotai Inc to Ministry of Transport, 13 May 1991 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Rawhiti Higgott papers folder, IMG2588)

377. George Jenkins, brief of evidence (doc F41), pp 4–5

> otherwise from Air Transport with regards the proposed sale. Section 40 of the Public Works Act states this should be so.[378]

The approaches from the tumuaki of Ati Awa ki Whakarongotai Inc, Huirangi Lake, and Poiria Love-Erskine all received much the same response from the Ministry to the effect that no final decision had been made to sell the aerodrome, and that the Crown was considering how to protect the section 40 rights of former owners. A meeting between the Lake whānau and Ministry officials yielded no concrete results, although the Ministry did ask DOSLI to ascertain the identities of all former owners and their successors but not to make any contact with them. DOSLI responded in May 1991 that this was a 'fruitless exercise' without being able to verify that the correct people had been identified.[379]

The Ministry of Transport also received an approach in May 1991 from the solicitors of the Ngahina Trust (discussed above), which owned the Ngarara West E block adjoining the aerodrome on the eastern side. The trust advised that all former owners and their successors were beneficiaries of the trust, apparently in response to a letter from the Ministry which is not on our Record. The trust responded:

> One of the possible options mentioned by the Honourable Minister of Transport was the Direct Sale of an Airport to an Airport Company, and it seems to us that this option at least would trigger the offer back provisions of Sections 40 and 41 of the Public Works Act 1981. We realise that an Airport Company . . . would need to have the use of the land for its operations. What we thought might be a reasonable compromise having regard to this factor might be for the Maori owners to be given back the freehold title but subject to a long lease to the Crown at a rental based on say 11% of the unimproved value . . . When the Crown sells the Airport it could then transfer the lease to the purchaser with the Maoris still owning the freehold.[380]

There is no evidence on file that the Ministry responded to this letter, and it is clear that the Ministry of Transport rejected the 'compromise' it proposed between privatisation and the offer back requirements. The Minister recommended the sale of the aerodrome on the open market to Cabinet in July 1991. Ms Bassett commented in her report that the 'early approach by a Māori trust which proposed a lease-back to the Crown was rejected'.[381] Mr Mouat in his evidence said that he had

378. Poiria Love-Erskine to Ministry of Transport, 7 August 1991 (Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 15)

379. Basset and Kay, 'Public Works Issues' (doc A211), pp 386–388; District Manager/Chief Surveyor to Air Transport, 27 May 1991 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), NZTA folder, IMG1925)

380. Oakley Moran to Acting General Manager, Department of Transport, 16 May 1991 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2580)

381. Bassett and Kay, 'Public Works Issues' (doc A211), p 425

'no knowledge of any such proposal' or of 'any such proposal having being put to the Ministry of Transport or to the Crown.'[382] The documentary evidence is clear that the Ngahina Trust did put this proposal to the Ministry in May 1991.[383]

Further, Manatū Māori (the Ministry of Māori Affairs) expressed concerns in July 1991 about the Minister's proposal to sell Paraparaumu Aerodrome on the open market. Its concerns revolved around (a) the availability of Crown land to settle Treaty claims and (b) the avoidance of any offer back and the Crown's justification for claiming that the aerodrome was still a public work after privatisation. Manatū Māori considered that the Crown must offer the land back, and raised the option of a lease or some arrangement that would enable the former Māori owners to own the aerodrome:

> The justification for land to be acquired under the Public Works Act for a public work centres on there being an appreciable net social benefit in doing so. The focus on net social benefits is thus quite removed from that of the profit motive or the provision of private use benefits. Manatu Maori considers that aerodrome land previously acquired to provide a social benefit must not be transferred to private enterprise, whose primary motive is profit or private use, without invoking the offer back provisions in the Act.
>
> Manatu Maori recognises that social benefits can still arise from a privately owned aerodrome. However, as these benefits are the result of externalities rather than being intrinsic to the aerodrome's management they do not justify circumventing the offer back provision of the Public Works Act.
>
> Manatu Maori also considers that if an aerodrome is to be managed solely for profit then the former owners should have the opportunity to share in the profits. This could occur in several ways. First, the aerodrome could be offered back outright to the prior owners. Second, the offer back could be negotiated in such a way that it includes a long term lease allowing a third party to own and operate the aerodromes. The lease arrangement could include provisions for any subsequent closure of the aerodrome.[384]

These were all important points but the Minister of Transport did not address any of them in his memorandum to Cabinet.[385] The only point raised by Manatū Māori that the Minister did consider significant was the issue of Treaty claims and the possibility that the aerodrome land could be needed for use in a Treaty settlement.

By way of background, the New Zealand Māori Council (NZMC) had challenged the Crown's state sector reforms in the courts on the basis that the Crown was disposing of Crown assets that might be needed for settlements. In the well-known

382. Mouat, brief of evidence (doc G7), p 6

383. The trust's letter of 16 May 1991 was stamped as received by the Ministry of Transport on 21 May 1991.

384. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 2)

385. Bassett, answers to questions in writing (doc A211(q)), p 13

Lands case, the Court of Appeal held that the transfer of land out of Crown ownership to State-Owned Enterprises (SOEs) 'without sufficient protection for Māori claims was contrary to the principles of the Treaty and was therefore inconsistent with section 9 of the State-Owned Enterprises Act 1986'.[386] Section 9 stated: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.' As a result, the NZMC and the Crown reached an out-of-court settlement embodied in the Treaty of Waitangi (State Enterprises) Act 1988, which provided for memorials on the titles of land transferred to SOEs and for the Waitangi Tribunal to make binding recommendations for the return of memorialised land to claimants.[387] Similar arrangements were later made for other Crown assets such as State forests and Education lands.[388]

Manatū Māori raised the issue that the interests of Treaty claimants would be protected if land was transferred to an SOE whereas no such protection applied to 'the direct disposal of land by a Crown agency'. Claimants would 'undoubtedly resent the land passing from Crown ownership prior to resolution of their claim' if the land had 'specific cultural value' to them, or if it held 'the potential to provide them with an economic base'. Manatū Māori pointed out that claims were often too general to pinpoint exactly what areas were 'under claim', and that claims could also 'refer to a general injustice'. Such claims could be remedied by the transfer of any Crown land in the general area. But in all of those different cases the sale of Crown assets would forgo the opportunity to use them in a settlement, and this could 'present the Crown with added difficulties and costs in seeking alternative resources with which to settle the claim'.[389] The Minister of Transport agreed that the 'possibility of sales complications arising from claims cannot be ignored', and that consultation with claimants would be required. The Minister specifically rejected, however, the idea of including memorial provisions in the Airport Authorities Act similar to those in the Treaty of Waitangi (State Enterprises) Act 1988. Instead, 'Maori land claim issues should be addressed as part of the disposal process to be employed for each aerodrome'.[390]

Following receipt of this memorandum, Cabinet decided on 8 July 1991 that Paraparaumu Aerodrome should be sold with a 'specific requirement on the purchasers to keep the aerodromes operational'. This could take the form of caveats on the title or contractual obligations. Cabinet also asked officials to report back on a sale process, including the possibility of forming the aerodromes into 'small SOEs'

386. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 17)

387. Treaty of Waitangi (State Enterprises) Act 1988, preamble, s 4 (inserting ss 8A-8H in the Treaty of Waitangi Act 1975)

388. Crown Forest Assets Act 1989; Education Amendment Act 1990, ss 210–212

389. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 2)

390. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 7)

to operate them as a 'transitional measure' in the meantime while other issues were resolved.[391] This option would have resulted in memorials being placed on the titles, although this was not mentioned specifically.

The Minister of Transport reported back to Cabinet later in July 1991. Essentially, the Minister rejected the option of putting a caveat on the title or some other instrument to ensure the continued operation of the aerodrome after sale. This was because the Ministry did not want to limit the way the new owners conducted their business. Also, it would result in the Crown receiving a lower price. Primarily, however, the Ministry wanted to avoid any possibility of the Crown having to subsidise the new owners if their businesses proved uneconomic or even having to bail out the companies and buy the aerodromes back if they decided to 'exit the [aerodrome] business for any reason'. There were clearly strong limits on the Ministry's desire to see the aerodromes continue operating after sale. Nonetheless, the option of special legislation to require the continued operation of aerodromes after sale was still on the table, at least in theory, in 1991.[392] The Minister proposed that, instead of proceeding with sales to airport companies, the Crown retain ownership of aerodromes for the time being while transferring management functions to Crown-owned airport companies.[393]

By this time, Manatū Māori appears to have accepted that no lease arrangements would be negotiated with the former owners (as had been suggested in the previous memorandum to Cabinet). The Ministry of Māori Affairs still wanted to protect the interests of Treaty claimants but 'acknowledged that it would be unreasonable to impede the sale of the Ministry of Transport's land, preventing the Ministry from realising its financial objectives'. Although Manatū Māori's preference was that the aerodrome land be retained in Crown ownership until any claims were settled, it recommended

> that, in order to allow sale to proceed, the Airport Authorities Act should be amended to set in place memorial provisions similar to those in the State Owned Enterprises Act 1986 which would allow the Crown to resume ownership of land transferred to airport companies should it be required to satisfy recommendations of the Waitangi Tribunal.[394]

391. Minister of Transport, second July 1991 memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1624)

392. Minister of Transport, second July 1991 memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1624, IMG1625)

393. Minister of Transport, second July 1991 memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1625)

394. Minister of Transport, second July 1991 memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1625)

The Minister of Transport advised Cabinet that he was 'reluctant' to agree to amending the Airport Authorities Act in this way, partly because the Justice Department had recommended waiting for the development of a complete policy on Treaty claims and asset sales. Also, the Minister advised Cabinet, there were other impediments: the inclusion of memorial provisions in the Act at this stage would have implications for airport companies that had already been established, especially for the joint venture airports where the Crown only owned half of the airport (local authorities owned the other half).[395]

In terms of the former Māori owners, DOSLI was also becoming increasingly concerned in 1991 that the Airport Authorities Act, while allowing the Crown to sidestep any offer of land back by transferring it to an airport company, did not protect former owners' rights if the airport company decided to on-sell land. The Minister noted:

> DOSLI, however, are strongly of the view that the Airport Authorities Act is inadequate to transfer land to an airport company because of an apparent conflict between that Act and the Public Works Act in that a 'public work', even if a 'Government work' as in the Airport Authorities Act, must be operated by the Crown or a local authority. This view casts doubt on the past transfer of land to existing airport companies (excluding Auckland and Wellington), and despite what is intended, allows an airport company to on-sell land, by-passing offer-back. Accordingly, it is my recommendation that no further Crown land be transferred to airport companies until the issue has been thoroughly investigated and the Airport Authorities Act has been strengthened as necessary.[396]

In October 1991, Cabinet

> *agreed*, in order to protect the rights of former owners, that:
> (i) the Airport Authorities Act 1966 be amended; and
> (ii) the Articles of Association of the Ardmore and Paraparaumu Airport companies stipulate that the Public Works Act 1981 provisions be followed *in respect of the disposal of land that was compulsorily acquired under this Act* . . . [Emphasis in original.][397]

It is important to note that Cabinet's intention was to restrict offer-back requirements to lands taken compulsorily, which was in line with DOSLI policy at the time but was narrower than the offer-back provisions in the Public Works Act 1981. Cabinet's decision was given effect in August 1992 with the passage of the Civil

395. Bassett and Kay, 'Public Works Issues' (doc A211), p 383
396. Minister of Transport, second July 1991 memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1626)
397. Cabinet paper, 7 October 1991 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 138–139)

Aviation Amendment Act 1992, which inserted section 3A(6A) into the Airport Authorities Act 1966:

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to an airport company under this Act, but sections 40 and 41 of that Act shall after that transfer apply to the land as if the airport company were the Crown and the land had not been transferred under this Act.

This was as far as the Crown was prepared to go at the time, at least in terms of protecting the offer-back rights of former Māori (and European) owners. In the meantime, any further consideration of Māori interests was suspended by Cabinet's decision to establish an SOE.

7.6.4.5 *The Crown chooses the SOE option, October 1991–April 1993*

In October 1991, Cabinet changed its mind about selling three of its aerodromes: Ardmore, Milford Sound, and Paraparaumu. These three aerodromes would be formed into an SOE, Airport Holdings Ltd (AHL). An 'Establishment Board was appointed in March 1992 to manage the transition of the aerodromes to fully commercial status by 1 July 1992'.[398] There was no consultation with Māori about this decision. Presumably, the use of memorials for SOE lands was considered sufficient protection, although there is no specific mention in the documentation that the memorial regime would apply to AHL. The process of establishing the new SOE was stopped in July 1992, however, because aerodrome valuations 'did not demonstrate that the business was viable', there was no clear plan as to how to make the aerodromes successful businesses, and the 'critical issue of land rationalisation had not been addressed sufficiently'.[399] As noted above, both Landcorp and the Minister of Transport had highlighted the need for land rationalisation at Paraparaumu Aerodrome. This remained an obstacle in setting up an SOE. Paraparaumu Aerodrome's valuation for the establishment board showed that the aerodrome would be 'uneconomic as a business'. There was insufficient revenue for the large amount of 'capital and maintenance expenditure' needed to keep the aerodrome running.[400]

In July 1992, the Minister for State-Owned Enterprises asked officials to review the viability of AHL, including obtaining a 'market valuation of the surplus land' for each aerodrome, and to consider alternatives to establishing an SOE, such as sale or even closure of the aerodromes. Treasury commissioned a revaluation, which still showed that Paraparaumu was 'unlikely to be commercially viable'. Paraparaumu was also considered to have 'non-core assets' in terms of land, improvements, and houses valued at an estimated $1.4 million, on the assumption

398. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 88)

399. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 88)

400. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 19–20)

that the land could be 'made available for subdivision into residential and light industrial developments.'[401]

Treasury recommended against continuing with AHL because it would not be viable without much higher landing charges and Government subsidies. This left the Crown with two alternatives. The first was for the Ministry of Transport to continue to operate the aerodromes. This would ensure the future retention of the aerodromes for their users. In that case, urgent maintenance could not be delayed any longer, and the Ministry would have to 'dispose of land not required for core aerodrome purposes' and raise landing charges and rents. While feasible, this option required the Ministry to bear a lot of expense for 'little obvious benefit' and to continue as an operational rather than, as planned, a solely policy-oriented Ministry. It is important to note that, whether as an SOE or a Ministry-owned aerodrome, there was a strong expectation on the part of the Crown at that time that surplus land would have to be identified and sold.[402]

Treasury's preferred option in 1993 was (once again) to sell the aerodromes, subject to the Crown meeting its Treaty and Public Works Act obligations. Officials considered that the Treaty obligations were confined to the use of Crown land to settle claims. Although the claims did not pose a legal impediment to sale, Treasury noted that 'Cabinet has agreed in principle that the Crown should make itself informed of the Maori perspective, consulting where appropriate, in making decisions that relate to the principles of the Treaty'.[403] Officials also advised that the amendment of the Airport Authorities Act in August 1992 now allowed the Crown to sell aerodromes as airport companies without 'jeopardising the rights of former land owners.'[404] Treasury therefore recommended sale of airport company shares for core aerodrome areas on the open market as well as separate sale of surplus land (where that would maximise returns).[405]

In April 1993, a Cabinet paper from the Ministers of Finance and State-Owned Enterprises argued that continuing with an SOE was not viable, noting that the business of Paraparaumu Aerodrome had been valued at negative $2 million.[406] This valuation had been 'prepared on a "discounted cashflow" basis, which allowed for future income and business cost assumptions and cashflow projections to be taken into account over a 15-year period'.[407] If, alternatively, the land could be used

401. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 89, 90–91)
402. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 91–94)
403. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 92, 94)
404. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 92)
405. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 94)
406. Cabinet paper, 26 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 84–85)
407. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 44)

for other purposes such as housing or light industry, Treasury had reported the net realisable value of the core assets as $0.7 million and the non-core assets at $1.4 million.[408] The Ministers advised Cabinet to retain Milford Sound in Crown ownership for possible use in the Ngāi Tahu settlement, and to sell Ardmore and Paraparaumu. The Crown would need to meet its Treaty obligations first which, 'while taking some time to fulfil, are not expected to prevent disposal'. This was in line with Treasury's advice but hardly suggests an open mind going into consultation with Māori. For each 'core aerodrome', the paper recommended sale of shares in airport companies on the open market without any restrictions as to buyers (the preferred option) or by negotiation with aerodrome user groups. At this point, the proposal was that surplus aerodrome land would be sold separately on the open market.[409] Treasury had noted that separate sale of the surplus land would require public works offer-back provisions to be met first.[410] If Cabinet accepted the Ministers' preferred option, there would be no guarantee against closure of the aerodrome after sale but Māori interests would be met at least in part by the offer back of surplus land to former owners.

7.6.4.6 *Final decision to sell Paraparaumu Aerodrome, subject to fulfilling the Crown's Treaty obligations*

On 27 April 1993, the Cabinet committee on enterprise, growth, and employment agreed not to proceed with the establishment of AHL. It directed the Ministry of Transport, '*subject* to fulfilling the Crown's obligations under the Treaty of Waitangi and the Public Works Act' (emphasis in original), to offer airport company shares for each 'core aerodrome' by negotiation with 'user groups and/or other local groups, or by restricted tender involving user groups and/or other local groups'. The Minister was also directed to report back to Cabinet on how potential purchasers intended to use the aerodrome lands. This was promising on the face of it because 'other local groups' could have included Puketapu or some association of the former owners. Also, although Cabinet had stipulated that Treaty obligations would have to be met first, Treasury's advice was echoed in the Cabinet minute: 'These obligations, while taking some time to fulfil, are not expected to prevent disposal.'[411] Importantly, nothing was said explicitly about surplus lands in the Cabinet minute but the Ministry was instructed to offer 'core aerodromes' only, so presumably Cabinet intended to follow Treasury's advice and sell the surplus land separately.

The issue of what was meant by a 'user group' or 'other local group' was not clarified by the Cabinet minute itself. According to Crown counsel, the question of

408. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 90–91)

409. Cabinet paper, 26 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 84–85)

410. Treasury, memorandum to Minister for State-Owned Enterprises, Minister of Finance, 14 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 94)

411. Cabinet Committee on Enterprise, Growth and Employment, minutes of meeting, 27 April 1993 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 186–187)

how to define the parameters of these groups referred to in the Cabinet paper was decided by the Minister of Transport and his officials, after which it was communicated to the local members of Parliament and potential purchasers.[412]

Nigel Mouat explained to the auditor-general in 1995 that officials had advised putting no form of restriction on the future use of the aerodrome after sale. As noted above, this had been a much-debated issue and Cabinet had earlier considered the possibility of using caveats, restrictions in the company's articles of association, or special legislation. Cabinet's decision to have a tender process that was restricted to user groups and local groups 'was the Government's chosen approach to ensure that, as far as possible, the aerodrome would continue in operation'. Mr Mouat had discussed this issue with the Minister and the Secretary for Transport prior to the Cabinet committee meeting. The Minister indicated that Cabinet would not agree to selling the aerodrome by tender on the open market, and so Mr Mouat suggested restricting tenders to 'the respective local authorities, international airport companies [Wellington and Auckland], and aerodrome users'. The Minister agreed to recommend this to Cabinet but, as noted above, the Cabinet minute was worded more generally and referred to user groups and other local groups.[413] Mr Mouat therefore asked the Minister's office to clarify whether 'other local groups' was in fact restricted to the two international airports and local authorities, to which the response was 'yes'.[414]

Unless they qualified as a 'user group', therefore, local Māori would be excluded from the tender process. Further, eligibility to tender was communicated directly to the Kāpiti Coast District Council, Wellington International Airport Ltd, and 'the various aerodrome users (principally lessees)'.[415] The question then becomes: how and why did the Crown consult Māori about the intention to sell the aerodrome, and with what results? We discuss that issue in section 7.6.4.

We also note that Cabinet agreed to *two* options for disposal to 'user groups' and 'local groups': by negotiation or by limited tender. In the event, the Ministry opted to sell the shares in the airport company by limited tender rather than by negotiation. Claimant counsel raised with Mr Mouat whether there was any impediment to including the former owners or their descendants in a negotiated sale, bringing them into the arrangement with one or more user groups.[416] Mr Mouat responded: 'No, we simply hadn't thought of it.'[417]

We turn next to discuss a piece of airport land that was transferred to an SOE.

412. Crown counsel, memorandum, 23 September 2019 (paper 3.2.451), pp 4–5
413. Nigel Mouat to Office of the Controller and Auditor-General, 29 August 1995 (Crown counsel, document collection (paper 3.2.451(a)), pp 99–100)
414. Nigel Mouat to Minister of Transport's Office, 3 May 1993 (Crown counsel, document collection (paper 3.2.451(a)), p 102)
415. Minister of Transport to J Keall, member for Horowhenua, 11 August 1995 (Crown counsel, document collection (paper 3.2.451(a)), p 103)
416. Transcript 4.1.21, pp 312–313
417. Transcript 4.1.21, p 313

7.6.4.7 *Transfer of aerodrome land to the MetService*

A piece of land consisting of 7.6 acres was excepted from the decision to sell in 1993. This site was set formally apart from the rest of the aerodrome in 1993 for meteorological purposes.[418] This was done under section 40(1)(b) of the Public Works Act 1981, which allowed land taken for one purpose to be used for another public work without triggering the offer-back requirement.[419] The site was then transferred from the Crown to the Meteorological Service of New Zealand Ltd, an SOE established in 1992, and therefore has a memorial on the title and is subject to resumption on the recommendation of the Tribunal. The weather station is situated on what was Ngarara West B7 subdivision 1, which belonged to Kaiherau Takurua at the time it was taken. The access to the station is located on Ngarara West B7 subdivisions 2A and 2B, and that part of those former titles was also included in the transfer to the MetService.[420] Ngarara West B7 2B was taken from Te Wanikau Teira, Tahu Wiki Teira, and Utiku Heketa Teira, and 2A was taken from G W Maclean. There was no consultation about the transfer of this land to the MetService, presumably because the Crown considered that Māori interests were protected by a memorial on the title in the event of a successful Treaty claim.

We have no information as to whether the MetService needed 7.6 acres for a weather station, and therefore have to query the extent of land transferred to this SOE by the Crown.

7.6.5 Crown consultation and engagement with Māori during the sale process, 1993–95

7.6.5.1 *Initial consultation, May–June 1993*

As discussed above, the Crown was approached by various Te Ātiawa/Ngāti Awa groups in 1991 after the public announcement of the Crown's decision to sell Paraparaumu Aerodrome. In October 1991, however, Cabinet decided to establish an SOE instead of selling Paraparaumu Aerodrome outright. No further consultation or discussion with Māori occurred until May 1993, when the Ministry of Transport wrote a letter to various groups who had filed claims with the Tribunal. The same letter was sent to all the groups, advising them that the decision to devolve the aerodrome to an SOE had been revisited. The Crown now intended to form the aerodrome into 'an airport company, which will then be sold' to 'aerodrome users and/or nearby international airports and/or local authorities'. The reason for this method of disposal was stated explicitly: because the Crown would otherwise have to offer land back to former owners prior to selling 'on the open market', and because the Crown wanted to keep the aerodrome operational, it had decided to use the vehicle of an airport company to sidestep offering the land back and thereby risking closure of the aerodrome. The Ministry sought the 'comments

418. Bassett and Kay, 'Public Works Issues' (doc A211), p 405
419. Crown counsel, closing submissions (paper 3.3.60), p 61
420. Bassett and Kay, 'Public Works Issues' (doc A211), p 405

of the iwi and hapu that may be affected by the proposal to sell Paraparaumu Aerodrome, before inviting any tenders.'[421]

The Ministry also wrote to Huirangi Lake in May 1993. This letter explained:

> In order to fulfil the Crown's obligations under the Public Works Act, the aerodrome will be sold as an airport company because the rights of former owners are safeguarded through this method of sale. In other words, if the airport company should later to wish to sell land at Paraparaumu which it no longer requires for airport purposes, *it will be required to offer the land back to the former owners in accordance with the Public Works Act*. Consequently, the position of former owners and their descendants will be unaffected by this disposal. [Emphasis in original.][422]

There are six points to note about this letter:

- The Lake whānau were not asked for comments but merely informed of the changed approach to disposing of the aerodrome.
- The Ministry did not advise (as it did in its letter to the claimants) that the airport company vehicle was being used to avoid offer backs prior to sale via limited tender.
- The Ministry referred to the position of 'descendants' being unaffected, which obscured the point that, with every year that passed, the transfer of the land to a third party made it less likely that successors as defined in section 40(5) would still be alive to receive an offer back. Denise Parata, daughter of Huirangi Lake, pointed to this assurance about 'former owners and their descendants', explaining that they had believed the rights of grandchildren and others entitled under Māori custom were protected.[423]
- No mention was made of the ability of an airport company to lease surplus land that was not required for airport purposes. Any future offer back, according to this letter, would be triggered if the airport company wanted to *sell* land.
- No mention was made of the statutory exceptions to offer back – that it could be considered impracticable, unreasonable, or unfair for the land to be offered back. Rather, the letter stated emphatically that if the company wanted to sell any land, it would have to offer the land back first.
- The Ministry of Transport was clear in communicating to owners that the airport company would be responsible for the offer-back requirements. This reflected the Ministry's understanding of section 3A(6A) of the Airport Authorities Act.[424]

421. Nigel Mouat to Te Runanganui o Toa Rangatira, 14 May 1993 (Mouat, papers in support of brief of evidence (doc G7(a)), p 188)

422. Nigel Mouat to Huirangi Lake, 17 May 1993 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1831)

423. Denise Parata, brief of evidence (doc F40), pp 8–9

424. See also 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 24, 37).

In response to the May 1993 letter, Ati Awa ki Whakarongotai Inc responded that the iwi were '*happy to support their whanau who are the descendants of the original owners* of the airport land in their quest for the return of any surplus land under section 40 of the Public Works Act'. (Emphasis added.) But they had concerns about paying for the improvements 'when that land is returned both immediately and in the future'. They were also concerned about the limits placed on using the land after it was returned as well as the lack of detail for them to make informed decisions about what to do.[425] The initial letter was followed up by a more detailed submission, which again stressed that the iwi was 'supporting claims of their whanau members who are the descendants of the original owners on this issue'. The iwi expressed concern about the value of improvements to the surplus land (if any was surplus to the tenderers' requirements) and also their expectation that the airport would later need to be moved to another site. This would raise the question of improvements to the 'airport grounds and buildings' as well as surplus lands. They flagged this as a matter of importance: they would not be able to buy back the improvements if the land was offered back 'without the help of government'. The iwi submission also noted that the land would be virtually 'worthless' to the former owners at present because the Kāpiti Coast District plan prevented any residential development on it, whereas the former Māori owners would want to maximise the value of the asset. Nonetheless, the iwi was exploring the possibility of putting in a tender.[426] If an offer back had ever been made, we would have considered the Treaty-compliance of requiring Māori, who had been denied an income from the land since the point it was taken, to buy back the land at market value.

7.6.5.2 *Shift in focus to the use of aerodrome land in Treaty settlements*

As far as we are aware, there was no response from the Ministry to the communications from Ati Awa ki Whakarongotai Inc in June 1993. This may be because the Crown's focus of consultation changed from seeking comments about the proposed disposal (as in the May 1993 letter) to something much more specific.

In August 1993, the Treaty of Waitangi Policy Unit (TOWPU) and the Crown Law Office provided important advice to the Ministry about the nature and purpose of the consultation it should undertake. The background to this advice was the *Lands* case and the memorial regime for SOE lands (discussed above). Also, the Crown had recently created a 'protection mechanism' that would landbank any surplus assets needed for Treaty settlements. In April 1993, Cabinet signed off on a 'protection mechanism for Maori interests' in surplus Crown assets which were not protected by some form of memorial on the title. The 'consultative clearance mechanism' required the Crown to consult and determine whether sites were essential to settlement (category A) because they had 'special historical, cultural,

425. Ati Awa ki Whakarongotai Inc to Ministry of Transport, 28 June 1993 ('Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 26)

426. Ati Awa ki Whakarongotai Inc to Minister of Transport, 28 June 1993 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1829-IMG1830)

[or] spiritual significance which the Crown acknowledges are non substitutable eg burial places'. Category B was non-essential but 'important' sites for the claimants, and category C covered sites that the claimants wanted for settlement, even if those sites were not of 'special significance' to them. The protection mechanism allowed for land in all three categories to go into a land bank for later use in settlements or for the Crown to dispose of the assets if none of the categories applied.[427] For Paraparaumu Aerodrome, however, the Crown was only prepared to consider some form of protection if it could be shown by claimants to be category A, as we discuss below.

In August 1993, TOWPU advised the Ministry that,

> because transferring the aerodromes to an airport company would mean that land subsequently deemed surplus would not be available for use in a Treaty settlement, the Crown could be seen to be in breach of the Treaty principle that the Crown should avoid creating impediments to redressing grievances. Clearance of the land through the protection mechanism did not appear to be possible. One option was to place a covenant on aerodrome land so that it would revert to the Crown if it were declared surplus and not be disposed of by the airport company under the Public Works Act. Advice was to be sought from the Crown Law Office on the issue.[428]

Crown Law advised the Ministry that the protection mechanism did not apply if Crown assets were transferred to an airport company, which meant that the Ministry would have to consult Māori to 'assess whether a mechanism was needed' to ensure that such transfers 'did not create a further impediment to redress of Treaty breaches'. The 'key point' of consultation would be to find out if the land had 'special significance' to the claimants or whether other land could be used in a settlement, in which case 'a mechanism to preserve redress options may not be required'.[429] As noted above, in 1991 Manatū Māori had recommended inserting a memorial regime in the Airport Authorities Act 1966 but the Ministry of Transport advised against doing so. Cabinet agreed with the Ministry of Transport but it seemed in 1993 that a similar mechanism might be required. Crown Law also advised the Ministry to find out if the claimants would agree to the continued use of the land as an airport if they acquired title as part of a settlement.[430]

The Ministry's consultation in 1993–94 focused on these matters. The Ministry wrote to Te Pehi Parata, the chair of Ati Awa ki Whakarongotai Inc, in October 1993. The opening remarks in this letter showed the change of approach. The Ministry informed Ati Awa ki Whakarongotai that the Crown was not 'legally

427. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1429-IMG1430)

428. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 26)

429. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 26–27)

430. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 27)

required to comply with the principles of the Treaty when exercising powers under the Airport Authorities Act 1966'. This must have referred to the absence of a Treaty clause from this Act, in contrast with section 9 of the State-Owned Enterprises Act 1986 (quoted above). No move was made to insert a Treaty clause in 1988 when the Airport Authorities Act was amended to allow the transfer of airport lands to privatised airport companies. What the Ministry meant, therefore, was that a legal challenge of the kind made in the *Lands* case was less likely to succeed.

The Ministry then went on to say: 'However, the Government has decided to comply with the principles of the Treaty in disposing of the aerodrome.' This was an important statement. The Ministry also said that the 'particular manner in which those principles will be fulfilled will ultimately be an issue for the Government to determine as a matter of policy'.[431] These statements were intended to convey a key message about the limits on consultation and the legal remedies available to the claimants due to the use of the Airport Authorities Act. As the Ministry understood it, the Ministry alone would decide how the Treaty principles would be fulfilled.

Four questions were put for a specific response:

> Do you claim that the land upon which the aerodrome is located is of particular significance? Is it for example wahi tapu?
>
> Does your claim extend to the whole of the land upon which the aerodrome is located or simply part of that land? If only part of the land, which part?
>
> Do you accept that the land should continue to be used as an airport, given that there is limited land in the vicinity available for airports and that the provision of airport facilities is of wider benefit to the community?
>
> In your claim to the Waitangi Tribunal (WAI 88) you have referred to the Paraparaumu Airport but given no particulars of the basis of the claim to that piece of land. Has any research been commissioned or completed in respect of particular claim to the aerodrome?[432]

It is important to stress the content of the third question. The aerodrome land acquired from Māori owners was taken compulsorily for the public good (with the exception of Ngarara West B72C). Now the owners' descendants were expected to accept that the land should 'continue to be used as an airport, given that there is limited land in the vicinity available for airports and that the provision of airport facilities is of wider benefit to the community'. This raised the obvious question: why should their interests be sacrificed *a second time* for the benefit of the community while in fact private persons would benefit financially as the new owners?

431. Nigel Mouat to Te Pehi Parata, chair, Ati Awa ki Whakarongotai Inc, 7 October 1993 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1815)

432. Nigel Mouat to Te Pehi Parata, chair, Ati Awa ki Whakarongotai Inc, 7 October 1993 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1815–IMG1816)

Ati Awa ki Whakarongotai Inc did not respond to the October 1993 letter. It appears from later correspondence that the letter was either not delivered or overlooked. In the meantime, the Ministry developed its policy approach to fulfilling the Crown's Treaty obligations, based on the advice received from TOWPU and Crown Law. The Cabinet instruction in April 1993 required the Ministry to sell the aerodromes, subject to fulfilment of the Crown's Treaty obligations, and officials understood that the relevant Treaty principles were 'that the Crown should act reasonably and in good faith, should make informed decisions, and should avoid creating impediments to redressing grievances'.[433]

According to the Ministry's analysis, the claimants' main concern was that the Crown would not be able to use the aerodrome lands as part of a settlement if the assets were transferred out of Crown ownership. In order to deal with this concern, the Ministry identified four possible options for the Crown to take. First, the Crown could retain ownership of the aerodromes – this option, however, was rejected outright. Secondly, the Crown could retain ownership until the claims were settled, leasing the aerodrome to private operators in the meantime. Thirdly, the Crown could proceed with the sale but attach 'some sort of covenant' allowing the Crown to buy it back if required for a settlement.[434] This covenant would differ from the SOE memorial regime, which empowered the Tribunal to order the resumption of memorialised land.

The Ministry considered these two options as problematic. In respect of the second option (leasing the land in the meantime), the Ministry noted a number of difficulties, including arranging the lease and continuing to pay the capital charge on the asset. Any lease would need to be long enough to enable long-term decisions to be made about the management of the airport but would 'virtually amount to sale anyway, in the sense that the Maori claimants, even if underlying ownership could be transferred to them, would be precluded from putting the land to any other use' unless the lease could be broken.[435] As noted above, both the Ngahina Trust and Manatū Māori had proposed that the Crown lease the aerodrome to private operators while returning ownership to Māori, but the Ministry dismissed this option without any consultation about it with the claimants. The point raised by the Ngahina Trust and Manatū Māori was a pertinent one; some option of sharing the financial benefit with former owners would have been a pragmatic way of addressing their interests while still achieving the Crown's goal of privatising the aerodrome's operations.

The third option – a covenant on the land – was also dismissed because it would be difficult to implement, it could force the Crown to sell at a 'discount', and there were a number of legal uncertainties which might require further amendments

433. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1428); see also Mouat, brief of evidence (doc G7), p 3.

434. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1428)

435. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1428)

to the Airport Authorities Act 1966. Also, if the Crown did have to buy the aerodromes back because of a covenant, it would still not be able to use the land for a Treaty settlement without first offering it back under the Public Works Act. The Ministry raised this point for the first time in 1994. According to the Ministry, it was an obstacle no matter what mechanism was used to preserve the Crown's ability to return the aerodrome land in a Treaty settlement.[436] In the case of Te Ātiawa/Ngāti Awa, however, we note that the iwi was acting in support of the former owners, and therefore no such obstacle existed, provided any successors of the European owners were also consulted. As discussed in section 7.5, 259 acres of Māori land and 72 acres of European land had been acquired for the aerodrome.

The fourth option for the Ministry was to clear the land for disposal via the protection mechanism process. In respect of this option, the main point was that the consultation to date had not revealed whether the aerodrome lands had any particular significance to claimant groups (category A). If this continued to be the case, then the Crown could dispose of Paraparaumu Aerodrome, all the other options as set out above having been rejected as problematic. Even if there was some special significance to the land, the Ministry doubted that it could override the 'public interest' in keeping the aerodromes operational; that is, the aerodromes were not surplus assets. This was important and is worth quoting in full:

> Furthermore, we cannot lose sight of the emphasis of this decision [to establish a protection mechanism] on surplus Crown assets. While the Government has decided that the aerodromes should be devolved from Government ownership, as noted earlier, it certainly has not decided that the aerodromes are surplus as it wishes to preserve their continued use for airport related activities. In this regard, even if a particular significance were ascertained, the Government might legitimately determine, as part of its right to govern under the Treaty, that the disposal should nevertheless proceed on the grounds of an overriding public interest. For example, it may be concluded that because the airports should forever be preserved as airports (given the expense of building new airports and the shortage of available land) that there is no realistic prospect of the land ever being available for any other use, including Treaty settlements.[437]

This point was critical to the Ministry's thinking about Māori interests.[438] In our view, there is a difficulty in reconciling the Ministry's position that a 'public work' could be sold to private interests for profit and yet was not surplus and could not be returned to Māori because of an 'overriding public interest'. George Jenkins stated in his evidence to the auditor-general's inquiry in 2005: 'We want our ancestral land; it should not be used for commercial gain at the expense of our

436. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1429, IMG1431)

437. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1430)

438. Mouat, brief of evidence (doc G7), pp 4–6; transcript 4.1.21, pp 289–295, 298

legal rights. That is not what Parliament intended it was to be *taken* for.' (Emphasis in original.)[439] It is also difficult to reconcile the Ministry's position with the point that the Crown was not prepared to use any of a number of instruments to ensure that the aerodrome continued in operation after sale. Instead, the decision was to allow *the market* to decide if the privatised aerodromes would remain operational in the future (see above).

After consideration of all the options, the Ministry decided in February 1994 to make one last attempt to find out if the claimant groups attached any special significance to the aerodrome lands and, if not, to continue with the tendering process. In terms of protecting Māori interests, the Ministry noted that the successful tenderer might not want all the aerodrome land, in which case any unwanted land would be surplus and offered back to former owners or passed through the 'consultative clearance mechanism' prior to sale on the open market.[440]

Following these policy decisions, the Ministry wrote to Ati Awa ki Whakarongotai Inc in late February 1994, observing that a response had not been received to the October 1993 letter and asking for answers to the questions posed in that letter. A deadline of 25 March 1994 was set.[441] In response, Te Pehi Parata responded with a request for a copy of the October letter, and reminded the Ministry that he would be 'handing the investigation and negotiations over to the family who are descendants of the original owners'. The role of the iwi would be to 'support whatever decisions they deem to make', and to pursue a claim for 'all surplus crown land within the Iwi's boundary, which includes the airport'. Mr Parata also noted that the 'families involved' had been having meetings about the issue and would continue to do so. He also copied the letter to 'Mr Ake Taiaki, the kaumatua of the family involved'.[442] Mr Taiaki was a 'kaumatua and representative of the Taiaki line of descent of the relevant lands (B4 in particular)'.[443]

It is not clear what happened in response to this letter but the Ministry had not received the written answers it sought by May 1994. The Crown Law Office advised the Ministry to try meeting with the various claimant groups instead of relying on correspondence.[444]

7.6.5.3 *The Ministry meets with claimants and gives assurances about offer-back protections*

The Ministry met with the remaining three groups who were still involved in the consultation from September to November 1994: Ati Awa ki Whakarongotai

439. George Jenkins to Office of the Controller and Auditor-General, 15 March 2005 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG2006)

440. John Edwards, memorandum, 11 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG1431)

441. Nigel Mouat to Te Pehi Parata, 25 February 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2566)

442. Te Pehi Parata to Nigel Mouat, 1 March 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2567)

443. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 18

444. Bassett and Kay, 'Public Works Issues' (doc A211), p 394

Inc (September), Te Runanga ki Mua-Upoko (October), and Te Runanga o Toa Rangatira (November). These meetings were organised by Te Puni Kōkiri (TPK).[445]

The September meeting with Ati Awa ki Whakarongotai was attended by Te Pehi Parata and Ake Taiaki. The Crown's record of the meeting shows that the Ministry did not get the answers that it wanted. This was because the two representatives wanted to consult more widely on the matters discussed at the meeting. In a follow-up letter to Te Pehi Parata, the Ministry put the questions to Mr Parata for a final response: if 'your' claim to the Tribunal was upheld, would the claimants accept other compensation instead of the airport; and should the airport continue to be used as an airport or for some other purpose?[446] It is important to note that the Crown no longer wanted to know if the land was of special significance but rather if other compensation would be acceptable.

Nothing of what Mr Parata or Mr Taiaki said at the hui was recorded in the Ministry's summary of it, except a statement that the claim had not yet been researched. Rather, the Ministry summarised the points made by (and for) the Crown. These included the point that the Ministry had a 'firm objective' to transfer the aerodrome to parties who could run it on a 'fully commercial' basis. In other words, this decision had been made and was not the subject of consultation. On the issue of surplus land, Russell Armitage, the Secretary for Transport, recorded: 'It is considered that the amount of land occupied by the airport at present may be more than is needed.' The Ministry told Mr Parata and Mr Taiaki, however, that it did not want to make a decision on this question: 'We consider this matter is best left to those tendering to buy the airport.'[447] Heather Bassett noted that Ngāti Toa challenged this assertion at their meeting in November 1994, querying why the Ministry, which had operated airports for a long time, was not capable of deciding what land was required for an airport to function.[448] The auditor-general also considered in 2005 that the Ministry had been operating this aerodrome for many years and was in fact 'in a position to form a judgement on what areas of land were required for operational purposes at that time'.[449]

The Ministry stressed at its meeting with Te Pehi Parata and Ake Taiaki that 'the rights of previous owners as defined in the Public Works Act, Section 40, will still be protected'. The statements that followed were significant:

> If the new owners decide that some of the land is surplus to their requirements then this land will have to be offered back to the original owners or their beneficiaries in

445. Bassett and Kay, 'Public Works Issues' (doc A211), pp 394–395. Manatū Māori and the Iwi Transition Agency were replaced by Te Puni Kōkiri (the Ministry for Māori Development) in January 1992.

446. Russell Armitage to Te Pehi Parata, 3 October 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1795)

447. Russell Armitage to Te Pehi Parata, 3 October 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1795–1796)

448. Bassett and Kay, 'Public Works Issues' (doc A211), p 395

449. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 39)

> accordance with the procedure laid down in this Act. Furthermore, if the new owners decide to cease using any of the airport land for airport purposes then this land will be subject to the offer back provisions of the Act.[450]

More particularly, with 'respect to the particular concerns of the Lake family, as former owners of the airport land, their interests are protected by the Section 40 provisions of the Public Works Act as outlined above'.[451]

These assurances as to the protection of rights were to some extent misleading or incomplete. First, the use of the term 'beneficiaries' was used without any explanation of the Act's limit of offer back requirements to legal successors or how those successors were defined in the Act. For the purposes of section 40, a successor was the immediate successor in law to the person who owned the land at the time it was taken. Secondly, there was a great deal of ambiguity in terms of what land was needed for aerodrome purposes and what land was needed to make Paraparaumu Aerodrome commercially viable (and therefore was needed for aerodrome purposes in the broader sense). As noted, the Ministry itself refused to make that call prior to the sale because, it was argued, this was a *commercial* decision that could only be made by the new owners. Thirdly, there was no mention of the qualifications to the offer-back requirements in section 40(2)(a) of the Public Works Act; that is, the land need not be offered back if the airport company decided that it was impracticable, unreasonable, or unfair to do so. These qualifications on the offer-back right were never explained in any correspondence with the claimants nor, as far as we are able to tell from the available evidence, at any meetings. Claimant Bridget Mitchell believed that 'section 40(2)(a) was overlooked by the Crown when it purported that our rights would be protected'.[452] Nigel Mouat disagreed in his evidence for the Crown, stating: 'I do not believe that the Crown overlooked section 40(2)(a)'.[453] Mr Mouat did not support this statement with any evidence from the consultation period but rather stated: '[T]he Crown went to some lengths to ensure that the purchaser of the airport lands met its section 40 obligations.'[454]

After sending the follow-up letter in October 1994, the Ministry confirmed Te Pehi Parata's answers on a telephone call in late November 1994 rather than holding a further meeting. We have no information as to what internal meetings may have occurred prior to this telephone discussion but it is clear that at least one meeting had occurred with the Lake whānau. The Ministry's record of the conversation noted the point that the Ministry was supposed to be dealing with representatives of the former owners, a point which Mr Parata had made in all his communications with the Ministry thus far: 'The interest of Ati Awa in this matter has

450. Russell Armitage to Te Pehi Parata, 3 October 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1796)
451. Russell Armitage to Te Pehi Parata, 3 October 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1796)
452. Bridget Mitchell, brief of evidence, 22 January 2019 (doc F7), p 8
453. Mouat, brief of evidence (doc G7), p 8
454. Mouat, brief of evidence (doc G7), p 8

now been passed to Mr Taiaki who is acting on behalf of the Lake family.' Speaking for Ati Awa ki Whakarongotai Inc, Mr Parata confirmed the two points that the Ministry wanted to know: the Wai 88/Wai 89 claimants were 'prepared to accept other land as compensation for any claim that might be successful'; and they 'were happy for the aerodrome to keep operating.'[455]

From discussions with the Lake whānau, Mr Parata advised that there was an urupā near the control tower but the whānau did not want to be too specific about the location 'as such information had been abused in the past with areas being dug up'. The urupā would require protection. The Secretary of Transport advised Mr Parata in his letter recording the conversation that he had since checked with Mr Taiaki, who was not aware of an urupā on the aerodrome lands and thought 'there must have been some misunderstanding on this point'.[456]

The Crown's consultation with Te Ātiawa/Ngāti Awa concluded with the phone call to Te Pehi Parata in November 1994, despite his statement at the September meeting and in the phone call that the matter was to be dealt with by the former owners, naming Mr Taiaki as a representative of those owners. The Crown's dealings with the former owners were limited, however, to the letter to Mrs Lake in 1993 which notified her of the Crown's decision, the meeting with Mr Parata in September 1994 which Mr Taiaki attended, and the check with Mr Taiaki about an urupā located on aerodrome lands. There was a deliberate strategy on the part of the Crown to limit consultation to the groups who had lodged claims with the Tribunal, on the basis that the Crown's Treaty obligations were owed to those claimants only, and to further limit consultation to whether the land was essential for use in a Treaty settlement. According to the Ministry, the rights of the former owners arose under the Public Works Act and as such did not involve any Treaty obligations to the former owners or, indeed, to the local hapū at Paraparaumu. The auditor-general's inquiry in 2005 was critical of the Ministry for this, although accepting that Treaty consultation was an 'evolving' art and that the Ministry was acting on advice from other departments.[457] It should be noted that Crown counsel did not accept this distinction in closing submissions, stating that Treaty obligations were owed to all tangata whenua (including the successors and descendants of former owners), whereas Public Works Act obligations were owed only to former owners and their legal successors.[458] We agree with the Crown on this point.

Mr Mouat observed in his evidence to the Tribunal that, with the 'benefit of hindsight', he could understand the auditor-general's criticism and that the Ministry could have done more. He added: 'All I can say is we thought we were doing all we were required to do, in terms of consulting with the affected Māori,

455. Russell Armitage to Te Pehi Parata, 22 November 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2564)

456. Russell Armitage to Te Pehi Parata, 22 November 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2564); Bassett and Kay, 'Public Works Issues' (doc A211), p 395

457. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 67–68)

458. Crown counsel, closing submissions (paper 3.3.60), p 79

both in terms of their Public Works Act rights and their Treaty rights.'[459] The virtual exclusion of the former owners from the consultation, however, led to significant problems for the Ministry in its attempt to complete the sale of Paraparaumu Aerodrome, as we discuss in the next section.

7.6.5.4 *The Minister of Transport agrees that consultation has been concluded and the sale can proceed*

In December 1994, the Minister of Transport approved a memorandum from his officials which advised that the consultation had been completed and the tender process could begin.[460] The Ministry's explanation of the consultation was still focused on Treaty claims and the possible use of Ardmore or Paraparaumu Aerodrome land to settle those claims to the exclusion of all other considerations. John Bradbury for the Secretary for Transport reported that the Crown's objectives of keeping the aerodromes operational and ensuring that 'developmental decisions' about the aerodromes could be made (by the buyers) could now be met without prejudicing the Crown's ability to settle claims. The sale could therefore proceed at once. The reasons behind this decision were:

- all claimant groups considered the aerodromes should continue to operate;
- there was 'no evidence submitted to the Ministry' of areas of 'special significance' within the aerodromes, as defined by the protection mechanism;
- the claims could be settled by the use of other land or some other form of compensation;
- there were limited ways in which aerodrome land could be used to settle claims due to the offer-back requirements (if land was surplus) and the need to keep the aerodromes a 'going concern';
- the question of which claimants were the correct group to receive compensation in respect of the aerodromes would take time to resolve; and
- there was a countervailing 'urgent need for commercial management of the aerodromes to enable decisions about the long-term future to be made', which it would be unreasonable to delay any longer.[461]

In addition, Mr Bradbury advised the Minister:

> Transferring the aerodromes as a going concern to settle claims would have to be delayed until the various issues had been resolved before negotiations with the Crown could commence. These issues are: which is the rightful claimant group, which is the rightful claim, and what compensation, if any, is considered appropriate. The possibility of these being resolved would be some time away.[462]

459. Mouat, brief of evidence (doc G7), p 12
460. Bassett and Kay, 'Public Works Issues' (doc A211), p 395
461. John Bradbury to Minister of Transport, 12 December 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1884)
462. John Bradbury to Minister of Transport, 12 December 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1884)

Crown Consultation with Other Claimant Groups

In addition to Ati Awa ki Whakarongotai Inc, the Ministry of Transport consulted other iwi organisations whose claims potentially included the Paraparaumu Aerodrome lands. The Raukawa Trustees were approached but advised that 'the appropriate "tangata whenua" group to deal with was Te Ati Awa ki Whakarongotai'. Only two iwi bodies expressed an interest: Te Runanga ki Mua-Upoko and Te Runanga o Toa Rangatira. The Ministry's consultation with these two entities followed the same pattern as with Ati Awa ki Whakarongotai Inc: correspondence (especially about whether there were any sites of importance on the aerodrome lands) and a meeting. The Ministry decided that the land was not essential for settling their claims as set out in the memorandum of John Bradbury (quoted above).

This was a view reached by the Ministry without consultation. There had been no discussion of the possibility of transferring Paraparaumu Aerodrome to claimants as a 'going concern', nor had there been consultation about transfer of the aerodrome to the successors of the former owners.

Ati Awa ki Whakarongotai Inc, Te Runanga o Toa Rangatira, and Te Runanga ki Mua-Upoko were informed of the Crown's decision on 14 December 1994, with the reasons set out as in the memorandum to the Minister above.[463]

7.6.6 Puketapu and Te Whānau a Te Ngarara object to the sale, 1995

7.6.6.1 *Correspondence and meetings with the Ministry, February–April 1995*

In early February 1995, prior to the tendering process, the Lake whānau approached the Ministry about the sale, both by telephone and through Mrs Lake's solicitors.[464] Nigel Mouat, the head of Domestic Air Services, responded on 15 February 1995 with an explanation of the intended sale process and assurances about how the former owners' rights would be protected. He explained the option chosen for disposal – sale by limited tender of all shares in a Crown-owned airport company, Paraparaumu Airport Ltd (PAL). This was intended to keep the aerodrome open after sale but only so long as it was commercially viable to do so. If the airport company later decided that any land was surplus, or 'the land ceased to be used as a public work, the company must satisfy the offer-back provisions of the Public Works Act'. This was because the 1992 amendment of the Airport Authorities Act applied sections 40–41 of the Public Works Act 'to an airport company as if it were

463. Bassett and Kay, 'Public Works Issues' (doc A211), p 396
464. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 32)

the Crown and the land had not been transferred to the Company'.[465] It is important to note that assurances were given about both of the scenarios referred to earlier: the land would have to be offered back if the airport company decided any land was surplus and if the land ceased to be used as a public work (regardless of any decision that the land was surplus and could therefore be sold). The Crown later lost sight of these assurances and considered that land only became surplus if the company decided to sell it.

On the question of whether any aerodrome land could be offered back prior to the sale, Mr Mouat explained to Mrs Lake's solicitors that 'an amount of land at Paraparaumu Aerodrome may be considered to be surplus to future requirements', but the aerodrome was being offered to tenderers as a 'going concern'. This meant that all land and assets would be included in the sale but tenders for a 'lesser area of land' would also be considered. In that case, the Crown would sell any surplus land in accordance with the Public Works Act 1981.[466]

It is important to note that the Ministry conveyed the same points to possible tenderers in an 'information memorandum' on 17 February 1995, which officially began the tendering process. The memorandum noted that there 'may' be surplus land so tenders for a smaller area would be considered, and that Public Works Act offer-back requirements would apply to any land that became surplus after the sale.[467] In terms of why a limited tender was offered to those likely to keep the aerodrome going, the information memorandum made it clear that the only limit placed on any new owners' freedom of action was to keep it operational 'for as long as it remains commercially viable'.[468] One of the Ernst and Young accountants involved in the sale later commented on this point that it was in line with Treasury's report to Ministers in April 1993 (see above), which advised:

- any formal restriction to ensure the aerodrome's continued operation, whether contractual or legislative, would lead to less interest in the sale and lower bids, as well as a perception that the Government guarantee continued operation if the aerodrome later got into financial difficulties; and
- the existence of other airport facilities meant that there would be little benefit from any formal restrictions on closing the aerodrome.[469]

The information memorandum also gave an assurance that the land could not be resumed for use in Treaty settlements (unlike some other Crown asset sales). The Crown, it was stated, had 'properly discharged its Treaty of Waitangi duties

465. Nigel Mouat to Tee & McCardle, 15 February 1995 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2569-IMG2570)

466. Nigel Mouat to Tee & McCardle, 15 February 1995 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2569-IMG2570)

467. 'Extracts from Information Memorandum dated 17 February 1995', app 4 to 'Report of Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 83, 87)

468. 'Extracts from Information Memorandum dated 17 February 1995', app 4 to 'Report of Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 83)

469. Roger Taylor to Graeme Horsley, 27 February 2004, app 4, 'Petition 1999/231 of Ross Sutherland and 584 others: Report of the Transport and Industrial Relations Committee', p 96 (Mouat, papers in support of brief of evidence (doc G7(a)), p 183)

concerning disposal of the land by extensively consulting with interested Maori'. As a result, there would be no 'protection mechanism' used in the sale to 'protect the as yet unproven claims after alienation of the land from the Crown'.[470]
The Ministry was thus satisified that its consultation was complete and that Māori interests had either been sufficiently identified or (in the case of former owners) would be adequately protected. It had also conveyed these points to potential aerodrome buyers. But the descendants of the former owners did not agree with the Ministry's position at all. In their joint brief of evidence, Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill explained:

> As it became public knowledge that the proposed transfer would be going ahead, the various whānau groups who had interests in the Airport and surrounding lands came together, including the representative body Te Ngarara a te Ngarara Inc.
>
> The primary objective of Te Whanau a te Ngarara in the Deed of Trust is to *'promote, encourage, organise, develop and assist the aspirations of the people of Te Whanau a te Ngarara as a united family, and in particular, to reclaim the land originally owned by their ancestors but taken under proclamation by the Crown to establish Paraparaumu Aerodrome.'* [Emphasis in original.][471]

Although Te Whānau a Te Ngarara was not formally incorporated until December 1995,[472] it began to operate informally as early as April 1995. Ms Bassett stated in her report that Te Whānau a Te Ngarara approached the Ministry about the sale in that month, which resulted in a meeting with Ministry officials.[473] George Jenkins, Rawhiti Higgott, Aaren Bridger, and J A Stewart attended this meeting. Their main point was that the aerodrome had been taken for defence or an 'emergency airport' (that is, an emergency landing ground) but was now being used as a 'recreational airfield', and the Crown should therefore have offered the land back to its former owners prior to any sale. The Crown had 'changed the use of the aerodrome and deprived them of their offer back rights'. In response, the Ministry stated that their offer-back rights would be preserved by the sale to an airport company, and that Mrs Lake and her solicitors had been 'kept informed'. The Te Whānau a Te Ngarara representatives then asked for the sale process to be suspended while they 'researched the question' so that they could present their concerns in writing. The Ministry was not prepared to agree to this and advised them that the sale process would continue.[474]

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470. 'Extracts from Information Memorandum dated 17 February 1995', app 4 to 'Report of Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 86)

471. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, joint brief of evidence (doc F5), p 16

472. Crown counsel, closing submissions (paper 3.3.60), p 101; 'Certificate of Incorporation of Te Whanau a Te Ngarara Incorporated (WN/653071)', 12 December 1995 (Bridget Mitchell, papers in support of brief of evidence (doc F7(a)), p 15)

473. Bassett and Kay, 'Public Works Issues' (doc A211), p 398

474. John Edwards to office solicitor, 13 April 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 3)

A 'background note' was also distributed to the meeting's attendants.[475] This Ministry note stated that the Crown would normally have to meet offer-back requirements prior to selling the aerodrome but section 3A(6A) of the Airport Authorities Act 1966 allowed the Crown to transfer the land to an airport company 'without the need to satisfy the offer-back provisions'. Thus, the Ministry explained how it could circumvent the offer-back protections in the Public Works Act. But the 'background note' also stated:

> *However, sections 40 and 41 of the Public Works Act will apply to the Company's land as if the Company were the Crown and the land had not been transferred to the Company*. The practical effect will be that the Company will need to satisfy the offer-back provisions contained in the Public Works Act if it either decides to sell any land or the land ceases to be used for a public work. In other words, former owners (and their ***descendants***) retain their rights under the Public Works Act after the Ministry has sold the airport. [Emphasis in original; bold emphasis added.][476]

This point had already been made in the February 1995 letter to Mrs Lake but it underlined that the company, not the Crown, would be responsible for their offer-back rights. As noted in section 7.2.5, the Crown no longer has this interpretation of the Act (that the company was responsible for offer-back requirements), but the Ministry of Transport and other Government departments held this view at the time and conveyed it to Te Whānau a Te Ngarara representatives.

Also, the note referred to the rights of 'descendants' rather than legal successors, which was not the first or last time that the Ministry had overstated the degree of protection in this way. Under cross-examination about this note, Nigel Mouat accepted that 'we [were] not immune from confusing successors and descendants'.[477] Further, the Ministry failed to explain any of the qualifications to offer-back rights under section 40 of the Public Works Act. The other point to note is the two triggers for an offer back, which were now being communicated by the Ministry for the third time: if the company sold land or if the company ceased to use it for a 'public work', it would have to be offered back. The second criterion was to become highly controversial after the sale, when the airport company planned and executed a major commercial development of aerodrome land without offering it back. Crown counsel submitted in this inquiry that the commercial development (a Mitre 10 mega store, a New World supermarket, and other retail outlets) was still being used for an airport purpose because, without it, the airport would cease to be viable economically (see section 7.2.4). The test of whether land was still needed for a public work was therefore a complex one, and the Crown's position

475. John Edwards to office solicitor, 13 April 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 3)

476. Background note for meeting George Jenkins, 11 April 1995, enclosed with John Edwards to office solicitor, 13 April 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 4). Mr Rawhiti Higgott retained a signed copy of this note in his papers (see Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2589)

477. Transcript 4.1.21, p 257

on this has changed over time, but none of this was apparent in the assurances given to Māori in 1995. We discuss this further below.

In response to the meeting and the background note, Huirangi Lake wrote to the Ministry to emphasise the main argument that an offer-back should have occurred prior to any sale process and again asking for the sale to be halted:

> We the descendants of Puketapu Hapu of Te Atiawa wish to express our concerns regarding the injustice our rights are being subjected to by the crown's tendering process transferring ownership of Paraparaumu Airport to another agency.
>
> The original purposes for Paraparaumu Airport were stated as defence and as a back up for Rongotai. The requirement of the land taken by crown proclamation to serve these purposes has since been exhausted by the crown and these purposes have not been served for some time and will continue not to.
>
> It is our concern that the current use of the land as such is a direct contradiction to the Public Works Act. We therefore desire the proper return of all land taken by crown proclamation to serve the original purposes of Paraparaumu Airport to the rightful owners without cost. We also desire all processes concerning transfer of ownership of Paraparaumu Airport be halted to allow George Jenkins and Ra Higgott, representatives of the concerned descendants of Puketapu Hapu, time to compile a case for your perusal.[478]

The issue raised by Te Whānau a Te Ngarara was dismissed by the Ministry on legal grounds. On 19 April 1995, the Ministry wrote to George Jenkins in reply to Mrs Lake's letter, stating:

- Under the Public Works Act, 'land cannot be considered for sale back to the original owners or their successors whilst it is required for any public work even though the type of use may have changed'; and
- Section 3A(6A) of the Airport Authorities Act 1966 (inserted in 1992) made 'special provision' for 'aerodrome land to be transferred to an airport company without reference to the requirements of the Public Works Act'.[479]

The Ministry was correct that section 40 of the Public Works Act 1981 stated that land should be sold if it was 'no longer required' for a public work and 'not required for any other public work'. The Ministry was also correct that the Airport Authorities Act had been specifically amended to empower the Crown to sell the aerodrome land via selling shares in an airport company without having to offer the land back first. We consider later whether this was consistent with Treaty principles.

At the time the Ministry's letter was sent (19 April 1995), the tendering process was due to expire on 21 April. All tenders had to be submitted by that date.[480] The

478. Huirangi Lake to Nigel Mouat, 17 April 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 5)

479. J Bradbury to George Jenkins, 19 April 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 8)

480. Marrian A Tall to Commissioner of Crown Lands, 19 April 1995 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1865)

letter to Mr Jenkins did not mention this fact. The Ministry had received three bids by the due date, only two of which went any further.[481]

7.6.6.2 *Appeal to the Minister of Transport, May 1995*

Dissatisfied with the Ministry's response, Rawhiti Higgott and George Jenkins wrote to the Minister of Transport, Maurice Williamson, on 4 May 1995. This letter was sent on behalf of the 'concerned descendants of the Puketapu Hapu'. Mr Higgott requested a meeting with the Minister to clarify the Ministry's intentions, the implications for the 'descendants of the original landowners in respect to a possible new ownership of Paraparaumu Aerodrome', and 'to discuss our concerns regarding the same'.[482]

The Minister's response was important and it covered some new points as well as repeating the explanations and assurances already given (see above). On the issue of whether the land should be offered back because it was no longer being used for the original purposes, the Minister responded that the section 40 report prepared by DOSLI in 1990 (see section 7.6.4.2) had been sent to Huirangi Lake. This report, he said, showed that most of the aerodrome land had been acquired compulsorily for 'aerodrome' purposes, although some of it had been 'voluntarily sold' by its owners. The Minister argued: 'While there may have been reasons publicly advanced at the time as to the rationale behind the formation of the aerodrome, there is no doubt that the land was acquired for aerodrome use and that its current use was still as an aerodrome.'[483]

This was a response to the main argument advanced by Te Whānau a Te Ngarara that the aerodrome was no longer being used for the purposes for which the land was originally taken, and it was certainly correct as far as the legal formalities of the takings were concerned. In section 7.5, we discussed the reasons advanced at the time for the various takings, including for the purposes of an emergency landing ground and (in one case) to fix a problem with the location of a cowshed. The term 'aerodrome purposes' was used in almost all of the taking proclamations, however, as a catch-all phrase that covered all the specific purposes for which the land was actually taken. This was because of the broad statutory description of an 'aerodrome' at that time; the legislation did not specifically confer power on the Crown to take land for an emergency landing ground. The Minister was incorrect in one detail because the 1943 taking was officially for defence rather than aerodrome purposes. Defence concerns had been an underlying factor in the establishment of an emergency landing ground as well. We also note that it was becoming increasingly difficult for the Ministry to justify the argument that the land was still needed for a 'public work', although this was one of the main planks in the Ministry's defence of its position at this time.

481. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 50)

482. Rawhiti Higgott to Minister of Transport, 4 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Wai 609 folder, IMG2134)

483. Minister of Transport to George Jenkins, 11 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2139)

On this point, the Minister stressed that ownership of the land would be 'devolved' while 'ensuring that the aerodrome operation can continue for the *foreseeable future*' (emphasis added), which in fact meant for so long as it was economically viable to do so, although this was not stated explicitly. If, however, the airport company decided that land was surplus to 'aerodrome requirements' and wanted to sell it, then the rights of former owners and their successors would be protected. The Airport Authorities Act 1966 'makes it clear that Sections 40 and 41 of the Public Works Act 1981 apply and the company is obliged to offer the land back to former owners, as if the airport company were the Crown'.[484] The degree of protection was again overstated as there was no mention of the various qualifications to the offer-back right. The Minister did, however, state that 'any future "offer back" gives the former owners or their successors the first opportunity to purchase the land back generally at current market value'.[485] Importantly, section 40(2)(d) of the Public Works Act gave the chief executive or a local authority the power to offer the land back at 'any lesser price' if considered 'reasonable to do so'. The Minister's letter did not mention this provision or clarify whether it would apply in circumstances where the airport company would act 'as if [it] were the Crown' in making offer-back decisions.

Finally, the Minister stated that the Ministry had 'previous consultations with Mrs Lake, her legal representatives, and other family representatives since the sale of Paraparaumu aerodrome was first mooted in 1991', and that the 'advice consistently given to the family by the Ministry has been that the rights of the former owners and their successors will remain protected under new ownership'.[486] Although the word 'successors' was used in this letter, the statutory definition of that term was not explained in this or any other Crown correspondence.

The Minister of Transport declined the request to meet with the Puketapu representatives because the sale was a commercial arrangement in which the Minister could not have any personal involvement. Instead, he recommended that they meet with the General Manager of Air Services.[487] In the meantime, DOSLI sent a letter to George Jenkins in response to Mrs Lake's letter of 17 April, which had been treated as an application to have land returned under section 40 of the Public Works Act. This letter was important because it was the only communication from the Crown to ever mention that there could be exceptions to the offer-back requirement. DOSLI reiterated the point that land was only sold if it was no longer required for the original public work or any other public work. Even if the land was no longer required for any public work at all, however, 'it does not necessarily follow that the land has to be offered to the person from whom it was acquired or the successor of that person. There are other considerations laid down in the

484. Minister of Transport to George Jenkins, 11 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2139)
485. Minister of Transport to George Jenkins, 11 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2140)
486. Minister of Transport to George Jenkins, 11 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2139)
487. Bassett and Kay, 'Public Works Issues' (doc A211), pp 399–400

section [40] which have to be taken into account.'[488] Although this letter did not explain what the 'other considerations' were or the meaning of a legal successor, it nonetheless would have conveyed that the offer back right was not absolute.

The letter also reiterated the point that the Crown was using the Airport Authorities Act to dispose of the aerodrome land, and that this Act had been amended by section 3A(6A) to specify that 'nothing in section 40 of the Public Works Act applies' to a transfer of land from the Crown to an airport company.[489] This underlined the fact that the Crown had given itself a specific exemption from the offer-back requirements, allowing it to sidestep the legal obligation to offer the land back before selling the aerodrome.[490] This point was already very clear to the Puketapu representatives. In reply to the Minister's letter, George Jenkins stated: 'From the advice that has been consistently received from the Ministry that the rights of the former owners and their successors will remain protected under new ownership, the ability of the current owners (the Ministry) to waive such rights is inconsistent with the principles of the Treaty of Waitangi.'[491]

7.6.6.3 *The 19 May 1995 meeting*

As per the Minister's suggestion, a four-hour meeting was held between Ministry officials and the 'representatives of some former owners' (as the Ministry described them) on 19 May 1995. The owner representatives were Rawhiti Higgott, George Jenkins, Yvonne Mitchell, Mark Mitchell, and one other person whose name was not recorded.[492] This unnamed person was Muri Stewart, the daughter of Huirangi Lake. Mrs Stewart's husband was J A Stewart, who had attended the April 1995 meeting.[493] The meeting took the format of a presentation of the representatives' position, a presentation of the Ministry's position, and a response from the owner representatives.

According to the Ministry's notes of the meeting, the owner representatives' position was:

- the aerodrome land was 'ancestral hapu land' but the former owners had not been consulted about the sale;
- the use of the land had changed from the original purpose for which it was taken and should be offered back to its former owners;

488. Director-General to George Jenkins, 16 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2137)

489. Director-General to George Jenkins, 16 May 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder (IMG2137)

490. Claimant counsel (Watson), submissions by way of reply (paper 3.3.65), p 6

491. George Jenkins to J Bradbury, 16 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 9)

492. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 10)

493. Muri Aroha Valerie Stewart, brief of evidence, 13 February 2016 (doc E2); Muri Stewart, brief of evidence (doc F28)

- the aerodrome was now being used mainly for 'private recreational use and even non-aviation type activit[ies]', and could no longer be considered a 'public work'; and
- it was wrong for the Crown to acquire land for a public work and then change its use to another public work without 'former owners being informed and having the right to make their views known'.[494]

In terms of consultation, the Ministry's position in response was:

- the consultation had been 'extensive and over a long period of time', and it was 'surprising that none of the former owners were aware of this' and that their approach had come 'so late in the day';
- the consultation took place with the iwi that had made claims to the Tribunal, and there was 'never any intention to consult former owners' because (a) section 40 of the Public Works Act did not require it and (b) the 'rights of the former owners with respect to the offer back provision were not being changed – in fact they were being strengthened'; and
- there had nonetheless been discussions with Mrs Lake when she approached the Ministry 'for an explanation of the situation', and the Ministry 'would have been willing to talk to any former owners who approached the Ministry for information on the [Crown's] intentions for Paraparaumu Aerodrome'.[495]

Ministry officials also stated that there was 'probably nothing the Ministry could do or say which would alter the position legally'. By this time, the Ministry had accepted a bid from the successful tenderer and was in the 'final stages of completing the agreement for sale' that very day. The sales process was therefore too far along for the Ministry to stop it, as requested by the owner representatives, without the 'possibility of damages' being sought by the successful bidder.[496]

On the issue of the use to which the aerodrome land was being put, the Ministry agreed that 'the nature of aviation use had changed over time' but the land was still designated an aerodrome and was clearly 'defined as a "public work" covered by provisions of the Public Works Act'. The new airport owners would decide whether any land was surplus to aerodrome requirements, and the former owners' rights were protected because the airport company would be 'subject to the offer back provisions as though it were the Crown'. The Ministry offered to meet with the former owners to explain this protection further after the sale was completed.[497]

According to the notes of the meeting, the former owners responded that the iwi consulted by the Crown had no claim to the aerodrome land which had

494. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 10)
495. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 10–11)
496. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 11)
497. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 11)

belonged to their hapū, and there was documentary proof of their ownership.[498] This was presumably referring to the award of Ngarara West B to Puketapu in 1886, although we note that the award resulted in the vesting of that block in a list of eight Puketapu individuals, omitting an unknown number of other hapū members who had rights in that land (see section 7.4). George Jenkins noted in his evidence that no one had disputed Puketapu's claim to the land (Ngarara West B) in the Native Land Court.[499] Also, he stated, '[e]ven though there was no legal obligation to consult the former owners there was certainly a moral one', and the Ministry should 'accept that it was wrong, stop the sales process and discuss the issue with the former owners'.[500] But it seemed that 'nothing would come out of this meeting', and any further meeting would involve the Ministry repeating 'what was being said now and would not stop the sales process'. The former owners would therefore have to consider other options – they had taken legal advice but 'the time had been so short and the costs of injunction [was] too high'.[501]

As noted above, the Ministry explained at the meeting that the tendering process had closed and the Ministry was about to finalise the sale to the successful bidder. The owner representatives still wanted this process stopped so that further discussions could be held. On the issue of them making a tender themselves, the meeting notes recorded their response: 'Why were former owners not given the chance to tender for the aerodrome? They would have liked the opportunity to do so.'[502] There is no mention in the notes of any response on this point. We discussed above the Ministry's interpretation of 'local groups' in the 1993 Cabinet paper, and the decision to limit tenders to aerodrome 'user groups', Wellington and Auckland airport companies, and local authorities. Local Māori, including the Puketapu hapū and the former owners, were excluded from this category.

The issue of what was said about tendering at the meeting was controversial in our hearings. Yvonne Mitchell, the granddaughter of Kaiherau Takurua (the owner of Ngarara West B7 s1), told us: 'I was involved in it, went in to see them in town about it, we couldn't do a thing. I put a bid in for 2 million, they told me I couldn't, couldn't put a bid in at all, they just ignored us, ignored us completely.'[503] Mrs Mitchell's son, Mark Mitchell, was also present at this meeting and stated:

> I remember my mother talking to Peter Love before we went to the meeting. My mother told him that the airport land had been advertised and she wanted to buy it

498. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 12)
499. George Jenkins, brief of evidence (doc F41), p 3
500. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 12)
501. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 12)
502. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 12)
503. Transcript 4.1.10, p 134

back. He said that if she wanted to put in a bid for the airport she should do so and he could arrange finance through the Tenths Trust if she was successful.

At the meeting I heard my mother make the offer, to the officials, of two million dollars for the airport. Some of the officials laughed. The comment was made that they '*wouldn't bother*' putting in such a bid. Their minds were already made up. We didn't feel treated with respect. There was some huffing and puffing while we talked. It was like they saw us as a spanner in the works. [Emphasis in original.][504]

Muri Stewart, who also attended the meeting, supported this version of events, stating that she 'saw and heard' Yvonne Mitchell make an offer of $2 million. She added:

One official's response to the offer was to say that the price offered was too high and was unrealistic. I was flabbergasted and couldn't believe what I heard. After that we went on with the business of the meeting.

I later heard that the government had accepted a lower offer for the airport lands. That was an extraordinary thing to do. Yvonne's whanau were the owners who had their land taken and Yvonne made a higher offer to buy the land back.[505]

In his evidence, George Jenkins stated that the bid was submitted at a meeting with Nigel Mouat and other officials. As this was the only meeting in 1995 at which all of the named individuals were present (and there were only two meetings in Wellington), this must have been a reference to the 19 May 1995 meeting. Mr Jenkins summarised the proposal made at the meeting as:

- Te Whānau a Te Ngarara would submit a 'purchase offer' of $2 million in partnership with the Kāpiti Aero Club and the Wellington Tenths Trust;
- Te Whānau a Te Ngarara were eligible to submit a tender because one of their members rented a house on Avion Terrace; and
- their dedication to keeping the aerodrome was demonstrated by partnering with 'passionate airport activity operators who are not property speculators [that is, the aero club], whose role in our partnership is to operate the business of airport activities'.[506]

According to Mr Jenkins' account, he explained to officials that there were significant advantages for the Ministry if their offer were to be accepted. First, the offer would give the Crown an 'ideal solution' by enabling it to satisfy both section 40 rights and Treaty claims. The 'Puketapu people would have restoration and a platform for hapu development'. Secondly, the Crown's goal of keeping the aerodrome operational after sale would be 'passionately pursued by people living in the community', and the Crown could 'walk away dignified', having achieved its aim of privatisation by returning the land to Māori instead of selling it to a third party. Mr Jenkins also stated that the Ministry rejected the proposal at the meeting

504. Mark Mitchell, brief of evidence, 18 December 2015 (doc E1), pp [2]–[3]
505. Muri Stewart, brief of evidence (doc E2), p [3]
506. George Jenkins, brief of evidence (doc F41), p 10

on the grounds that tenancy of a residential property by a hapū member was an insufficient link to airport users, while the Kapiti Aero Club lacked the capacity to manage a commercial airport.[507] Mr Mouat confirmed in his evidence that only 'lessees of airport infrastructure' were counted as aerodrome users, not lessees of the residential properties. The successful bidder, Murray Cole, leased a hangar at Paraparaumu Aerodrome and 'that made him a "user"'.[508]

As noted above, nothing about a $2 million offer was recorded by officials in the minutes of the meeting, which simply stated the representatives' position as: 'Why were former owners not given the chance to tender for the aerodrome? They would have liked the opportunity to do so.'[509] Nigel Mouat, who was present at the 19 May 1995 meeting, did not recall an offer of $2 million and was not sure what meeting was being referred to by the claimants. In preparing his evidence, Mr Mouat relied on his recollections and on the auditor-general's report, and he did not check any Ministry documentation (including the notes for this meeting).[510] On the issue of a possible bid, he stated:

> My recollection of the meeting was that we gave the standard explanation of the sale process and how the Public Works Act still protected the interests of the successors of the original owners, which they seemed to understand. I believe we would also have explained how we considered descendants/relatives to not be 'users or local groups' as required to be eligible to submit a tender for the purchase of the aerodrome land.[511]

As noted, Mr Mouat did not recall an oral bid being made but explained:

> if an offer was put for $2 million dollars which was substantiated as coming from an eligible user group and *before the closing of the tender*, the proponent would have been asked to put the offer in writing and in accordance with the tender. I cannot imagine anyone at the Ministry ever saying that an offer was 'too high'; if I had heard that, I think that I, too, would have been flabbergasted. [Emphasis added.][512]

The key point here is that the time for tenders had closed and the Ministry had already accepted a bid by the time of the meeting on 19 May 1995. The auditor-general's report stated in 2005:

> We also note that the Ministry did not consider whether Māori or other former owners could be invited to tender for the aerodrome (either on their own or in conjunction with another group). Officials considered they were not in a position to do

507. George Jenkins, brief of evidence (doc F41), p 10
508. Mouat, brief of evidence (doc G7), p 9
509. Notes of meeting on 19 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 12)
510. Mouat, brief of evidence (doc G7), pp 2, 12–14
511. Mouat, brief of evidence (doc G7), p 10
512. Mouat, brief of evidence (doc G7), p 14

so, because, although the Cabinet directive to sell the aerodrome referred to 'other local groups' as well as user groups, and was also expressly subject to fulfilling the Crown's obligations under the Treaty, the Minister of Transport had instructed that the term 'other local groups' should be confined to the Wellington airport company and the Kapiti Coast District Council.

We accept that, by the time the Puketapu representatives approached the Ministry, it would have been too late to consider whether any realistic tendering options were open to the hapū. But something might have been able to be done had the hapū's interest been identified at an earlier stage.[513]

The reason for the Ministry's failure to consult the local hapū and former owners in a timely manner was its decision that Treaty obligations were distinct from Public Works Act obligations. Also, the Ministry's consultation with Treaty claimants had been aimed at answering one key question: was the aerodrome land essential or non-substitutable for a Treaty settlement? Ati Awa ki Whakarongotai Inc repeatedly encouraged or directed the Ministry to consult the former owners in 1993–94, but the Ministry considered that their interests were already provided for under section 3A(6A) of the Airport Authorities Act. Also, the Ministry did not consider whether the descendants of the former owners might file their own Treaty claim in the future, which was foreseeable given the compulsory nature of the Crown's acquisition of most of the airport lands,[514] and that memorials on the title were designed to enable the land to be used in the settlement of current and prospective claims.

These issues were traversed again soon after the meeting, when Rawhiti Higgott, Yvonne Mitchell, George Jenkins, and Billie-Kaye Bridger hired a solicitor to represent their interests. On 22 May 1995, D M Howden of Cain & Co wrote to the Ministry, acknowledging that the Ministry was finalising the sale and was not prepared to stop the process, but observing:

> Our clients are naturally very disappointed with that decision as we would have thought it would have been politic, at the very least, to consult with the descendants of the original owners. The Ministry did after all consult with Iwi representatives who had lodged a Treaty of Waitangi claim affecting the surrounded area when it is common ground [between Ati Awa ki Whakarongotai Inc and the former owners] that the future ownership of the airport land is a Hapu matter and not an issue affecting the Iwi claimants.[515]

Mr Howden also sought reassurance from the Ministry that the successful tenderer understood their future (offer-back) obligations under section 3A(6A) of

513. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 41)

514. Waitangi Tribunal, *Te Maunga Railways Report* (Wellington: Legislation Direct, 1994), p 68

515. D M Howden to Nigel Mouat, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 13)

the Airport Authorities Act and was aware of his clients' concerns.[516] Obviously, Te Whānau a Te Ngarara were starting to turn their minds to how their interests might be treated after the sale by the new airport company, which was (according to the Ministry's assurances) responsible for carrying out any offer-back obligations as if it were the Crown.

In response, the Ministry acknowledged their disappointment at not being consulted, but reiterated that there was no 'legal obligation' to consult because 'the protection afforded former landowners by sections 40–41 of the Public Works Act is retained, and indeed expressly acknowledged by section 3A(6A) of the Airport Authorities Act'. The Ministry also challenged the statement that it was 'common ground that the future ownership of the airport is a Hapu matter' on two grounds. First, the aerodrome had been acquired from individual owners of freehold land, only some of whom were Māori, and 'not from Hapu as suggested'. Secondly, five iwi had lodged claims relevant to the aerodrome and had been consulted. The point was made in stark terms: 'We see a clear distinction between the Crown's obligations under the Treaty of Waitangi and the rights of your clients under the Public Works Act, and *understand this is accepted by your clients*'. (Emphasis added.)[517] This was not in fact the case. As noted above, George Jenkins' letter to the Ministry on 16 May 1995 had said that the Ministry's use of the Airport Authorities Act to sidestep its offer-back obligations was a breach of the principles of the Treaty.[518]

The auditor-general's report considered the statement by the Ministry in this letter about the taking of land from individuals and the lack of 'common ground' that the issue was a hapū matter. Importantly, the auditor-general found that the Ministry would have been better-informed about this if it had consulted fully and earlier, as it should have done:

> The Ministry would have been better advised, in particular, to have made more enquiries about the nature of the former ownership of the Ngarara West B blocks. Although the land would have had many owners listed, it was recognisable as Māori land and there would have been a good chance that individual owners were members of the same whānau or hapū. It is clear to us that the members of the Puketapu hapū regarded the land as belonging to the hapū, even though in law it may have been owned in many individual shares.
>
> Had the Ministry taken this step at the time it received DOSLI's report, the Ministry would have been likely to identify the hapū's interests. That would have alerted the Ministry to the need to consult with the hapū in terms of its Treaty of Waitangi interests.

516. D M Howden to Nigel Mouat, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 13–14)

517. Nigel Mouat to D M Howden, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 15–16)

518. George Jenkins to J Bradbury, 16 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 9)

> We also think the Ministry should have informed all previous owners (or their successors) of its sale intentions – including the fact that the Crown's duties under the Public Works Act were to be transferred to the new owner of the airport company.[519]

On 23 May 1995, the date of this correspondence, the Ministry issued a press release announcing the sale of Paraparaumu Aerodrome, which would take effect on 30 June 1995 when the successful consortium would purchase the Crown's shares in Paraparaumu Airport Ltd.[520] The limited period left before the settlement date of 30 June concentrated the attention of Māori objectors on two issues: the question of whether there was any surplus land that should be excluded from the sale and offered back; and any remaining possibility of stopping the sale, such as applying to the High Court for an injunction. As stated at the meeting with the Ministry on 19 May 1995, Te Whānau a Te Ngarara had considered seeking an injunction but were worried about the cost of court action. We turn first to the issue of surplus land.

7.6.6.4 *Te Whānau a Te Ngarara seeks return of surplus land before the Ministry completes the sale, June 1995*

In May 1995, Paraparaumu Airport Ltd was constituted as an airport authority by order in council. The Crown's intention was to transfer the aerodrome assets to this company and sell 100 per cent of the Crown's shares to Kapiti Avion Holdings (KAH), the successful bidder, on 30 June 1995. An agreement to this effect was signed by the Ministry and KAH on 23 May 1995.[521]

KAH was made up of four local business men, led by Murray Cole, who submitted a bid on 21 April 1995. The other main bidder was Kapiti Regional Airport Ltd (KRAL), which consisted of the main aviation operators at the aerodrome. The project group in charge of the sale (a commercial adviser, a consultant, and a Ministry official) rejected the initial bids as too low because they failed to take into account the 'value of the surplus land'. The bidders were instructed that they could either make a revised bid or else their current bids would be interpreted 'as being for the operational areas only without the surplus land'.[522] The commercial adviser from Ernst and Young contacted the bidders and told them that 'none of them had put sufficient value on aerodrome land that may be surplus to operational requirements', inviting them to resubmit their tenders. The KRAL shareholders met on 2 May 1995 and 'accepted that they were being steered in the direction of a bid that took into account the realisable [sellable] value of surplus land'.[523]

519. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 38)

520. Ministry of Transport, press release, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), p 17)

521. Bassett and Kay, 'Public Works Issues' (doc A211), pp 401–404

522. Project group minutes, 26 April 1995 ('Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a))), pp 50–51)

523. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 51–52)

In response, KRAL considered that the cost of subdividing the surplus land might be too high and made its new bid (for $1.5 million) conditional on the Crown delivering the surplus land 'in a form which would enable it to be sold and the increased price recouped'. KAH's new bid was for $1.7 million. No reference was made to surplus land but this bid was also conditional, including that the Crown must give an 'indemnity against claims under the Treaty of Waitangi'. This bid was higher than Ernst and Young's valuation of the aerodrome as a going concern ($1.6 million) and well below the valuation if the land was used for other purposes ($3.5 million). The project group was satisfied that KAH would keep the aerodrome operational after sale, essentially because they believed that the local community would pressure the company to do so.[524] The project group also considered accepting a KRAL bid for 'just the operational areas (which they had indicated was an option for them) and selling off the surplus land' but the Ministry did not want to be left with 'land on its books for which a sale might take some time and trouble'.[525] This was important because the Ministry had earlier advised both tenderers and the former owners that this was in fact an option. Also, the Ministry later claimed that none of the tenderers had bid for a 'lesser area',[526] which does not appear to have been correct.

The details of the deal (and KRAL's objections) are not relevant here except in relation to the issue of surplus land. Suffice to say that the KAH bid was subject to negotiation. In return for abandoning its conditions, including the indemnity against Treaty claims, KAH reduced its bid to $1.65 million, which was accepted on 10 May 1995. The sale agreement was executed on 23 May 1995.[527]

The issue of surplus land was not mentioned in the revised KAH bid but it remained of great concern to the descendants of the former owners. As discussed throughout section 7.6, the issue of surplus land was discussed frequently within Government between 1989 and 1995, including the most recent direction from the project group that tenderers had failed to take into account the value of the surplus land in their bids. There had been multiple statements by various officials, departments, and Ministers over the years that there was surplus land at Paraparaumu Aerodrome, even though the Ministry of Transport's position by 1995 was that the new owners should be the ones to decide exactly how much was surplus to requirements.

On 19 June 1995, Te Whānau a Te Ngarara representatives met with Nigel Mouat from the Ministry and Murray Cole and Brett Mainey from KAH. George Jenkins, Matthew Love-Parata, Joanne Love-Parata, and Rawhiti Higgott attended for Te

524. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 44, 52–54)

525. Project group minutes, 3 May 1995 ('Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a))), p 52)

526. Draft reply, no date (June 1995) (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1848)

527. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 54–57)

Whānau a Te Ngarara.[528] George Jenkins explained what they hoped to achieve in his evidence to the Tribunal. He noted that if the new airport company got land 'rezoned and used for other purposes such as residential and commercial', this would increase the value of the land to the point that they would never be able to afford to buy it if offered back. They considered that 'the onus was on the Crown to discharge its obligations honourably before any privatisation occurred'.[529] Mr Jenkins made a presentation which focused on surplus land as a remedy that could still be provided even though the sale was at a late stage in its completion. He said that 'it is never too late to change a situation, particularly where all parties are agreeable', and noted that the 'tender document' (the February information memorandum) 'provides the Crown with a withdrawal and/or variation right'. Te Whānau a Te Ngarara hoped that the agreement could be varied to allow offer back of land surplus to aerodrome requirements before the rest was sold to KAH:

> We believe and state that it is important to continue to have an aerodrome in place at Paraparaumu. The type and requirements of this aerodrome is a matter of assessment relative to the needs of the users.
>
> We believe there is land surplus to the aerodrome's requirements.
>
> The surplus land is of prime importance to us and the descendants we represent. Meaningful discussion is the obvious means to achieving a united settlement. That process requires consultation with the rightful representatives being Te Whanau a Te Ngarara.[530]

Nigel Mouat took brief, incomplete notes of the discussion at the meeting. On the issue of surplus land, Mr Mouat 'explained MOT position – no surplus – not over to MOT to prejudge'. He also 'confirmed that [there was] no consideration given to allowing former owners to bid' in the tendering process. Rawhiti Higgott then asked if the Ministry would offer back land before the sale if the owners identified surplus land, to which Mr Mouat replied: 'I said I didn't see the point when the co[mpany] could do that after sale'. Murray Cole added that 'he wouldn't rush into decisions – more use for land as an aerodrome than carving it up'.[531]

In our view, the Ministry's position on surplus land at this June meeting sat uncomfortably with the project team's approach to that very issue a month earlier, which was that the bids had failed to take into account the value of surplus land and would therefore need to be resubmitted. Three days after the meeting, Nigel Mouat wrote to Matthew Love-Parata and Rawhiti Higgott to confirm the Ministry's position at the meeting, prior to a large hui of Te Whānau a Te Ngarara planned for the weekend:

528. One other person attended but their name was illegible.

529. George Jenkins, brief of evidence (doc F41), p 11

530. George Jenkins, written opening statement, 19 June 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1960-IMG1961)

531. Nigel Mouat, notes of meeting, 19 June 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1968)

> As outlined at our meeting, the Ministry does not propose halting or delaying the sale. The Crown's 100% shareholding in Paraparaumu Airport Limited is to be transferred to Kapiti Avion Holdings Limited on 30 June 1995. It should be understood that this date is the settlement date and a binding contract to this effect already exists between the parties.
>
> While you assert that there is surplus land, the Ministry does not accept that this is the case. We accept that some land may appear under-utilised, but this does not make it surplus land. We believe it would have been irresponsible and unfair to prospective purchasers for the Ministry to have arbitrarily reduced the landholding prior to the sale process. As you know, tenderers were given the option of electing to obtain a lesser area of land for the purposes of the aerodrome, *but none elected to do so*. [Emphasis in original.][532]

At the meeting, the Te Whānau a Te Ngarara representatives raised the issue of all the extant leases of aerodrome land. Mr Mouat responded that 'there are a number of sites along the Kapiti Road boundary available for lease'. While the majority of leases were for 'aviation use', he noted that land was leased for other uses if no aviation-related tenants were available at the time. In terms of Avion Terrace, for example, the houses were 'for the time-being rented to the public', but, he said, 'this does not affect the continued use of the aerodrome land for a public work'. We note here that Ministry officials did not refer to the point that the Avion Terrace residential area had already been declared surplus in 1983 although most house sites were not actually sold at that time (see section 7.6.2).

Mr Mouat summarised the Crown's position at the meeting as:

> the Crown is not obliged to consult with former landowners as sufficient protection exists for them under the Public Works Act. That protection remains. We believe that any decisions as to whether or not aerodrome land is surplus (including houses and land for the time-being currently leased) is a matter for the new owners.[533]

The auditor-general's report in 2005 acknowledged the Ministry's position but commented that the Ministry could possibly have met Māori interests by making an arrangement with them about surplus land, but the Ministry's drive to complete the sale and to divest itself of all responsibility prevented an accommodation of interests:

> It is not for us to form a judgement on whether the circumstances were sufficient, as a matter of law, to have required the Ministry to offer any part of the land back to a previous owner. We acknowledge that the Ministry considered that the judgement about surplus land was best left to a purchaser of the aerodrome, having regard to its

532. Nigel Mouat to Matthew Love-Parata and Rawhiti Higgott, 22 June 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2145)

533. Nigel Mouat to Matthew Love-Parata and Rawhiti Higgott, 22 June 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Wai 609 folder, IMG2146)

own operational intentions, and that the Ministry saw limitations in the way the aerodrome could be used for settlement of claims, other than as a going concern.

But we do think the Crown could have considered whether the concerns which Māori had raised during the consultation process might be accommodated by making an arrangement as regards 'surplus' aerodrome land – either within the sale process or otherwise. Instead, it seems that officials were concerned about the time it would take to identify and negotiate a solution to a valid claim – it being government policy to not retain assets indefinitely pending resolution of claims over them. An over-riding concern seems to have been to complete the sale before 30 June 1995, without leaving any residual responsibilities or risks in the Ministry's hands.[534]

After the Ministry of Transport rejected their final appeal, Te Whānau a Te Ngarara sought help from members of Parliament. On 27 June 1995, Sandra Lee, the member for Auckland Central and leader of the Mana Motuhake party, asked a question of the Minister of Transport in the House:

> Which 'interested Maori' were extensively consulted according to the statement in clause 1.5 of the Paraparaumu Aerodrome Information Memorandum, and were the local hapu, as the previous owners from which the land had originally been taken under the Public Works Act, consulted?[535]

The Ministry of Transport prepared a draft response for the Minister. This summarised the former owners' concerns as: 'Representatives of some of the former owners believe there is surplus land which should be given back', and 'they also believe they should have been given the opportunity to tender for the aerodrome.'[536] The suggested reply about these concerns (if raised) was essentially a repetition of the text in the Ministry's 22 June letter to Matthew Love-Parata and Rawhiti Higgott: land may appear 'under-utilised but this does not make it surplus', it would have been 'inappropriate for the Ministry to have arbitrarily reduced the landholding prior to the tender process', and none of the tenderers had bid for a 'lesser area'. On the opportunity to tender, the Government 'targeted groups most likely to keep the aerodrome open.'[537]

The Minister of Transport's response to Sandra Lee's question in the House was:

> The Ministry of Transport consulted five groups identified by the Office of Treaty Settlements and Te Puni Kokiri as having lodged claims with the Waitangi Tribunal that may have incorporated the Paraparaumu aerodrome land. Those groups were: Te Runanga o Toa Rangatira (Inc) of Porirua, Ati Awa ki Whakarongotai (Inc) of

534. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 41)

535. Sandra Lee, 27 June 1995, NZPD, vol 548, p [520]

536. Draft reply, no date (June 1995) (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1847)

537. Draft reply, no date (June 1995) (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG1848)

> Waikanae, Runanga ki Mua-Upoko of Levin, Tama-i-Ruru of Levin, and Raukawa Trustees of Otaki. The ministry had the objective of devolving ownership to a party that would continue the aerodrome operation. *The possibility of the aerodrome land being surplus, necessitating offer-back to former owners, did not arise therefore, and there was no obligation to consult any of the former owners or their successors.* [Emphasis added.][538]

Ms Lee followed up with a second question:

> Given that the original owners, the local hapu, assert that they have not been consulted, and given that the information memorandum on the sale states: 'A protection mechanism will not be invoked to protect their as yet unproven claim, after alienation of the land from the Crown. Once the aerodrome land has been transferred it will not be available to satisfy future or existing Maori claims', why does the Minister refuse to uphold the principle of the Public Works Act in relation to the rights of the original owners now by offering the land back to the local hapu?[539]

The Minister replied:

> I can but repeat to the member that the possibility of the aerodrome land being surplus, which necessitates some offer back to former owners, does not arise. The new owners have bought the aerodrome with the intention of operating it as an aerodrome, and it will continue as an aerodrome.[540]

Roger Sowry, the National member for Kāpiti, asked: 'When did the Ministry of Transport receive concerns from former owners or successors about the sale?'

The Minister responded:

> Following the announcement of the intended devolution of ministry aerodromes in 1991 the successors of one former Maori owner contacted the ministry. Ministry officers visited the family and explained the protection of their offer-back rights to the family's satisfaction. Until only recently, when the sale was well advanced, no other former owners or successors had expressed concerns about, or interest in, the sale. The ministry has had three meetings with representatives of former Maori freehold owners and fully explained the sales process and the continued protection of offer-back rights. It has also made its files available to assist the representatives with their research.[541]

This answer from the Minister had gaps in its information but it does raise the issue of why the former owners were not involved earlier in the sale process.

538. Maurice Williamson, 27 June 1995, NZPD, vol 548, p [520]
539. Sandra Lee, 27 June 1995, NZPD, vol 548, p [520]
540. Maurice Williamson, 27 June 1995, NZPD, vol 548, p [520]
541. Roger Sowry, Maurice Williamson, 27 June 1995, NZPD, vol 548, pp [520]–[521]

After the initial press release in 1991, which led to contact from Huirangi Lake, Poiria Erskine-Love, and the Ngahina Trust, the Crown decided not to sell the aerodrome but rather to establish an SOE. When this position changed again in 1993, largely because the proposed SOE would not be profitable and did not have an effective plan to deal with the surplus land, the Ministry consulted Ati Awa ki Whakarongotai Inc (among the other iwi organisations). As discussed above, Te Pehi Parata repeatedly told the Ministry to deal with the former owners in 1993–94, and the kaumātua of one of the whānau involved, former owners of Ngarara West B4, was involved in the only meeting that occurred between Ati Awa ki Whakarongotai and the Ministry in 1994. In the meantime, the Ministry had written to Huirangi Lake in May 1993 to inform her of the renewed plan to sell the aerodrome, but this letter may have gone astray or been overlooked.[542] One of Mrs Lake's daughters, Nora Pidduck, replied a year later in April 1994, that 'they were still researching the ownership of the land' and they 'wanted to register an interest'.[543]

Mrs Lake's solicitors contacted the Ministry in February 1995,[544] prior to the start of the tender, and various correspondence and meetings followed alongside the tendering process (and after), but, from the available evidence, Te Whānau a Te Ngarara representatives were not informed of the sale timeline until 19 May 1995, when it was too late for them to submit a tender. The information memorandum was a confidential document and only a limited number of institutions and aerodrome 'users' were targeted for tendering.

The essential reason that the former owners were not involved earlier is that the Ministry considered it unnecessary to consult them, despite Ati Awa ki Whakarongotai Inc's suggestions, and it was not until they became 'a spanner in the works',[545] as Mark Mitchell put it, that they received serious attention from the Ministry in 1995.

7.6.6.5 *Te Whānau a Te Ngarara apply for an injunction*

Following the meeting on 19 June 1995 and the correspondence of 22 June, Te Whānau a Te Ngarara decided to try one last resort and applied to the High Court on 29 June for an injunction. George Jenkins commented: 'Our action was doomed to fail and we knew it. But we had to do all we possibly could.'[546] The plaintiffs were Hari Jackson, Tina Thomas, Carol Teira-Capon, Teoti Ropata, and Yvonne Mitchell.[547] The proceedings were brought the day before the Crown was due to transfer the aerodrome and all assets to Paraparaumu Airport Ltd and then trans-

542. For the letter having been overlooked, see 'Report of Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 35); Mouat, brief of evidence (doc G7), p 11.
543. Bassett and Kay, 'Public Works Issues' (doc A211), p 391
544. 'Report of the Controller and Auditor-General', p 32
545. Mark Mitchell, brief of evidence (doc E1), pp [2]–[3]
546. George Jenkins, brief of evidence (doc F41), p 11
547. Neazor J, 30 June 1995, Wellington High Court 149/95 at 1 (Watson, casebook (doc F5(h)), p 22)

fer all shares in that company to KAH.[548] Justice Neazor delivered an oral judgment on 30 June 1995, in which he stated that the transaction was structured this way 'so that the Crown would not incur the obligation under s 40 of the Public Works Act 1981'.[549] The plaintiffs sought declarations that the disposal of aerodrome land to – ultimately – KAH was unlawful, and that they were entitled to be offered the land back under section 40 'at the value which it has as an airport'.[550] They argued that the sale was unlawful because KAH was not an aerodrome user and therefore not entitled to submit a tender, and that KAH also did not meet the tender criteria because it did not really intend to keep the aerodrome in operation.[551]

Justice Neazor considered the evidence for these arguments about KAH and the lawfulness of the transaction to be 'very frail, if not completely speculative'. On the section 40 rights, he found that the plaintiffs' interest was covered by section 3A(6A) of the Airport Authorities Act 1966, which stated that sections 40–41 of the Public Works Act did not apply to the Crown's transfer of land to an airport company but would apply after that transfer 'as if the airport company were the Crown and the land had not been transferred under this Act'. Justice Neazor commented:

> It is in my view perfectly clear that the plaintiffs' interest in being able to repurchase the land (if they are entitled to do so) is protected by that subsection once the land is transferred, as is proposed to be, to the second defendant [Paraparaumu Airport Ltd]. If the second defendant tries to dispose of it, or if in the hands of the second defendant events occur which would trigger the entitlement under s 40 if the land was still held by the Crown, the plaintiffs' rights would be unchanged. Whatever rights they have today they would have then; whatever right they have today in respect of the valuation on the basis of which the land would be offered for sale would be (in terms of legal entitlement) the same, as it would continue to enure to them under the same statutory terms. Whether in practical terms it would produce a different result is in my view a consequence of law [and] not of any statutory power of decision.[552]

Justice Neazor therefore dismissed the application for interim relief.[553] The transfer of land to Paraparaumu Airport Ltd duly occurred along with the sale of all shares in the company to KAH.[554]

The Ministry saw this decision as proof that all its assurances to the former owners had been justified. Nigel Mouat stated in his evidence:

548. Bassett and Kay, 'Public Works Issues' (doc A211), pp 403–405
549. Neazor J, 30 June 1995, Wellington High Court 149/95 at 3 (Watson, casebook (doc F5(h)), p 24)
550. Neazor J, 30 June 1995, Wellington High Court 149/95 at 2, 4 (Watson, casebook (doc F5(h)), pp 23, 25)
551. Neazor J, 30 June 1995, Wellington High Court 149/95 at 5–6 (Watson, casebook (doc F5(h)), pp 26–27)
552. Neazor J, 30 June 1995, Wellington High Court 149/95 at 7 (Watson, casebook (doc F5(h)), pp 27, 28)
553. Neazor J, 30 June 1995, Wellington High Court 149/95 at 8 (Watson, casebook (doc F5(h)), p 29)
554. Bassett and Kay, 'Public Works Issues' (doc A211), p 405

> I believed then and continue to believe now that the judgment of Justice Neazor was also confirmation that our confidence in those protections were well founded. We did not foresee, and could not have foreseen, in 1995, that the lands later deemed surplus to the airport operations (both the Avion Terrace residential area and the lands at the eastern end of the airport which is now commercially developed) would not be offered back to the original owners.[555]

We consider the extent to which the Crown protected – or was able to protect – Māori interests after the sale of Paraparaumu Aerodrome to Paraparaumu Airport Ltd in section 7.7.[556]

7.6.6.6 *Filing of the Wai 609 claim*

In July 1996, Te Whānau a Te Ngarara filed a claim with the Tribunal in the names of Anne Colgate, Yvonne Mitchell, Bridget Mitchell, Carol Teira-Capon, and Teoti Tangahoe Ropata. The claimants argued that the Crown's compulsory taking of their lands, its 'continued failure to return the ownership of the land', its circumvention of the 'minimal protections provided by section 40 of the Public Works Act' by using the Airport Authorities Act to sell to a third party, and other Crown actions were in breach of the principles of the Treaty.[557]

7.6.7 Conclusions and Treaty findings

In this section, we provide our conclusions and Treaty findings. As a preliminary point, it is necessary to note that the claimants have not challenged the Crown's corporatisation and privatisation policies per se. The Crown's decision to corporatise (1986) and then privatise (1988) airports was not in dispute between the parties.

7.6.7.1 *Consultation and the Crown's understanding of its Treaty obligation*

Crown counsel submitted in this inquiry:

> the Crown says that it complied with the Cabinet direction of 27 April 1993 and only sold its interest in the airport company after fulfilling the Crown's obligations under the Treaty of Waitangi and the Public Works Act.
>
> The Crown says these obligations are distinct, even if some of the individuals concerned were owed both. That is, some of the former owners (or successors) to whom Public Works Act obligations were/are owed were also owed Treaty obligations as tangata whenua. Descendants (as distinct from successors) of former owners are not owed Public Works Act obligations.[558]

555. Mouat, brief of evidence (doc G7), p 4
556. The name of Paraparaumu Aerodrome changed to Paraparaumu Airport with this sale.
557. Wai 609 statement of claim, 2 July 1996 (paper 1.1.50), p [5]
558. Crown counsel, closing submissions (paper 3.3.60), p 79

We address the issue of whether descendants (as distinct from successors) were owed Public Works Act obligations later in the chapter. Here, we note that the Crown's view of its Treaty obligations in 1993–95 was narrower than the Crown's position at hearing, with significant consequences for the sale process. The Crown's view at the time was that there was a 'clear distinction between the Crown's obligations under the Treaty of Waitangi and the rights of [the former owners and their successors] under the Public Works Act'.[559] DOSLI, however, advised the Ministry of Transport that most of the Paraparaumu Aerodrome lands would need to be offered back in the event of an open market sale because of the 'highly coercive nature in which Paraparaumu land was compulsorily acquired from previous owners'.[560] The Ministry did not consider the significance of this point in terms of Treaty obligations to the former owners (who could and did later file claims), despite a number of Tribunal reports at the time which found Treaty breaches in respect of compulsory takings.[561] Rather, the Ministry insisted that there were neither legal nor Treaty obligations for it to consult with the former owners or their local hapū, Puketapu.[562]

We accept that the Crown rightly recognised that it had Treaty obligations towards Māori, and made a genuine attempt to meet those obligations prior to the sale of Paraparaumu Aerodrome. The Crown understood its Treaty obligations as to act in good faith, to inform itself, and to avoid putting impediments in the way of providing redress for past breaches. This understanding arose from the *Lands* case. On that basis, the Crown tried to inform itself of Māori views and wishes through consultation before the sale. The Crown's consultation was deficient, however, because it focused solely on whether the aerodrome lands were so significant to the iwi claimant groups that other compensation would not suffice, and the Crown did not consult with the former owners' descendants and hapū. The chair of Ati Awa ki Whakarongotai Inc repeatedly advised the Crown to consult them but the Crown denied that it had legal or Treaty obligations towards them, although it provided some information to them prior to the final decision to sell. The Crown's conduct in these respects was not consistent with the principles of partnership and active protection.

As a result of the Ministry's flawed consultation, the airport claimants in this inquiry were prejudiced because the Crown did not engage with their representatives in detail until it was too late. As a result, the Crown had not informed itself as to their views about the disposal of the aerodrome (including the use of the airport company vehicle to avoid offering the land back), possible ways of involving them in the future ownership of the aerodrome, or whether they intended to file a

559. Nigel Mouat to D M Howden, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 15–16)

560. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 22–23)

561. Waitangi Tribunal, *Te Maunga Railways Land Report*, pp 68–71; see also 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 21–22).

562. Niget Mouat to D M Howden, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 15–16)

claim with the Tribunal. Nor did the Crown offer them an option of tendering for the aerodrome as part of its limited tender process, as we discuss further below.

7.6.7.2 *Options for disposal*

The Ministry of Transport and various other Government departments, including DOSLI and Manatū Māori, debated various ways of disposing of the Crown's aerodromes in the period from 1989 to 1993. There was no consultation with Māori about the various options until 1993. In 1989–90, DOSLI advised the Ministry that most of the Māori land had been taken compulsorily and would need to be offered back if Paraparaumu Aerodrome was sold on the open market. As a result, the Ministry advised Cabinet in July 1991 that the aerodrome should be disposed of by setting up a Crown-owned airport company and selling the shares so as to avoid triggering an offer back. Manatū Māori raised concerns about whether ancestral Māori land taken for the public good should be sold to privately owned companies for their commercial gain without some form of arrangement enabling the former Māori owners to benefit from the commercial use of public works as well, such as a transfer of the land to Māori which could then be leased to an airport company. The Crown could sell the lease. This option was also proposed by the Ngahina Trust in 1991 but it was not considered by the Minister of Transport in recommendations to Cabinet. Manatū Māori also proposed inserting a memorial scheme in the Airport Authorities Act 1966 so that the land could be used in the settlement of Treaty claims if recommended by the Tribunal, which the Minister advised against because some airports had already been sold and most were jointly owned by the Crown and local authorities.

In October 1991, Cabinet chose another option: to establish an SOE for three of the aerodromes (including Paraparaumu). There was no consultation with Māori about this option but it would have protected Māori interests because an SOE would have memorials on the title and the Crown would make any section 40 offer-back decisions for SOE lands. This option ultimately failed, however, because the SOE establishment board could not develop a viable corporation. In 1993, therefore, Cabinet reverted to the option of establishing a Paraparaumu airport company and privatising it through selling 100 per cent of shares. In order to keep the aerodrome in operation after sale (but only for so long as commercially viable), Cabinet chose a limited tender to aerodrome users or other local groups. Cabinet also made the sale process conditional on meeting the Crown's Treaty obligations, which 'while taking some time to fulfil, [were] not expected to prevent disposal'.[563] In practical terms, this resulted in consultation to determine whether the aerodrome land was 'category A' under the new land banking protection mechanism, and therefore not substitutable for other redress in a Treaty settlement (discussed above).

In December 1994, the Minister of Transport decided to proceed with the sale of the aerodrome because none of the iwi claimant groups had provided evidence that

563. Cabinet paper, 26 April 1993 (Crown counsel, document collection (paper 3.2.451(a)), pp 84–85)

the land was so special to them that no other compensation would suffice, the aerodromes could not be used to settle claims because of the offer-back requirements of the Public Works Act and the need to keep the aerodromes a 'going concern', and it would take too long to determine which claimant iwi was the correct one.[564] There had not in fact been any discussion with Ati Awa ki Whakarongotai Inc or representatives of the former owners of transferring Paraparaumu Aerodrome to them as a 'going concern'. The failure to consult with the representatives of the former Puketapu owners had significant impacts on the Crown's decision to proceed with the sale. The Crown did not consider the possibility of including them as an interested 'local group' in the tender process. Instead, communication about tendering was limited to the particular groups selected by the Ministry of Transport. By the time Te Whānau a Te Ngarara realised in 1995 that they could not stop the sale and would need to get involved with airport 'users' in submitting a tender, it was already too late. The auditor-general's inquiry in 2005 was critical of the Ministry on this point.

The question arises, therefore, as to whether the Crown chose a Treaty-compliant option for the disposal of Paraparaumu Aerodrome. In our view, it did not. First, the Crown chose not to make some form of arrangement that allowed the former Māori owners to benefit from the commercialisation of the land acquired from them (mostly compulsorily) for the public good, as Manatū Māori had suggested. Secondly, the Crown declined to introduce a memorial scheme into the Airport Authorities Act 1966 so that the land could be returned if required for a Treaty settlement, even though the option of establishing an airport SOE had fallen over. The justifications for this were that some airports had already been privatised, others were owned jointly by local authorities and the Crown, and public works offer-back provisions should take priority (not all the land had been acquired from Māori). In our view, the memorial scheme had been established to ensure that Crown assets could be returned for a Treaty settlement should it prove necessary in the future after disposal, and the Crown ought to have ensured that this regime was made available for the Crown-owned aerodrome lands it wanted to dispose of, including Paraparaumu. Its consultation on whether the aerodrome lands were needed to settle claims was insufficient, as discussed above, because it failed to consult with those who felt the strongest grievance about the public works takings for the aerodrome, despite repeatedly being advised by Te Pehi Parata that the matter should be dealt with by them. The Crown's earlier failure to include memorials for other airports was not relevant to Paraparaumu, especially since the Crown had considered including Paraparaumu in an SOE without any concerns on that head. Also, the inclusion of the memorials scheme in the State-Owned Enterprise Act was not considered incompatible with the public works offer-back regime. We find, therefore, that the Crown failed to choose a Treaty-compliant option when it decided not to include memorials on the title, in breach of the

564. John Bradbury to Minister of Transport, 12 December 1994 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), NZTA folder, IMG1884)

principles of active protection and redress. The transfer of land to the MetService is an exception to this finding.

We do not, however, consider the Crown was in breach of Treaty principles for inserting and taking advantage of section 3A(6A) in the Airport Authorities Act (discussed further below) to avoid offering the land back under section 40 when transferring the aerodrome out of Crown ownership. The Crown's intention was to have the airport continue in operation as a 'public amenity' for the whole Kāpiti Coast community.[565] The Crown's Treaty breach was not to privatise the airport but rather to do so without (a) providing the usual protection (memorials on the title) and/or (b) without exploring with the representatives of the former owners and their hapū an arrangement so that they could share in the benefits of privatising land that was taken compulsorily for a public work, as had been suggested at the time. The question of whether the descendants of the European owners would also have had to be included under point (b) would have been a matter for the Crown to consider.

7.6.7.3 *Section 3A(6A) of the Airport Authorities Act 1966*

As discussed, DOSLI advised that most of the aerodrome's former Māori land would need to be offered back to the former owners or their successors if the aerodrome was sold on the open market. We have already discussed the inclusion of section 3A(6A) in the Act to avoid offering the land back while transferring the aerodrome out of Crown ownership, which was considered necessary at the time due to advice from DOSLI. Here, we are concerned with the other aspect of section 3A(6A), which stated that sections 40–42 of the Public Works Act did not apply to the transfer of land to an airport company but did apply after transfer 'as if the airport company were the Crown and the land had not been transferred under this Act'. From 1992 to 2020, this section has been interpreted as transferring the Public Works Act decisions under section 40 to the airport company without provisions for Crown oversight or enforcement, and it certainly operated in that way (see section 7.6).

The Ministry gave multiple assurances to the representatives of the former owners' descendants and hapū in 1995 that their offer-back rights were protected by section 3A(6A). As discussed in section 7.6.6, the degree of protection was over-stated by the Ministry, which did not clarify the legal definition of 'successor in title' (and sometimes confused the matter further by referring to beneficiaries instead of successors, as Nigel Mouat conceded).[566] Nor were the section 40(2) exceptions to an offer back explained in any of the Ministry of Transport's communications. Also, Ministry officials assured Te Whānau a Te Ngarara that the company would have to offer land back if it (a) decided to sell it or (b) stopped using it for airport purposes; no suggestion was made at that time that land would not have to be returned if its commercial development was needed to keep the airport viable, which the Crown was later to contend. In our view, the Ministry's

565. Mouat, brief of evidence (doc G7), p 5
566. Transcript 4.1.21, p 257

assurances were not made in bad faith but they overstated the degree of protection and were later shown to be incorrect, as discussed in section 7.6. We make no finding of Treaty breach here. We address these matters further below, including whether section 40 of the Public Works Act provided a Treaty-compliant degree of protection for the rights of the former owners of ancestral Māori land and their descendants/hapū.

7.6.7.4 *Surplus land prior to sale*

The issue of surplus lands was strongly contested between the parties. Claimant counsel argued that the Crown had known all along, prior to the sale, that there was surplus land at Paraparaumu Airport:

> The fact is that the Crown did not make a formal declaration that the lands were surplus, because to do so (as conceded by Mr Mouat) would have triggered a requirement to offer back to successors of original owners. The Crown wanted to avoid that.
>
> But the submission remains both correct and accurate on the evidence, that across a range of Crown agencies, including the Minister, the Crown at various times regarded the airport lands or parts of the airport lands, as surplus to their requirements. The prejudice of the legislation was that the ultimate authority as to whether or not to *formally declare* land to be surplus lay with the Crown, and because it was not in the interests of the Crown to do so, the Crown was able to side-step its good faith obligations to tangata whenua and dispose of their ancestral whenua. [Emphasis in original.][567]

It is not our role to make a legal determination as to whether there was surplus land that should have been offered back prior to this transfer in 1995. That is a matter for the courts. Nor is it necessary to do so for the purposes of this inquiry. Instead, we rely on what the Government itself said at the time about whether land was surplus, which has been set out in some detail in section 7.6. Landcorp advised in 1989 that about 30 per cent of the aerodrome lands was surplus to requirements. Crown counsel submitted that we should put no weight on this because Landcorp was not 'in the business of operating airports' and was not 'qualified to determine what land was or was not required for the operational needs of the Paraparaumu Airport'.[568] Nonetheless, the Ministry of Transport (which was in the business of operating airports) believed that there was significant surplus land. The Minister advised Cabinet in 1991 that Paraparaumu was 'unlikely to be commercially viable although it could be after an extensive land rationalisation programme', and that prospective buyers were interested in it as an aerodrome but were 'also likely to have in mind the development potential of the surplus land'.[569]

567. Claimant counsel (Watson), submissions by way of reply (paper 3.3.65), p 4
568. Crown counsel, further closing submissions (paper 3.3.62), p 8
569. Minister of Transport, memorandum to Cabinet Committee on Enterprise, Employment and Growth, no date (July 1991) (Bassett and Kay, appendices to answers to questions in writing (doc A211(q)(i)), p 4); 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 19)

When the decision was made in late 1991 to establish an SOE for three aerodromes instead of selling shares in an airport company, the SOE failed to get off the ground for a number of reasons, including its failure to plan for a programme of land rationalisation. The Minister for State-Owned Enterprises ordered a review of the SOE, including surplus land, which calculated that surplus land was worth $1.4 million at Paraparaumu Aerodrome. Because the SOE was not viable, Treasury recommended that either the Ministry resume operation of the aerodrome, in which case the Ministry would need to dispose of the surplus land, or sale. When the Ministers of Finance and State-Owned Enterprises recommended sale to Cabinet in 1993, they recommended sale of 'core' airports and separate disposal of the surplus land, including for Paraparaumu Aerodrome. This was rejected by the Ministry of Transport, not because there was no surplus land but becausethe Ministry wanted the new commercial owners to decide this question. Then, in the bidding for Paraparaumu Aerodrome, the sale project group (which had a Ministry representative) rejected all the bids because they had undervalued the surplus land. One bidder wanted the Ministry to put the surplus land in new titles where it could more easily be sold – this bid was rejected.

On this evidence, Landcorp (1989), the Minister of Transport (1991), Treasury (1993), the Minister of Finance (1993), the Minister for State-Owned Enterprises (1993), and the sale project group (1995) all said that there was surplus land at Paraparaumu Aerodrome. In addition, the Avion Terrace house sites had been declared surplus back in 1983 (though almost no tenants wanted to buy at that point). When Te Whānau a Te Ngarara realised in 1995 that they could not stop the sale or put in a bid themselves, they appealed to the Ministry to offer back the surplus land before the sale was completed. The Ministry responded:

> While you assert that there is surplus land, the Ministry does not accept that this is the case. We accept that some land may appear under-utilised, but this does not make it surplus land. We believe it would have been irresponsible and unfair to prospective purchasers for the Ministry to have arbitrarily reduced the landholding prior to the sale process.[570]

The auditor-general's inquiry commented that the Crown could have considered meeting Māori concerns by 'making an arrangement as regards "surplus" aerodrome land – either within the sale process or otherwise' but failed to do so because of its determination to complete the sale 'without leaving any residual responsibilities or risks in the Ministry's hands'.[571] The Crown's logic in 1995 was that the aerodrome was to become a privately owned business, and commercial decisions about land use would need to be made by the owners of that business, saving the need to keep the aerodrome operational while it was commercially viable to

570. Nigel Mouat to Matthew Love-Parata and Rawhiti Higgott, 22 June 1995 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), Wai 609 folder, IMG2145)

571. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), p 41)

do so, and saving the offer-back rights of the former owners and their successors. But this meant that the Crown did not carry out its Public Works Act obligations to offer back land that had been repeatedly stated to be surplus. We accept that corporatisation created a significant problem for the Ministry because the Public Works Act 1981 had not been designed with the operation of public works as businesses for private profit in mind, and had not been updated to fit with the new Crown approach to public works. The remedy for this – amending the public works regime – was available to the Crown at all times.

In our view, the Crown was not willing to take the risk that return of surplus land would make the airport company unviable and lead to closure, but that does not change the protection inserted in the Public Works Act in 1981 that land should be offered back when no longer needed for a public work, a protection that was considered necessary in light of the coercive nature of public works takings. We saw the coercive nature of those takings in section 7.4 and made findings of Treaty breach accordingly. It needs to be recalled that the Crown had sidestepped the public works offer-back obligations for the whole of the aerodrome lands, using section 3A(6A) of the Airport Authorities Act to ensure that it could do so. In that context, the Crown's avoidance of its obligation to offer back surplus land as well was significant. We cannot predict whether the Crown would have offered land back – the Crown may have decided it was impracticable, unreasonable, or unfair to do so – but the Crown owed it to its Treaty partner to give effect to the protections of section 40 and make a decision. Instead, the Crown abdicated that responsibility to the airport company to make after sale in anticipation that section 3A(6A) would protect the interests of the former owners. We consider whether section 40 itself provided sufficient protection later in the chapter. Here, we find that the Crown's failure to carry out its section 40 obligations prior to the transfer was a breach of the principle of active protection, and the claimants were prejudiced thereby.

7.7 The Crown's Post-Sale Protection of Māori Interests

7.7.1 Introduction

The Airport Authorities Act 1966 was amended in 1988 and 1992 to enable the transfer of airport land to airport companies and the sale of those companies to private buyers. The Crown made repeated assurances to Ati Awa ki Whakarongotai Inc and to the representatives of the former owners that the section 40 offer-back requirement would apply to the airport company as if it were the Crown, and that the rights of the former owners and their 'successors' (sometimes 'descendants') were therefore protected. These amendments, however, did not include a Treaty clause requiring airport authorities to act in accordance with the principles of the Treaty or any other specific protections for Māori interests. No specific contractual obligations in respect of the Crown's section 40 obligations were included in the sale. The Crown's position at the time was that the airport company would be responsible for deciding whether to offer surplus land back to its former owners, but, as discussed in section 7.2.5, the Crown's position has recently changed. In

the Crown's view, as developed in 2020, LINZ was responsible for making offer back decisions for Paraparaumu Airport because the airport remained defined as a 'Government work' under the Airport Authorities Act and the Public Works Act. As a result, we have to consider in this section whether the Crown ought to have exercised its section 40 obligations and offered land back at any time between the sale of the airport in 1995 and the present day.

In addressing this issue, we discuss the airport company's sale of Avion Terrace, which was considered surplus to airport requirements but was not offered back. We also discuss the company's subsequent efforts to get airport lands rezoned for residential or commercial development without actually selling the land, and the responses of the Crown and the former owners to those efforts. This raised the difficult issue of when land should be considered 'surplus': the Crown argued that the land was not surplus if its commercial development was required to keep the airport viable, whereas the claimants argued that the land developed for commercial purposes was clearly surplus, especially after the closure of a runway.

In addition, we consider the attempts of both Te Whānau a Te Ngarara and (from time to time) the Crown to obtain a legislative remedy. This includes the Crown's review of the Public Works Act and its proposed reforms in the mid-2000s, which potentially could have improved the situation for the claimants. In particular, the claimants were aggrieved at the definition of successors in title, which confined any offer back to the immediate legal successors of former owners, arguing that this was incompatible with Māori custom and with Te Ture Whenua Māori Act 1993.

We begin our discussion with Paraparaumu Airport Ltd's sale of land at Avion Terrace.

7.7.2 The sale of Avion Terrace

7.7.2.1 *The sale of Avion Terrace, the occupation, and appeals to the Crown for a remedy*

In 1996, PAL sold 11.9 hectares (about 30 acres)[572] at Avion Terrace to a development company for $885,000. The houses on that land were moved after the sale, and the development company 'proceeded to subdivide the land and sell off sections'.[573] This sale of a relatively small part of the airport enabled PAL to recoup over half the price paid to the Ministry the year before. It was followed by the sale of small pieces of former European-owned land on the corner of Moa Road and Kaka Road. In all, PAL obtained $1 million from the sale of surplus land.[574] The Transport and Industrial Relations Committee investigated the sales of surplus land in 2004. The committee's expert adviser found it difficult to ascertain exactly what land had been sold, but noted that PAL did offer the land at Kaka/

572. Bassett and Kay, 'Public Works Issues' (doc A211), p 408. Suzanne Woodley, however, calculated the area sold as likely to have been 1.6766 hectares: Woodley, 'Local Government Issues' (doc A193), pp 673–674.

573. Woodley, 'Local Government Issues' (doc A193), p 674; 'Report of Transport and Industrial Relations Committee', p 46 (Mouat, papers in support of brief of evidence (doc G7(a)), p 133)

574. Woodley, 'Local Government Issues' (doc A193), p 676

Moa Road back to successors of the original owners whereas the Avion Terrace properties were not offered back.[575] The only evidence that the committee found about why the land was not offered back was a PAL file 'with a series of questions by journalism students put to Murray Cole'. Mr Cole reportedly told these students: '*Avion Terrace was not required as an offerback as it was impracticable to do so due to Houses built over boundaries (ie couldn't cut the houses up!).*' (Emphasis in original.)[576] This was the only information that the Crown was ever able to discover in relation to how the company exercised its offer-back obligations in the sale of Avion Terrace.[577]

In 1998, lawyers acting for Te Whānau a Te Ngarara contacted PAL about the sale. The houses had been removed but the status of the land was not clear, and they sought an urgent response as to the status of the Avion Terrace land, what land had been sold (if any), and – if there had been a sale – 'an explanation as to why it was not first offered back to descendants of the original owners'. A copy of the letter was forwarded to the Minister of Transport.[578] Rainey Collins Wright & Co wrote again on 3 February 1999, seeking confirmation as to what land (if any) had been sold at Avion Terrace, 'an explanation as to why it was not first offered back to descendants of the original owners', and details as to any 'further proposals for future sales'.[579] The Minister of Transport, Maurice Williamson, also wrote to PAL after receipt of his copy, stating that he understood Te Whānau a Te Ngarara to be the 'descendants of the original owners of the Paraparaumu Airport land and claimants at the Waitangi Tribunal'. The Minister noted that the letter from Te Whānau a Te Ngarara concerned the sale of airport land and 'arrangements made to offer the land back to the descendants of the original owners, as required under the Airport Authorities Act 1966 and the Public Works Act 1981'. The Minister asked for PAL to provide a copy of its response.[580]

It is important to note that the Minister referred to the offer-back rights of 'descendants', as did the solicitors for Te Whānau a Te Ngarara. Confusion between the rights of 'descendants' and legal successors had been a notable feature of the Crown's reassurances to Ati Awa ki Whakarongotai Inc and Te Whānau a Te Ngarara during the sale process. Gibson Sheat, solicitors for PAL, responded to Rainey Collins Wright & Co:

575. 'Report of Transport and Industrial Relations Committee', pp 48–49 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 135–136)

576. 'Report of Transport and Industrial Relations Committee', p 49 (Mouat, papers in support of brief of evidence (doc G7(a)), p 136)

577. Transcript 4.1.21, p 306

578. Rainey Collins Wright & Co to PAL, 21 December 1998 (Mouat, papers in support of brief of evidence (doc G7(c)), p 22)

579. Rainey Collins Wright & Co to PAL, 3 February 1999 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 24–25)

580. Minister of Transport to PAL, no date (Mouat, papers in support of brief of evidence (doc G7(c)), p 26)

> As you know, s 40(2) of the Public Works Act refers to '. . . the person from whom it was acquired or . . . the successor of that person'. Can you please identify for me the person for whom you act, in terms of that statutory definition.
>
> Our client is very willing to discuss this matter, and to elaborate on the background but, at the same time, my advice to the company is that it should address the issue with the appropriate person, and should avoid confusion between Public Works Act and Treaty of Waitangi issues.[581]

This is the first time that any explanation of the distinction between 'descendants' and 'successors' was made in the documentary evidence available to us. As noted earlier, section 40(5) defined 'successor' to a former owner as:

> For the purposes of this section, the term *successor*, in relation to any person, means the person who would have been entitled to the land under the will or intestacy of that person had he owned the land at the date of his death; and, in any case where part of a person's land was acquired or taken, includes the successor in title of that person. [Emphasis in original.]

The Minister of Transport was not interested in whether Te Whānau a Te Ngarara was comprised of legal successors. He wrote to PAL in February 1999, asking for a 'substantive reply to the question raised by Te Whanau a Te Ngarara: if land has been sold at the airport, what offer-back procedures were followed?'[582] PAL's solicitors, Gibson Sheat, responded to the Minister that an airport company's obligation was to 'the person from whom land was acquired, or the successor of that person', but stating: 'I can confirm to you that Paraparaumu Airport Ltd complied in all respects with its obligations under the Public Works Act.'[583]

This was the only explanation ever obtained by the Crown on this matter.[584] Indeed, the Ministry of Transport stated in 2001 that the Ministry had gone to the ombudsman to try to get the airport company to release documentation about its section 40 obligations, such was the inability of the Ministry to monitor the company's actions on that vital matter.[585] Nigel Mouat told us:

> While I was not involved, I am aware that Paraparaumu Airport Ltd disposed of Avion Terrace land soon afterwards, and around 2000/2001 some land to the west of [the] east-west [runway] for commercial development. In the absence of a contractual

581. Gibson Sheat to Rainey, Collins, Wright & Co, 9 February 1999 (Mouat, papers in support of brief of evidence (doc G7(c)), p 27)

582. Minister of Transport to PAL, no date (23 February 1999) (Mouat, papers in support of brief of evidence (doc G7(c)), p 28)

583. Gibson Sheat to Minister of Transport, 24 February 1999 (Mouat, papers in support of brief of evidence (doc G7(c)), p 29)

584. Nigel Mouat, answers to questions in writing, no date (September 2019) (doc G7(h)), p [2]

585. For the claim to the ombudsman, see: notes for an oral submission by the Ministry of Transport, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 68–69).

> obligation requiring disclosure, it was considered there was no legal obligation option available to require Paraparaumu Airport Limited to disclose its s 40 Public Works Act process to the Minister of Transport. I understand that while Paraparaumu Airport Ltd refused to confirm to the Minister that it had fulfilled the s 40 duties, the indications reported through the media at the time were to the effect that it believed it had.
>
> Thus we felt that there was nothing more we could do to determine whether Paraparaumu Airport Limited had met its section 40 obligations.[586]

Mr Mouat added that the Ministry had seen no need for including any contractual oversight of how the airport company carried out its section 40 obligations:

> I can only presume that the thinking at the time would have been along the lines of: 'Why do we need a contractual provision saying they have to comply with statutory obligations? Doesn't it go without saying?' It seems nonsensical to me that a contractual provision would be required in every contract which *contractually* binds parties to that contract to comply with their statutory obligations. I do not think anyone even thought of including such a contractual provision in the sale contract at the time. [Emphasis in original.][587]

In April 1999, Te Whānau a Te Ngarara occupied the land at Avion Terrace in protest about the sale. Muri Stewart told us that this was a 'peaceful occupation'. A new road was being constructed and 'new sections mapped out and sold' at the time.[588] Permission had been obtained from the new owner of Avion Terrace to occupy for a week. The local Kāpiti community offered 'overwhelming support', and the Wellington Tenths Trust and a Wellington 'Tino Rangatiratanga group' provided assistance in the form of tents and food.[589] There was a lot of press coverage as well. Joanne Lake Bramley described the message that was put out on the radio by George Jenkins: 'Yes, we were fighting against a giant that is the crown with no hope and no justice. So the only option left is to protest there remains no other option for Te Whanau o Te Ngarara but to go for it.'[590]

Following the week-long occupation of Avion Terrace, which had been agreed to by the new owner, Te Whānau a Te Ngarara moved on to occupy the airport itself on Kāpiti Road. George Jenkins told us:

> Everything was organised, from 24hr security to a marae-atea area for powhiri to wharekai, food, wood for heating, tents and communication protocols even. A powhiri was held for the police appearing on behalf of the owner and we engaged with them respectfully according to tikanga. Their request for our immediate vacancy of

586. Mouat, brief of evidence (doc G7), p 8
587. Mouat, brief of evidence (doc G7), p 8
588. Muri Stewart, brief of evidence (doc F28), p 5
589. Joanne Lake Bramley, brief of evidence, 6 May 2019 (doc F29), pp 5–6
590. Joanne Lake Bramley, brief of evidence (doc F29), p 5

> the land was denied. The occupation ended with the Police riot squad forcibly removing our people and being charged with Trespassing, charges that were later dropped.
>
> To say that this was an emotional time is to understate the reality of our pain. We had already spent so much on this issue and this was what we had been forced to do. Because silence is generally taken for consent how could we remain silent.[591]

The protest occupation resulted in a meeting with the Minister in charge of Treaty of Waitangi Negotiations, Sir Douglas Graham. The main account we have of this meeting comes from the evidence of the claimants. Joanne Lake Bramley stated that the meeting was attended by George Jenkins, Rawhiti Higgott, Peter Love, Yvonne Mitchell, and various officials 'at his office in Parliament'.[592] According to Mr Jenkins:

> We submitted to him [Sir Douglas Graham] that the fact that the sale of the airport had now resulted in the permanent alienation of land into private ownership contrary to Justice Neazor's judgment and that a legal sleight of hand had placed it outside of any Treaty claims was reason for his office to call for the Treaty exemption to be removed and seek clarification as to whether a power of oversight existed with the crown. The ability to act as if it were the crown does not mean that it is the crown nor that it will necessarily mean that the best action will always be taken.[593]

The issue of whether a 'power of oversight existed with the crown' is addressed further below.

We asked Crown counsel to locate any documentary evidence about this meeting. A search of Te Arawhiti files and the files from the Minister's office produced no results. The only reference to it that could be found was in a briefing paper for the Minister of Transport in October 2000.[594] Although Sir Douglas Graham was not named in the report, it is clear from the context that the meeting occurred soon after the occupation in April 1999, while he was still the Minister in Charge of Treaty of Waitangi Negotiations. That part of the report has been redacted so the only detail about the meeting is: 'The Minister for Treaty of Waitangi Settlement Negotiations met with Te Whānau [a Te Ngarara] and advised that Te Whānau's recourse against PAL was through the courts. To date, no further legal action has been taken by Te Whānau.'[595]

From this record, it appears that the Minister's response to Te Whānau a Te Ngarara was that their only option was to take action in the courts. This was an expensive remedy that Te Whānau a Te Ngarara hesitated to take again after they lost the 1995 case. As Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill explained:

591. George Jenkins, brief of evidence (doc F41), p 12
592. Joanne Lake Bramley, brief of evidence (doc F29), p 3
593. George Jenkins, brief of evidence (doc F41), p 12
594. Crown counsel, memorandum, 30 September 2019 (paper 3.2.457), pp 4–6
595. Briefing note for Minister of Transport, 2 October 2000 (doc G7(i)), p [2]

> The Judge also awarded court costs to be paid by the named members of Te Whanau a Te Ngarara. This was a very heavy blow to the Trust members and its effects reverberated through the individual whānau members, and had an impact on how the Trust dealt with future Court challenges.[596]

In supplementary closing submissions, Crown counsel submitted that this legal remedy had been available to the claimants ever since the sale of Avion Terrace, which they had simply failed to access:

> There is no explanation given by the Wai 875 (or any other) claimants as to why, if they believed that the Airport owner had failed to comply with their section 40 obligations, court proceedings had not been threatened or commenced much earlier in time. This was a legal remedy available to the original owners and their successors at all times. The Crown accepts that no oversight mechanism, or monitoring role, for the Crown to retain the ability to oversee compliance with section 40 obligations (which were effectively passed on to the airport purchasers) was built into the amendment to the Airport Authorities Act. Instead, the Crown relied on the enforceability of section 40 by the former owners or their successors through the courts (in the same manner as if the Crown had retained ownership of the relevant land and former owners or their successors believed the Crown had failed to comply with its section 40 obligations). As discussed above, by enacting the amendment to the Airport Authorities Act, the Crown effectively ensured uninterrupted protection of the original owners' and their successors' rights.[597]

It is not correct, however, to say that the Crown sat back and relied on the enforceability of section 40 in the courts following the occupation of Avion Terrace and the meeting with Sir Douglas Graham. The Ministry of Transport did consider the possibility of a statutory amendment in 1999–2003 to resolve the issue of Crown oversight of the company's section 40 obligations. The Ministry also got involved in the Kāpiti Coast District Council planning process, objecting to PAL's attempts to change the airport's zoning restrictions so that airport land could be developed. Further meetings took place between the Crown and Te Whānau a Te Ngarara as the latter attempted to find some kind of remedy. We discuss those developments in section 7.7.4. We turn next to consider the Crown's post-hearing submission and concession of Treaty breach in respect of the sale of Avion Terrace.

7.7.2.2 *The Crown's concession on the sale of Avion Terrace*

In its post-hearing change of position, the Crown submitted that the decision as to whether to offer back the Avion Terrace sections should have been made by the Crown, not the airport company (see section 7.2.5). This was based on the Crown's

596. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 17

597. Crown counsel, supplementary closing submissions (paper 3.3.62), p 15

recent reinterpretation of the Airport Authorities Act. According to the Crown, the land passed to the airport company in 1995 remained a 'Government work' for the purposes of the Public Works Act, and the decision as to offer-back for Government works must be made by the Chief Executive of LINZ, although the Crown also noted that the airport company disagrees and a law change is necessary to remove any 'ambiguity'.[598] In the Crown's submission, Parliament 'ensured that the statutory power of decision to offer back land taken under the PWA for an airport remained with a publicly accountable body'.[599] The Crown therefore conceded that its acts and omissions in respect of the sale of Avion Terrace breached the principles of the Treaty of Waitangi:

> After selling its interests in the airport company, the Crown took the view that responsibility for considering offer back sat with the company and the Crown failed to take appropriate action to ensure the protective mechanisms in section 40 of the Public Works Act, which protect the former owners' interests, were fulfilled.
>
> The acts and omissions of the Crown regarding the application of the offer back provisions in the Public Works Act to the land at Avion Terrace cumulatively mean that the interests of the former Ngāti Puketapu owners were not properly considered or protected when the airport company sold the land in 1999 on the basis that it was surplus to its requirements. This was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[600]

We welcome this concession.

As discussed, this is a recent change of position. At the time of the sale of Avion Terrace and subsequently, both the Crown and claimants considered that some form of remedy would have to be found to ensure that the airport company carried out what were understood to be its section 40 obligations in a transparent and accountable manner. At the same time, there were growing calls from within Māoridom for reform of the Public Works Act itself, including the offer-back provisions. We turn to those matters next.

7.7.3 In search of remedies: First attempts at a legislative remedy, 1999–2003

In October 1999, a short Airport Authorities Amendment Bill (No 2) was introduced to Parliament. Its purpose was to amend the Act so that local authorities could not transfer land to an airport company that was subject to the Reserves Act 1977. The Bill was not heard by a select committee until after the 1999 election, which meant that a new Minister of Transport had to decide what to do about the Bill. Te Whānau a Te Ngarara made an oral submission to the Transport and Industrial Relations committee in 2000, asking that 'compliance provisions' be added to the Bill to ensure airport companies carried out their section 40 offer-back obligations. Shortly after making this submission, Te Whānau a Te Ngarara

598. Crown counsel, memorandum, 20 November 2020 (paper 3.2.807), pp 2–4
599. Crown counsel, memorandum, 21 August 2021 (paper 3.2.1078), p 5
600. Crown counsel, memorandum (paper 3.2.1223), pp 2–3

representatives met with the Ministry to 'discuss the situation at Paraparaumu airport and its concerns about the proposed Bill'.[601]

The question of whether this Bill should be amended to include a remedy for Te Whānau a Te Ngarara was debated by Government departments and Ministers. In June 2000, the new Minister of Transport, Mark Gosche, asked the Minister for Land Information to comment on the Bill and the Public Works Act issues. The Acting Minister responded that Ministers in the previous Government were aware that 'the Crown had failed to provide a mechanism to ensure that airport owners complied with' their section 40 obligations, and had directed officials to address the problem as part of a broader review of the Public Works Act.[602] The Acting Minister, Trevor Mallard, made this admission in very clear terms:

> The particular problem stems from amendments to legislation after the enactment of the Public Works Act 1981. These devolved previous Crown responsibilities (carried out by government officials under the Public Works Act) to essentially private companies but did not provide the necessary associated enforcement measures to ensure their compliance with the legislative provisions.[603]

Trevor Mallard explained how this happened. The Crown had amended the Airport Authorities Act 1966 to exempt its own transfer of land to an airport company from the offer-back obligations but – in imposing those obligations on the new company – had not considered how the terms of an Act passed back in 1981 (prior to any corporatisation or privatisation) could apply to a private company. He advised the Minister of Transport:

> In summary, in 1986 the Airport Authorities Act 1966 was amended to enable the Crown and local authorities to establish airport companies and transfer their assets to those companies. In 1992 the Act was further amended to exempt *this transfer* from the offer back provisions of the Public Works Act 1981, to clarify the application of the Public Works Act to the *subsequent transfer* of land by airport companies and provide for the offerback of land to former owners. Although these provisions were similar to those built into the State-Owned Enterprises Act of 1986, the Crown Research Institutes Act of 1992, and some other legislation providing for the transfer of public works out of central Crown control, they are different in one key respect. Unlike the above mentioned entities that need to come to LINZ for exercise of the statutory decision relating to offer back, the airport companies (like local authorities) are themselves responsible for executing the offer back requirements.
>
> Furthermore, the 1986 and 1992 amendments to the Airport Authorities Act give no guidance to airport companies as to when they must consider airport land surplus

601. Briefing note for Minister of Transport, 2 October 2000 (doc G7(i)), p [2]
602. Bassett and Kay, 'Public Works Issues' (doc A211), pp 409–410
603. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2029)

and execute the offer back. Clearly, the Public Works Act 1981 could not have foreseen the privatisation forces of the mid-1980s. [Emphasis in original.][604]

This analysis by the Minister is a clear and important statement of the flaws in the Crown's actions in 1992–95. The Ministers who were responsible for these decisions had been very aware of the problem and the need to fix it. Land Information New Zealand (LINZ)[605] had considered whether to use the Airport Authorities Amendment Bill 1999 to introduce compliance measures instead of waiting for a full review of the Public Works Act:

> I am advised that Land Information New Zealand's interest in this Bill arose after Ministers in the previous government became concerned over the disposal of surplus Public Works Act land by Paraparaumu Airport Company. The former owners, Te Whanau A Te Ngarara, complained that they were not offered back the land and questioned the airport company's compliance with, and the enforcement of, the offer back provisions in the Airport Authorities Act 1966. Ministers were particularly concerned because of the associated potential for allegations of a contemporary Treaty breach and directed officials to address the problem of airport company compliance with their statutory offer-back obligations. The whanau has since lodged a Treaty claim with the Waitangi Tribunal.[606]

The select committee which heard Te Whānau a Te Ngarara's submission on an amendment to the Bill recommended against it:

> We carefully considered and received advice on one submitter's concerns about the 'offer-back' obligations in the Public Works Act 1981. We do not recommend that this bill amend the Airport Authorities Act 1966 to allow the Crown to prevent transfers of Public Works Act 1981 land unless the Crown is satisfied that an airport company has discharged its 'offer-back' obligations under the Public Works Act 1981. This is a very complex issue that we believe is best dealt with through the comprehensive review of the Public Works Act 1981 currently being undertaken by Land Information New Zealand.[607]

LINZ had earlier been in favour of using this Bill to provide a solution:

> In 1999 when the Paraparaumu situation was in the news, the Airport Authorities Amendment Bill was being progressed and officials in Land Information New Zealand

604. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2029-IMG2030)
605. DOSLI was replaced by LINZ in July 1996.
606. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2029)
607. Select Committee report, 6 July 2000, quoted in 'Report of the Transport and Industrial Relations Committee', p 50 (Mouat, papers in support of brief of evidence (doc G7(a)), p 137)

considered that this could be a vehicle to resolve the immediate problem involving airport companies.[608]

This solution was rejected by Cabinet in 1999, however, before the Bill was considered by the select committee, partly because 'Cabinet had directed that any new amendments were not to raise new policy issues or involve complex drafting'. Trevor Mallard agreed as Acting Minister for Land Information that the 'compliance and enforcement issues arising out of the divesting of Crown owned works to private providers, that have commercial incentives, do raise complex policy considerations'. Also, the Ministry of Transport had recommended to Cabinet in 1999 that 'it was not appropriate to amend the Airport Authorities Act to address airport companies' compliance with the offerback obligations'. In the Ministry of Transport's view, this was because of both the complexity of the issue and a concern that the Crown should act consistently between 'different classes of private provider'. A general solution was seen as necessary that would apply to all private providers.[609]

As a result, the Crown's review of the Public Works Act became the vehicle for providing a solution, as Trevor Mallard advised the Minister of Transport:

> Consequently, the compliance and enforcement issues now have to be considered in the review of the Public Works Act which is scheduled for completion in 2002. The Ministry of Transport supports LINZ in the wider review of the Public Works Act in which there will be a comprehensive and consistent approach to addressing these issues.
>
> I agree that the comprehensive review of the Public Works Act provides an opportunity to address, in a consistent manner, the now apparent compliance and enforcement shortcomings of legislation divesting Crown-owned works to private providers.[610]

By October 2000, a draft discussion paper had been prepared for public consultation on the review of the Public Works Act 1981. The paper included 'discussion on the compliance issues relating to s 40 and the disposal of surplus land' in respect of 'airport companies and other vendor agencies'. The Ministry of Transport reported that Te Whānau a Te Ngarara would have 'an opportunity through the consultation process to voice its concerns about the enforceability of offerback obligations on airport companies'.[611]

The Minister for Land Information, Matt Robson, announced the review in a press release on 14 January 2001, stating that it had been 20 years since the last

608. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

609. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

610. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

611. Briefing note for Minister of Transport, 2 October 2000 (doc G7(i)), p [3]

review. New Zealand had 'undergone significant economic and state sector reform' in the interim, and 'the law is clearly showing its age and needs to be overhauled'. The 'increasing importance of the Treaty of Waitangi has also put the Crown's land-related activities under greater scrutiny'. One of the questions for the review was: 'how should compliance be enforced, especially where former public works have been transferred to private organisations that continue to provide public services?'[612] The consultation paper suggested four possible options in answer to this question:

- registering a caveat on the title at the time of transfer to ensure that the obligations of the Public Works Act 1981 would be satisfied by the new private owner;
- transfer of the land to private companies in trust (rather than selling the freehold), so that it would revert to the Crown if no longer required for a public work, and the Crown would be responsible for disposal and offer-back obligations;
- legislative provision for the Crown to enforce offer-back obligations after transfer to private owners so as to ensure a 'consistent, transparent and fair mechanism', including empowering the Crown to 'invoke or enforce' the Act's disposal provisions if a private owner's 'actions' showed that the land was no longer required (but no move to dispose of it had been made); and
- retaining the present system in which the Crown's statutory offer-back obligations were passed on to the new private owners.[613]

Public consultation occurred from December 2000 to May 2001, including 17 hui with Māori groups. We have no information as to whether Te Whānau a Te Ngarara made a submission. LINZ reported that Māori submitters on this issue were strongly opposed to keeping the status quo:

> Opposition focused on it being the Crown that acquired the land so it should rightly be the Crown that retains the obligation to offer the land back. This argument was seen as particularly relevant in the case of Maori land as the Crown is the only body that currently has obligations under the Treaty of Waitangi.
>
> It was also proposed that passing the offer back obligations to the private provider could potentially result in a conflict of interests for the provider between their moral obligations and their commercial imperatives.[614]

There was strong support for the option of registering a caveat on the title, including from Māori, and the majority of Māori submitters also supported transferring the land to private owners in trust so that the Crown would remain responsible for offer-back requirements. Māori were also the strongest supporters

612. Minister for Land Information, 'Public Works Act Overdue for Overhaul', press release, 14 January 2001, https://www.beehive.govt.nz/release/public-works-act-overdue-overhaul

613. LINZ, *Review of the Public Works Act: Summary of Submissions* (Wellington: LINZ, 2001), pp 1, 67–69

614. LINZ, *Review of the Public Works Act: Summary of Submissions*, p 69

of a legislative provision to empower the Crown to enforce disposal of surplus land and offer-back requirements after sale to private buyers, so long as a Treaty clause was included in the new Act.[615] None of these options were retrospective, at least as phrased in the consultation process, and therefore would not have offered a specific remedy for Paraparaumu Airport. But the proposals eventually made to Cabinet in 2003 included that, wherever possible, 'the disposal provisions of the new legislation should apply retrospectively to land currently held for a public work.'[616]

The review of the Public Works Act was completed in 2003 and policy papers were submitted to the Cabinet Economic Development Committee in August 2003 but progress was slow because the Crown had other priorities. By 2005, the Public Works Act review had stalled and the introduction of new legislation was deferred.[617] By that time, on the specific issue of concern to us, the review had been overtaken by recommendations from the Transport and Industrial Relations Committee for specific action on Paraparaumu Airport. We consider the review and its proposals further below.

7.7.4 In search of remedies: district council zoning process

7.7.4.1 *PAL applies to KCDC for a plan change*

In 2000, the Acting Minister for Land Information advised that LINZ and the Ministry of Transport were 'investigating what recourse the Crown may have to other methods of ensuring Airport Companies' compliance with their legal obligations until the possible enactment of a new Public Works Act'.[618] Officials turned their attention to PAL's new plans for development of the airport, which appeared to suggest that a large amount of airport land was surplus to airport requirements. The Ministry of Transport reported to its Minister in October 2000:

> PAL has applied to the Kapiti District Council to have the land at the airport rezoned. Te Whānau [a Te Ngarara] has advised that it will challenge the application. Essentially PAL want the land rezoned to include residential, aviation residential and commercial aviation zones. It seems that of the approximately 130 hectares only 64 will remain in its current zoning. The focus on development of the airport land in the draft application raises issues about whether or not the company's offerback obligations under the PWA might be triggered. If so, we are concerned to ensure that PAL meets any such obligations.[619]

615. LINZ, *Review of the Public Works Act: Summary of Submissions*, pp 67–69

616. Minister for Land Information, 'Cabinet Policy Committee: 'Reviews of the Land Act 1948 and Public Works Act 1981: Proposed plan for consideration of policy proposals', 2005 (Crown counsel, documents provided in response to questions from the Tribunal, September 2019 (doc G7(f)), p [21])

617. Cabinet Policy Committee, minute of decision, 9 February 2005 (Crown counsel, documents provided in response to questions from the Tribunal, September 2019 (doc G7(g)), p [1])

618. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

619. Briefing note for Minister of Transport, 2 October 2000 (doc G7(i)), p [3]

The sale of the airport in 1995 coincided with the transition from the district scheme under the Town and Country Planning Act to the new Kāpiti Coast District Council (KCDC) plan under the RMA. The airport was zoned 'residential' in the old district scheme with a designation of 'airport' lying over top of the zoning category. With the transfer out of Crown ownership, however, the airport designation was removed. KCDC zoned Paraparaumu Airport as 'open land' in the proposed new district plan. During the sale process in 1995, one of the tenderers (it is not clear which one) objected to this zoning for the houses on Avion Terrace and the airport's Kāpiti Road frontage. The council agreed to change the open zone to residential for Avion Terrace and 'industrial/service' for the Kāpiti Road area. Any changes to existing uses outside these areas would require PAL to apply for a zoning change, which it did in June 2000.[620]

The PAL application wanted to change 17.12 hectares to a zoning of 'residential', which was clearly intended for housing development. A further 1.96 hectares would be zoned as 'industrial/service'. The remaining 112.86 hectares would be zoned 'airport' but divided into:

- aviation residential (23.43 hectares);
- general business (10.08 hectares);
- aviation recreation (5.69 hectares) and heritage (1.23 hectares);
- aviation industry and services (8.29 hectares); and
- core aviation (64.14 hectares).[621]

If granted, this rezoning would allow for a major redevelopment of the airport and (potentially) the sale of land for residential and business purposes. John Edwards of the Ministry of Transport met with Murray Cole on 27 September 2000 to discuss the zoning application and the concerns that had been raised with the Ministry by Te Whānau a Te Ngarara about PAL's offer-back obligations. Mr Cole advised that the company could not make decisions about whether any land was 'surplus' until the zoning application had been decided by the council. He also advised that PAL took its obligations under the Public Works Act 'very seriously', and that 'the company had followed its statutory obligations'. Mr Edwards noted that concerns had been raised about how PAL had 'dealt with offer-back in the past', and that one of the problems in particular was that 'it [the Ministry] didn't have any information on the process that the company had followed'. Mr Edwards also asked if PAL would be prepared to have its offer-back process 'peer reviewed by somebody like LINZ', which Mr Cole acknowledged could be a possibility in the future. This would have provided a voluntary means of Crown oversight since any compulsion was understood at that time to be missing from the Airport Authorities Act. On the issue of Te Whānau a Te Ngarara, Mr Cole noted that he had held meetings with them but could not obtain details about 'the links between the members of that group and former owners'.[622]

620. Woodley, 'Local Government Issues' (doc A193), pp 665–673
621. Woodley, 'Local Government Issues' (doc A193), p 678
622. John Edwards, file note of meeting, 27 September 2000 (Mouat, papers in support of brief of evidence (doc G7(c)), p 31)

7.7.4.2 *The Ministry of Transport files an objection*

Following the September meeting, the Ministry of Transport filed an objection with KCDC. The Crown's submission to the district council argued that PAL was planning to develop about 52 hectares of airport land for non-airport uses:

> It is clear that the residential sites and general business and industrial sites are not being developed for airport purposes. There is also an argument that the aviation residential site will not come within the definition of airport purposes.[623]

The Ministry opposed the plan change on the grounds that PAL had 'failed to satisfy its statutory obligations to undertake an offer-back process . . . in relation to the land being re-zoned'.[624]

PAL then met with the Ministry to ask it to withdraw the objection. Mr Edwards pointed out that land became surplus as soon as the owner no longer intended to use it for airport purposes rather than when the owner decided to sell it, and so the PAL application to KCDC had already triggered offer-back requirements, which should be carried out before the council decided on the zoning change. He recorded the Crown's position on this in a post-meeting letter to Murray Cole, stating:

> The reason for opposing parts of the application is that it strongly indicates that the company no longer intends to use some of the land at the airport for airport purposes. As you are aware, the land is subject to s 40 of the Public Works Act 1981 which requires it to be offered back to former owners and successors where it is no longer required for airport purposes. Whether the land is surplus or not for s 40 purposes is determined by the intention of the owner, either express or inferred from conduct rather than by actual sale of the land. The obligation to perform the offer back process rests with the company by virtue of the Airport Authorities Act 1966 under which the land was originally transferred to the company.
>
> We understand from our discussions with you that in relation to the relevant land, the company has not yet undertaken any offer back process. We therefore consider that the application (as regards the relevant land) should not proceed until the company has satisfied its s 40 obligations and ownership issues are determined. Until such time, the application cannot be said to meet the needs of the ultimate landowners and is, therefore, in the Ministry's opinion not an efficient use and development of natural and physical resources [under the RMA].[625]

The Ministry urged PAL to formally establish either that 'there are no former owners and successors to whom the land could be offered or alternatively that the

623. Secretary for Transport, submission, 6 November 2000 (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 64)

624. Secretary for Transport, submission, 6 November 2000 (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 64)

625. John Edwards to Murray Cole, 27 November 2000 (Mouat, papers in support of brief of evidence (doc G7(c)), p 32)

land does not need to be offered back by virtue of coming within the exceptions contained in s 40(2) of the Public Works Act'. If the company took that step and thus satisfied its section 40 obligations, the Ministry would withdraw its objection to the zoning change.[626] The essential problem for the Ministry, as the Crown interpreted the Act at that time, was that it had no power to enforce compliance with the Public Works Act, as the company was quick to point out. PAL responded:

> That is tantamount to a coercion on PAL to consider s 40 issues at this juncture, and is a misuse of the power of the Ministry and its responsible involvement in other PAL issues. PAL has no requirement to consider s 40 issues at this time. PAL will not submit itself to a review of its s 40 deliberations by either the Ministry or its external legal advisors when it [PAL] has the sole statutory and legal responsibility for s 40 issues.[627]

7.7.4.3 *Hearing commissioners consider objections*

KCDC appointed two commissioners to hear submissions on the proposed plan change.[628] The Ministry of Transport made an oral submission in support of its written objection, which highlighted the argument that an application for a plan change, where some of the land would be used for residential or general business purposes, was evidence that the land was no longer required for airport purposes. The submission summarised the courts' position on this issue as: the test of when land is no longer required for a public work is 'a question of fact involving an assessment of the land holding agency's intention in the light of the objective circumstances'. These could be a decision made by the agency that land is no longer required or 'an inference that the land is no longer required may be drawn from the conduct of that agency'.[629] In this case, the Ministry argued that an inference was justified by the plan change application. PAL's position that any decisions about surplus land would be made after the council's decision on zoning was inappropriate: '*the application clearly shows certain land not being required for a public work and therefore the offerback process must occur now*'. (Emphasis added.)[630]

The question arose, however, as to why this was an RMA matter? The Ministry argued that 'non-compliance with Public Works offerback process' meant that the proposed plan was not in accordance with the RMA's purpose of sustainable management. PAL had failed to 'comply with section 40' so those who had the right to own the land (if offered back) had not been identified, their interests had not been taken into account, and their 'social and economic wellbeing' was not considered. They might have different aspirations for the land than the proposed

626. John Edwards to Murray Cole, 27 November 2000 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 32–33)

627. Impact Legal to Secretary for Transport, 11 December 2000 (Mouat, papers in support of brief of evidence (doc G7(c)), p 35)

628. Woodley, 'Local Government Issues' (doc A193), p 678

629. Notes for an oral submission by the Ministry of Transport, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 67–68)

630. Notes for an oral submission to hearing commissioners, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 68–69)

zoning would allow. As a result, it would not be an efficient use and development of resources to continue with a plan change that might not 'meet the needs of the ultimate landowners'.[631]

The Ministry sought a council decision to either reject the proposed change or defer a decision until the section 40 issues could be resolved.[632]

Te Whānau a Te Ngarara also participated in the plan change process and made submissions in opposition to the proposed change. This submission noted that the 'descendants of the rightful owners' were not opposed to the continued operation of the airport in modern times. The 'massive grievance which has developed over these past (60) years' was one of a great number yet to be resolved, but this particular land grievance was significant because the land '*was in fact taken by "force" by the Crown* in comparatively modern time ie this century rather than last century'. Further 'retrenchment' of the original alienation had then been '*perpetrated* upon the descendants of the former Maori owners' when the Crown sold the airport to PAL instead of offering it back or returning it to them. The Crown had devised a scheme that enabled it to do this and effectively 'precluded Maori descendants from being able to claim or bid for this land'. A '*huge injustice*' remained in place and no council planning could occur until the fundamental issue of ownership was settled (emphasis in original).[633]

Te Whānau a Te Ngarara submitted that PAL had identified surplus land without offering it back, and their offer-back rights were supposed to have been protected in the Crown's sale of the airport to PAL. In their view, it was not appropriate for a plan change to 'designate what the current owners have planned for its development, leaving aside the burning issues of Maori ownership'. Te Whānau a Te Ngarara also objected to the proposal to zone about 112 hectares as 'airport' when a large part of that land was 'in fact going to be used for other purposes "disguised" as airport related'. The 'aviation residential', 'general business', and 'residential' classifications showed surplus land that would not be used for 'aviation/airport operations'. Finally, they argued that this plan change discriminated against them and '*rides across the known wishes of the tangata whenua*': 'Talking to us is not really consulting with us – dialogue does not necessarily translate into "participation" in the process, none of which has actually taken place.' (Emphasis in original.)[634]

In addition to the Te Whānau a Te Ngarara submission, two other Māori groups made submissions to the hearing commissioners. A group appeared called 'Ngati Komako Hapu', which represented three trusts: the Epiha me te Teira Ropu Charitable Trust of Paraparaumu, the Kaiherau Charitable Trust of Waikawa, and the Hoani Ihakara Charitable Trust of Waitara. Kura Taylor presented evidence on

631. Notes for an oral submission to hearing commissioners, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 69)

632. Notes for an oral submission to hearing commissioners, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 70)

633. Te Whānau a Te Ngarara, submission to KCDC, no date (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2026)

634. Te Whānau a Te Ngarara, submission to KCDC, no date (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2027-IMG2028)

behalf of this group, stating that they were the descendants linked to part Ngarara West B4, part Ngarara West B5, and part Ngarara West B7 that were acquired for the airport. The commissioners considered their issues to be identical in respect of section 40, and their opposition to the plan change was therefore dismissed (see below).[635] George Jenkins explained that a split had developed in Te Whānau a Te Ngarara, and that some 'former members' had left and identified themselves with Ngāti Komako.[636] This was partly because the membership of Te Whānau a Te Ngarara included descendants who were not legal successors. It also included members of the Puketapu hapū, for whom the whole of Ngarara West B was ancestral land.

Mr Manahi Baker presented submissions for the iwi organisation's environmental unit, 'Kapakapanui Te Ati Awa ki Whakarongotai'. Mr Baker's submission opposed the plan change on environmental grounds, arguing that any further development of the airport would have detrimental effects, especially to the Wharemauku Stream on the airport's boundary. The commissioners decided on this point that kaitiakitanga was not 'particularly relevant' given the transformation of the landscape that had already occurred in constructing the airport, and also noted that the Wharemauku Stream was a matter for the regional council to consider.[637]

The commissioners treated the issue of surplus land and offer-back obligations as a preliminary issue, which they dismissed as irrelevant because:

- The plan change proposed addresses zoning issues and questions relating to the appropriateness of certain activities occurring at the periphery of the operational airstrips and not land ownership. The issue to be addressed is therefore whether the proposed zoning change would be consistent with the purpose and principles of the Act.
- The zoning of land is permissive (s9 RMA) and does not in itself require a landowner to change the existing use of the land if he or she does not choose to take advantage of a new zoning, nor does it preclude a future application to change a zoning that has been achieved.
- The Kapiti Coast District Council as the district planning authority, has no jurisdiction to inquire into questions of land ownership by taking into account assertions made by former owners that portions of the airfield site should now be offered back to them. That is a matter for another forum.[638]

635. Paul Cavanagh QC and Stuart Kinnear, hearing commissioners, report, 20 December 2001 (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 40)

636. George Jenkins, brief of evidence (doc F41), p 14. Ngāti Komako are a hapū of Puketapu.

637. Cavanagh and Kinnear, report (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 39–40, 57–58)

638. Cavanagh and Kinnear, report (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 6–7)

The other forum referred to by the commissioners was the High Court,[639] but neither the Ministry of Transport nor Te Whānau a Te Ngarara tried that option. When the council confirmed the commissioners' decision, Te Whānau a Te Ngarara appealed to the Environment Court. The Ministry did not. Mr Mouat told us that 'there is information on Ministry files to indicate legal advice was sought from the Crown Law Office on potentially lodging an appeal to the Environment Court against the decision of the Kāpiti Coast District Council to accept the zoning change.'[640] Whatever the content of that advice, no appeal was filed by the Ministry. Claimant counsel submitted:

> The impotence of the Crown's involvement in the plan change proposal illustrates the complete lack of active protection mechanisms in place. The private airport company had the control and authority over the airport land. The Crown had passed the land over to private interests, and failed its Treaty partner in the process.[641]

According to the Crown's revised position in this inquiry, developed after its closing submissions (see section 7.2.5), there was in fact an alternative remedy to litigation. The Ministry of Transport argued emphatically in 2000 that 52 hectares of airport land was no longer required for airport purposes and that this land should be subject to a section 40 offer-back procedure.[642] The Ministry's submission to the RMA hearing commissioners stated that the application for a zoning change 'clearly shows certain land not being required for a public work and therefore the offer back process must occur now'.[643] The Crown's reinterpretation of the Airport Authorities Act in 2020 was that the Crown, not the company, should have made section 40 decisions for a Government work:

> The PWA empowers the Minister or the Chief Executive of LINZ to act under the PWA in respect of Government works. It follows that the powers in the PWA, including ss 40 and 41, are to be exercised by the Minister or the Chief Executive of LINZ in relation to land held for an airport operated or managed by an airport company because it is a (deemed) Government work.
>
> The Crown considers that this is reinforced by the purpose of the deeming provision s 3D of the AAA to ensure Crown involvement where land acquired under the PWA is then transferred to a private entity not accountable to the public in the same way as the Crown or local authorities.[644]

639. Crown counsel, supplementary closing submissions (paper 3.3.62), p 18
640. Mouat, answers to questions in writing (doc G7(h)), p [1]
641. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 22
642. See Secretary for Transport, submission, 6 November 2000 (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 64); John Edwards to Murray Cole, 27 November 2000 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 32–33).
643. Notes for an oral submission by the Ministry of Transport, no date (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), pp 68–69)
644. Crown counsel, memorandum (paper 3.2.1078), p 5

Under the logic of the Crown's argument that 'powers under the PWA, including ss 40 and 41, are to be exercised by either the Minister or Chief Executive [of LINZ] in relation to the Kāpiti Coast Airport',[645] the decision to offer back land (or make an exception) should have been made as soon as the Crown decided that airport land had become surplus with the plan change application in 2000.

As discussed in section 7.6.3, the Acting Minister of Land Information stated in 2000 that the amendments to the Airport Authorities Act in 1986 and 1992 'give no guidance to airport companies as to when they must consider airport land surplus and execute the offer back'. Nor did the Public Works Act 1981, which 'could not have foreseen the privatisation forces of the mid-1980s'.[646] When the Crown consulted on amending the Public Works Act in 2000–01, one of the Crown's proposals was that the legislation be amended to empower the Crown to 'invoke or enforce' the Act's disposal provisions if a private owner's 'actions' showed that the land was no longer required but no move had been made to sell it had been made.[647] Nothing came of this proposal (as discussed later), but this was considered necessary at a time when the Crown understood that airport companies made these section 40 decisions.

If the Crown had understood the Act correctly back in 2000, therefore, the Crown would have undertaken an offer-back process for the 52 hectares it considered surplus at that time, unless it was considered impracticable, unreasonable, or unfair to offer the land back. This could have made a very big difference to outcomes for the claimants. Instead, the Minister for Land Information stated in 2000 that the Crown had transferred the land to PAL without any oversight or enforcement mechanisms. This left the Ministry of Transport with no other alternative but to make submissions about public works issues in an RMA process. Whatever the strength of the argument on its own merits, the Ministry could not persuade the hearing commissioners that section 40 matters were RMA matters. The submissions of Te Whānau a Te Ngarara and the Ngāti Komako trusts failed for the same reason.

In supplementary closing submissions, Crown counsel emphasised the evidence given to the commissioners by Murray Cole, managing director of PAL, to suggest that land was not in fact surplus in 2000, despite the submissions made by the Ministry of Transport to the commissioners at the time. The Crown quoted the commissioners' report of Mr Cole's evidence:

> The airport's continued existence is dependent upon the company achieving an adequate stream of income. The present low number of chargeable aircraft movements at the airport and the need to set landing charges at a competitive level means that the company has to derive significant income from other than landing charges. For this

645. Crown counsel, memorandum (paper 3.2.1078), p 6
646. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c), NZTA folder, IMG2029-IMG2030)
647. LINZ, *Review of the Public Works Act: Summary of Submissions*, pp 67–69

> reason the company seeks to encourage the development of a range of activities at the airport.[648]

According to Crown counsel, this statement supported the evidence of Nigel Mouat 'concerning the use of airport land to ensure the commercial viability of the airport'.[649] One of the Crown's main arguments in this inquiry was that, after the sale of Avion Terrace,

> none of the land on which Paraparaumu Airport currently operates or the commercial areas surrounding the Airport has ever been declared surplus to the needs of operating an airport (which *includes the use of land to ensure the financial viability of an operational airport*). Therefore, the offer-back rights of former owners have never been triggered in relation to those remaining parcels of land. [Emphasis added.][650]

As noted, this argument runs directly counter to the submissions of the Ministry of Transport to the hearing commissioners in 2001, which argued strongly that 52 hectares of airport land was in fact surplus to airport requirements, and that this could be inferred from the airport company's actions in applying to change the zoning. Also, it was never a tenet of the Public Works Acts that a public work had to be commercially viable, or that land not needed for the purposes of a public work could be retained to make that work commercially viable, and the Crown had not sought to amend the Public Works Act to reflect the changes brought about by corporatisation. Instead, the corporatisation of the 1980s and 1990s, in which many public works became businesses and had to survive in the commercial world, was a policy laid over the top of the Public Works Act 1981. The Act was not designed for this, and hence the offer-back rights of the former owners' successors were in fact fundamentally altered for Paraparaumu Airport without actually amending the Act, despite Justice Neazor's statements in 1995:

> If the second defendant [the company] tries to dispose of it, or if in the hands of the second defendant events occur which would trigger the entitlement under s 40 if the land was still held by the Crown, the plaintiffs' rights would be unchanged. Whatever rights they have today [prior to sale] they would have then [after the sale].[651]

In practical terms, if the Crown had carried out its section 40 obligations in 2000, then LINZ may have considered it impracticable or unreasonable to offer the 52 hectares of land back because, in the absence of a commercial income from this land, the return of the land might have led to the closure of the airport. As

648. Cavanagh and Kinnear, report (Crown counsel, papers in support of supplementary closing submissions (paper 3.3.62(a)), p 14; Crown counsel, supplementary closing submissions (paper 3.3.62), p 17
649. Crown counsel, supplementary closing submissions (paper 3.3.62), p 17 n
650. Crown counsel, closing submissions (paper 3.3.60), p 60
651. Neazor J, 30 June 1995, Wellington High Court 149/95 at 7 (Watson, casebook (doc F5(h)), p 28)

discussed earlier, the Crown's sale of PAL put no restrictions on the continuation of the airport as a public work, merely that it should operate for so long as it was commercially viable. The purpose of the Public Works Act and the strength of the section 40 protections had thus been undermined by the terms of the sale to the detriment of the former owners and their successors. As will be recalled, the Crown had been anxious in 1991–95 not to do anything that might require it to bail out an uneconomic airport company or to buy back and operate the airport itself.

7.7.4.4 *Appeals to the Environment Court, 2002*

Following the commissioners' hearing and the KCDC decision to grant the requested plan change in December 2001, the Ministry took no further action – either legally or with PAL – to determine whether land was surplus to airport requirements and should be offered back. Te Whānau a Te Ngarara and the Epiha me Teira Ropu Charitable Trust did take an appeal to the Environment Court in 2002. George Jenkins made a submission to the court, mostly repeating the section 40 arguments made to the hearing commissioners. He also raised an additional issue: rezoning would increase the value of the land to the point where the descendants of the former owners would not be able to buy it if offered back, which would allow the airport company to gain the whole benefit of commercial development once the land was rezoned. The appeals from both Māori groups were withdrawn during mediation and not heard by the court because their issues were not considered relevant to the RMA.[652]

Having lost in the planning process, Te Whānau a Te Ngarara looked elsewhere for a remedy and hoped they had found one in the petition being prepared in Paraparaumu to try to save the airport, which was considered under threat from developers at the time. We turn to that next.

7.7.5 In search of remedies: petitioning Parliament

7.7.5.1 *The petition of Ross Sutherland and 584 others*

The petition of Ross Sutherland and 584 others was presented to Parliament in March 2002 and referred to the Transport and Industrial Relations Committee. The petitioners asked for legislation to ensure that:

- Paraparaumu Airport remained fully operational;
- no airport land was sold without consultation with the community and the permission of the regional council;
- no airport land was sold without it being offered back to the former owners; and
- the promises made by the current owner at the time of sale would be carried out.[653]

Te Whānau a Te Ngarara supported this petition, providing evidence and appearing before the select committee. George Jenkins provided an affidavit to the

652. Woodley, 'Local Government Issues' (doc A193), pp 684–686
653. Cabinet Legislation Committee, minute of decision, 29 July 2004 (Crown counsel, documents provided in response to questions from the Tribunal, September 2019 (doc G7(e)), p 1)

committee and a letter from Matthew Love-Parata to Ross Sutherland was also produced in evidence.[654] The petitioners also submitted evidence from Rodney Moffat on behalf of the descendants of R G MacLean (former owner of Ngarara West B7 2A).

7.7.5.2 *Independent specialist adviser's report, March 2004*

The select committee appointed a barrister, Kim Murray, as an independent specialist adviser to provide a report on the complex evidence and issues before the committee. Mr Murray was asked to investigate and report on 10 issues of concern to the committee. On the Public Works Act issue, the terms of reference for the specialist adviser posed the question: 'What subsequent transfers of land have occurred and whether any such sale process included "offer back" of land considered surplus to requirements by the airport owners to the original owners?'[655] The evidence and submissions on this issue were focused on how the airport company met its section 40 obligations in the disposal of land at Avion Terrace and Kaka Road.[656]

In terms of the law, Mr Murray noted that section 3A(6A) of the Airport Authorities Act 1966 was inserted in 1992 on the advice of DOSLI (for DOSLI's advice, see section 7.6.4.4). The 1992 amendment 'makes it clear that the new airport company landowner is bound by sections 40 and 41 of the Public Works Act', as Justice Neazor confirmed in his 1995 judgment (see above).[657] The essential problem, however, was that section 40 gave the decision-maker discretion as to whether to offer the land back. If the airport company declined to offer land back, as occurred with Avion Terrace, the only remedy for former owners was to take legal action in the High Court. Mr Murray drew two conclusions from the evidence:

> The two essential points that seem to emerge from the evidence overall is that the tests for whether an offer-back needs to be made is a subjective one which allows considerable scope for an airport company to avoid making an offer-back at all even though land may have become surplus to airport requirements. Furthermore, although Public Works Act issues can be tested in Court proceedings, the cost and difficulties of such litigation mean that in some instances legitimate rights could be infringed with impunity.[658]

654. 'Report of Transport and Industrial Relations Committee', pp 46, 47, 49 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 133, 134, 136)

655. 'Report of Transport and Industrial Relations Committee', p 45 (Mouat, papers in support of brief of evidence (doc G7(a)), p 132)

656. 'Report of Transport and Industrial Relations Committee', pp 45–52 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 132–139)

657. 'Report of Transport and Industrial Relations Committee', pp 51–52 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 138–139)

658. 'Report of Transport and Industrial Relations Committee', p 51 (Mouat, papers in support of brief of evidence (doc G7(a)), p 138)

These are both important points. The first point echoed the statement by the Acting Minister for Land Information, Trevor Mallard, that the Public Works Act 1981 had not been designed to be operated by private companies. Also, as noted in sections 7.6.4–7.6.5, the Ministry of Transport's assurances to Māori in 1993–95 never explained that there were exceptions to the offer-back requirement if the decision-maker considered that it was 'impracticable, unreasonable, or unfair' to offer the land back to former owners or their successors. The legislation made this a unilateral decision without any requirement for consultation. The second point is that the expense of proceedings in the High Court, especially with the prospect of appeals or the awarding of costs, meant that (as the specialist adviser put it) 'in some instances legitimate rights could be infringed with impunity'. This point is in contrast to that of the Crown in the present inquiry, in which Crown counsel submitted that this 'legal remedy [was] available to the original owners and their successors at all times', and that the Crown had relied on the existence of this remedy.[659]

In terms of a legislative remedy, the specialist adviser noted that the Transport and Industrial Relations Committee had earlier declined to recommend an amendment to the Airport Authorities Act. This was in respect of the Airport Authorities Amendment Bill (No 2). In 2000, the committee had rejected the submission of Te Whānau a Te Ngarara to include an amendment empowering the Crown to stop sales by airport companies unless the Crown was satisfied the section 40 offer-back obligations had been met (see section 7.7.4). The committee had instead relied on the Public Works Act review in progress at that time. In a submission of 9 December 2002, the Ministry of Transport confirmed that the review was still ongoing and could still provide a remedy in the case of Paraparaumu Airport:

> In the meantime, issues surrounding the adequacy of the Public Works Act 1981 in these types of situations are being addressed through the Public Works Act Review currently being conducted by Land Information New Zealand. The Ministry is also involved in this process. This Review may decide that legislation is needed to clarify the application of the Public Works Act to airport companies such as Paraparaumu Airport Ltd.[660]

We consider the review further below.

On the issue of Treaty claims, the specialist adviser was asked to report on 'whether any potential Treaty of Waitangi claims exist'.[661] Mr Murray noted that the Government started to take account of Treaty claims in respect of the airport from July 1991. He summarised the advice of Manatū Māori at that time, which was that the Crown should not sell the airport until Treaty claims were settled. Given that it

659. Crown counsel, supplementary closing submissions (paper 3.3.62), p 15
660. 'Report of Transport and Industrial Relations Committee', pp 50–51 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 137–138)
661. 'Report of Transport and Industrial Relations Committee', p 53 (Mouat, papers in support of brief of evidence (doc G7(a)), p 140)

would be 'unreasonable' to delay the sale, however, Manatū Māori recommended the amendment of the Airport Authorities Act to provide for memorials on titles along the same lines as for SOEs (see section 7.6.3.4). The Ministry of Transport had advised Cabinet against such an amendment on the grounds that a comprehensive policy should be developed first, there would be implications for airports that had already been privatised, and the Crown would not own the airport company (unlike for SOEs). In the event, 'no provision was made for satisfying Treaty claims' when Paraparaumu Airport was sold in 1995. Mr Murray noted the explanation given in the Ministry's memorandum for tenderers: the Crown had already discharged its Treaty obligations by extensive consultation with affected Māori before offering the airport for sale. Specific airport claims had since been filed (Wai 609 and Wai 876).[662] Mr Murray commented:

> These claims will have to be progressed through the Waitangi Tribunal and resolved on their merits but it is clear from the Ministry of Transport Information Memorandum that the airport land has now passed into private ownership and no reservation was made to enable Treaty claims to be satisfied by return of airport land.[663]

The specialist adviser did not consider any details about the consultation undertaken by the Ministry and offered no comment, other than pointing out that no SOE-style memorials had been placed on the airport title.[664]

Mr Murray was also asked to report on the district plan changes that had occurred as a result of PAL's application (see section 7.7.4). Mr Murray noted that PAL had shortened the crosswind runway against the recommendations of the hearing commissioners. PAL had appealed to the Environment Court on this (and other) issues, and KCDC had lacked the financial resources to oppose PAL's appeal in the court. The shortening of the runway had freed up land for either sale or lease for non-aviation purposes to bring in more rental income. This was a decision PAL was entitled to make: 'It is implicit in a sale to private owners that those owners will make cost benefit decisions about the reduction or extension of operational areas of an airport.'[665]

The specialist adviser also noted that the sale of land at Avion Terrace and Kaka Road had no perceptible impact on airport operations. The district plan change, however, meant that 17.12 hectares of airport land would be rezoned as residential,

662. 'Report of Transport and Industrial Relations Committee', pp 53–54 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 140–141)

663. 'Report of Transport and Industrial Relations Committee', p 54 (Mouat, papers in support of brief of evidence (doc G7(a)), p 141)

664. 'Report of Transport and Industrial Relations Committee' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 140–141)

665. 'Report of Transport and Industrial Relations Committee', pp 56–58 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 143–145)

and 1.96 hectares rezoned as 'Industrial/Service'.[666] 'This would be one clear indication', Mr Murray commented, 'that these [rezoned] areas of land are no longer required for airport purposes and the offer-back obligation would apply.'[667] PAL had agreed with KCDC that none of the land zoned as residential would be subdivided until a water supply was available for new housing. But Mr Murray advised that the issue of surplus land was not straightforward and required separate legal analysis that was outside the scope of the specialist adviser's report. Mr Murray added that a *sale* of any of the rezoned land would 'potentially trigger the offer-back obligation in the terms of s 40'. Mr Murray also commented that PAL's development plans were very similar to those proposed by Landcorp back in 1999 (see section 7.6.4.1). Overall, it appeared to Mr Murray that surplus land had been identified as a result of the rezoning for residential and industrial purposes, but he was not prepared to draw any firm conclusions about whether an offer-back was now required by law.[668]

7.7.5.3 *Select committee report and recommendations, May 2004*

The Transport and Industrial Relations Committee issued its report in May 2004, after consideration of all the evidence and submissions as well as the specialist adviser's report. The committee assessed Māori interests solely in terms of former owners and offer-back obligations, giving no consideration to Treaty claims or the issue of SOE-style memorials on the title. On the offer-back obligations, the committee commented:

> It appears that one assumption made by the Ministry of Transport during the sale process was that the interests of Māori and other former owners of airport land could be protected through the Public Works Act, sections 40 and 41; this despite evidence that this may not have been so. Our adviser's report clearly identifies that this optimism has proved to be unfounded, despite a new section 3A(6A) being inserted in the Airport Authorities Act in 1992. Statutory amendments are required to make this system more workable and effective. This advice has led to our recommendations on this matter.[669]

The committee made a number of criticisms of the sale process and the failure of the Crown to put any safeguards around the continued operation of the airport. Its final conclusions on the Public Works Act issues were:

666. 'Report of Transport and Industrial Relations Committee', pp 55–59 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 142–146)

667. 'Report of Transport and Industrial Relations Committee', p 59 (Mouat, papers in support of brief of evidence (doc G7(a)), p 146)

668. 'Report of Transport and Industrial Relations Committee', pp 59–60 (Mouat, papers in support of brief of evidence (doc G7(a)), pp 146–147)

669. 'Report of Transport and Industrial Relations Committee', p 11 (Mouat, papers in support of brief of evidence (doc G7(a)), p 98)

- The interests of former owners of the land were known not to be adequately protected by the Public Works Act and subsequent sales of airport land have given rise to unfortunate controversy between the representatives of former owners and Paraparaumu Airport Limited.
- Māori interests were investigated by the ministry at the time of sale. It was wrongly assumed that the interests of former Māori owners would be protected through s 40 of the Public Works Act on the disposal of any surplus land.[670]

Having identified these flaws in the Crown's sale of Paraparaumu Airport, the committee recommended urgent action. This included amendments to sections 40–41 of the Public Works Act to clarify the offer-back provisions in relation to land no longer required for airport purposes so as to 'facilitate enforceability and certainty in application'. Amendments would also be necessary to establish 'clear objective criteria for determining whether private airport owners are requested to make an "offer back" of land they have deemed surplus to requirements'. The committee noted that if there would be any delay in amending the Public Works Act, then the Airport Authorities Act should be amended to achieve the desired result. Also, the amendments should not await the completion of the long-running review of the Public Works Act: 'We consider that our recommendations should be implemented urgently and need not be delayed pending reform of the law relating to public works generally.'[671]

These recommendations, however, were potentially impacted by others. The committee recommended that the Airport Authorities Act be amended so that airport land could not be sold for non-airport purposes unless the Minister of Transport had 'completed a study of the national and regional public interest considerations relating to the proposed sale'. If the study showed 'significant public interest concerns', then the Act should be amended to require that the land be offered first to the Crown prior to sale. The Crown would reserve it for present or future airport use.[672] Since this would be a standing qualification on the offer-back provisions, it could have had a significant impact on the interests of former owners and their successors if acted upon by the Crown.

Finally, the committee recommended an inquiry into the sale process,[673] which the auditor-general undertook in 2005.

We turn next to consider the Crown's response to the committee's recommendations, especially in terms of urgent amendments to the Public Works Act 1981 and the Airport Authorities Act 1966.

670. 'Report of Transport and Industrial Relations Committee', p 12 (Mouat, papers in support of brief of evidence (doc G7(a)), p 99)

671. 'Report of Transport and Industrial Relations Committee', p 3 (Mouat, papers in support of brief of evidence (doc G7(a)), p 90)

672. 'Report of Transport and Industrial Relations Committee', p 3 (Mouat, papers in support of brief of evidence (doc G7(a)), p 90)

673. Report of Transport and Industrial Relations Committee', p 3 (Mouat, papers in support of brief of evidence (doc G7(a)), p 90)

7.7.6 Public Works Act reform and the Crown's response to the select committee recommendations

7.7.6.1 *Cabinet's decision on the select committee's recommendations*

The Government's response to the select committee's recommendations was noted by Cabinet in July 2004. The response on the recommended amendments to the Public Works Act was:

> [A] major review of the Public Works Act has been completed by LINZ, which has considered all relevant aspects, including the responsibility for the statutory offer back obligation when public works, such as airports, have been transferred to a private provider . . .[674]

The committee had specifically recommended against subsuming its proposed amendments in this review, but the Crown's view at the time was that the issue had already been addressed in the proposals arising from the review.

7.7.6.2 *Proposed reforms arising from the Public Works Act review*

The Public Works Act review (discussed in section 7.7.3) was completed in 2003 but Cabinet deferred consideration of the proposed reforms in July 2003 while other policy initiatives were progressed. In December 2004, Cabinet invited the Acting Minister for Land Information to resubmit the policy proposals in early 2005. By this time, the proposed reforms had been combined with a review and proposals to reform the Land Act 1948. An expert group, Te Roopu Arataki, provided a Māori 'perspective' during the review of the Public Works Act and produced an independent report, although this was not provided to the Tribunal.[675]

The Crown filed a copy of the February 2005 Cabinet paper, which contained an overview of the proposed Public Works Act reforms. The Crown's intention was to introduce a new omnibus measure entitled the Land Acquisition, Management and Disposal Bill, which would proceed to a select committee later in 2005. The Cabinet paper introducing the major reform proposals noted that three of the proposals were 'potentially controversial'. All three are relevant to the matters before us. First, the offer-back requirement on general land would be limited to 30 years after its acquisition for a public work but this limitation would not apply to Māori land. Secondly, there would be greater protections for Māori land and for general land in which there was a significant Māori interest. Thirdly, a central control agency would be established to 'ensure consistent and good administration of the legislation by users'.[676] Aside from these potentially controversial matters, LINZ believed that the reforms did not 'represent a significant departure from the

674. Cabinet Legislation Committee, minute of decision, 29 July 2004 (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(e)), p 2)

675. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981', 7 February 2005 (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [4])

676. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: proposed plan for consideration of policy proposals', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), pp [9]–[10])

well-established principles underpinning public works legislation' while 'striking a better balance between landowners' rights and the public good.'[677]

In this chapter, we focus on the proposals most relevant to the Paraparaumu Airport claims. The Crown wanted to address a number of key issues in the Bill, including 'some recommendations of the Waitangi Tribunal on the review of public works legislation in order to stem future grievances', and 'Treaty of Waitangi obligations by way of explicit provisions relating to the acquisition, holding, management and disposal of land that refer back to one Treaty clause.'[678] The proposal was to include a Treaty clause in the Bill that would refer to provisions that impacted on Māori and were in concurrence with the Treaty rather than leaving Treaty obligations to one 'overarching Treaty clause'. The Treaty clause in the New Zealand Public Health and Disability Act 2000 was referred to as an example.[679] Section 4 of that Act stated:

> In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Maori, Part 3 provides for mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services.

In addition to a Treaty clause and a strong emphasis on Treaty obligations, the Land Acquisition, Management and Disposal Bill would address 'issues raised by the increasing provision of public works by private entities made possible by the state sector reforms of the mid 1980s'. The Government also wanted to reduce the risk of litigation by introducing 'clear legislation' for the disposal of surplus land.[680] All of these reforms had potential to improve the situation in respect of Paraparaumu Airport and the section 40 offer-back obligations. The new Act, for example, would clarify that '[s]tatutory responsibility for the decision-making associated with the offer back obligation should remain within the Crown/local authority framework while implementation of the decision and all costs will rest with the private sector provider.'[681] This would have resolved the perceived

677. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [13])

678. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [15])

679. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [25])

680. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [15])

681. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [22])

problem with section 3A(6A) of the Airport Authorities Act 1966 that Te Whānau a Te Ngarara had been seeking since 2000.

In terms of specific reforms to the system for disposing of surplus land, submissions from Māori in the consultation process focused on 'failure, restrictions and delays in offer back arising from breach of statutory obligations; the exemption [to offer-back] provisions; or the requirement for the land for another public work'.[682] Increasing litigation over offer-back failures was a key driver of the review and proposed reforms. The new framework for disposal was designed to meet the Crown's Treaty obligations, protect former owners by ensuring that offer-back obligations were met, provide clarity on what would trigger an offer back, and provide more certainty about the date of valuation for an offer back. The 'underlying equitable principle to offer back land that was acquired compulsorily (or under a shadow of compulsion)' would also underpin the framework. The new disposal provisions would be retrospective 'wherever possible'; that is, they would apply to land currently held for a public work.[683]

As noted above, the offer-back provisions for general land would expire within 30 years of the taking, whereas the 'significance and importance' of Māori land was 'such that a sunset clause should not apply to the offer back obligation'. Also, the offer-back obligation would no longer be limited to former owners and their immediate successors. The 'reach of the offer back' would be extended to 'present day successors', which would apply to both general land (for 30 years) and Māori land. In addition, if the former Māori owners or their successors could not repurchase the land, there would be a second offer back to 'hapu/whanau'. Also, the Minister proposed 'reducing the wide exemptions to offer back to those of impracticability, and in such cases there may be practical considerations to instead amalgamate it with the adjoining land'.[684] In our view, these important amendments could have remedied key problems facing the claimants in respect of Paraparaumu Airport. The claimants in this inquiry were particularly aggrieved by the limitation of offer-back rights to successors in title which these proposed reforms would have abolished. Further, the provision for a second offer back to the hapū would have recognised the impact of the Crown's native land laws and the individualisation of title.

Some of the reforms that LINZ proposed to Cabinet could have been less beneficial to the claimants but were intended to reduce the risk of litigation, presumably considered necessary to bring the Act more into synch with corporatisation and the management of public works by businesses. The Minister proposed to simplify

682. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [20])

683. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [21])

684. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [21])

the issue of when land became surplus: an offer-back requirement would only be triggered by a decision to dispose of the land.[685] Valuation for repurchase of the land would be set at the date at which the offer back was made; the Cabinet paper did not mention whether the discretion of the Chief Executive of LINZ to accept a lower price would remain in the new Act. These two proposals meant that it would no longer be possible to *infer* that land was surplus because it was being used for purposes other than the purpose for which it was taken. The airport company would have freedom to develop and lease land for non-aviation purposes without any implication that the land was surplus to airport requirements and should be offered back to its former owners, and improvements could put the price well beyond what the former owners could afford. It was not intended to have these effects, however, and the Minister proposed:

> Improvements (that are associated with the public work and run with the land) and development or rezoning of the land when it is no longer required for the public work are problematic in that they can raise the price beyond the purchasing capacity of the former landowner. Officials consider that the acquiring agency should not further develop the land. In the case of improvements on the land, parties should be able to negotiate a mutually acceptable solution that could include such other matters as a discount or their removal but a mandatory requirement to this effect would be too onerous.[686]

Former owners would also be able to apply once a year to a 'land holding authority' to seek that it 'review the need for the land and resolve to dispose of it'.[687] The Minister's intention with these proposals was to meet Treaty obligations and better protect the rights of former owners in the disposal of land taken compulsorily while still maintaining the ability of the Crown, local authorities, and private providers to retain land for public works. Criteria for taking land compulsorily and for transferring land from one public work to another (instead of offering it back) were going to be inserted to redress concerns on those points as well.[688]

In sum, the key changes in the new Act would include:

- a Treaty of Waitangi clause;

685. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [21])

686. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), pp [21]–[22])

687. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), p [21])

688. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), pp [17]–[23])

- offer-back obligations for Māori land extended to all successors (no longer limited to one generation) and a second offer back to the whānau or hapū if the former owners could not repurchase the land;
- the Crown would decide whether an offer back should be made in the case of land that had been transferred to private providers, including airport companies;
- the exceptions to the offer-back requirement would be reduced to one (impracticability); and
- land would only become surplus, triggering the offer-back requirement, when the agency decided to dispose of it, although the former owners and their successors would have the right to apply each year for a review as to whether land was still necessary to the requirements of the public work.

If Cabinet had approved these reforms, the new Act could have been of crucial benefit to the claimants with the possible exception of the narrower definition of surplus land. On 9 February 2005, however, Cabinet noted the proposals in the Cabinet paper discussed above but deferred consideration of the Public Works Act reforms 'for the time being'. The Minister for Land Information was invited to report back separately on the proposed changes to the Land Act 1948.[689] In the event, this deferral turned out to be permanent and none of the reform proposals discussed in this section were carried out. This was a significant missed opportunity for the Crown to have addressed some key problems facing the claimants, who had put their faith in the petition and the select committee inquiry to obtain a remedy. George Jenkins told us that all attempts to obtain redress had proved futile: 'Even our appearance before a select committee was found to be a total waste of time and resources.'[690] As discussed above, Cabinet decided in 2004 not to implement the Transport and Industrial Relations Committee's recommendations on Public Works Act issues because the necessary reforms had already been addressed in the proposals arising from the review. Once the major overhaul of the Act was abandoned, the Crown did not reconsider or act upon the committee's recommendations for specific amendments to the Public Works Act 1981.

7.7.6.3 *The member for Otaki's Bill*

The Airport Authorities (Sale to the Crown) Bill was introduced in 2006 to address some of the Transport and Industrial Relations Committee's recommendations but it did not provide any kind of remedy for the claimants because, as claimant witness Bridget Mitchell explained, it was withdrawn in 2008.[691] Darren Hughes, the member for Ōtaki, introduced a members' Bill to assist his constituents who had filed the 2002 petition, both the wider community (which wanted the airport kept open) and Te Whānau a Te Ngarara).[692] Under this Bill, land that

689. Cabinet Policy Committee, minute of decision, 9 February 2005 (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(g)), p [1])
690. George Jenkins, brief of evidence (doc F41), p 11
691. Bridget Mitchell, brief of evidence (doc F7), pp 8–9
692. These Bills were previously called private members' Bills.

an airport company considered surplus would be offered first to the Crown so that it could be reserved for airport purposes. If the Crown declined to buy, then the airport company would carry out its offer-back obligations under the Public Works Act. In terms of meeting Māori concerns, the Bill included a provision that the company must consult the Minister when making offer-back decisions under section 40(2) of the Act – these included decisions on whether an exception to the offer-back requirement was justified and whether to offer the land back at less than market value.[693]

This Bill would have provided a partial remedy, at least in respect of *enforcing* offer-back provisions, which had been a major concern for the claimants. The Minister would have to be consulted about whether an exception could be made and what price should be offered. But its utility to the claimants was limited compared to the more far-reaching reforms proposed to Cabinet in 2005 arising from the Public Works Act review. In any case, the 2006 Bill had to be withdrawn without gauging whether the Government would support it because Darren Hughes was appointed a Minister. He notified the Transport and Industrial Relations Committee that he would withdraw the Bill once it was reported back from the committee.[694] This was because Ministers cannot propose members' Bills.

7.7.6.4 *The Māori Party's Bill*

There was another potential opportunity for a remedy in 2009, when the Māori Party introduced the Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill. Te Ururoa Flavell, the member for Waiariki, spoke at the introduction of the Bill. He referred to the long history of injustices arising from the Public Works Acts which had resulted in many Treaty claims about public works takings, including the issues raised by Te Whānau a Te Ngarara:

> We learnt about the impact of the legislation on the whānau associated with the Paraparaumu Airport lands, Te Whānau a Te Ngārara Inc. The airport land was taken by the Government under the Public Works Act to build a Second World War aerodrome. It was then sold to private interests by tender, with the tender limited to people participating in the aviation industry, for goodness' sake![695]

Mr Flavell also noted that the review of the Public Works Act had produced no reforms at all, despite the strong Māori call for action in the consultation process, hence the need for the Bill:

> The last big round of consultation was held throughout 2001, and resulted in a series of policy options that appear to have been 'deferred', or filed away in the back

693. Airport Authorities (Sale to the Crown) Amendment Bill 2006, cl 5
694. 'Airport Authorities (Sale to the Crown) Amendment Bill, Report of the Transport and Industrial Relations Committee', no date (2007), p 2, https://www.parliament.nz
695. Te Ururoa Flavell, 17 June 2009, NZPD, vol 655, p 4419

drawer. This is an issue, then, that has been parked for many years, yet an issue that has never ever been resolved.

. . . . .

In the 2001 review, Māori wanted land to be offered back in all cases, preferably at less than the current market value or at no cost. There was also a call for compensation, because with that land the acquiring authorities had also acquired the benefit of that land use. We expected that the Crown would act in good faith, be well informed, and redress any grievances in a timely manner, but, as the history record proves, the Crown has failed to respect Treaty interests, and in doing so has neglected the need to recognise and protect the rangatiratanga of the claimants who have been affected by the legislation.[696]

The Māori Party's Bill proposed to compensate for the Crown's failure to introduce reforms following the 2000–03 review of the Public Works Act. It would amend section 40 of the Public Works Act in various ways:

- the ability to use surplus land for another public work without offering it back to the former owners would be abolished, and land currently held which was not being used for the purpose for which it was taken would have to be offered back;
- the exceptions to the offer-back requirement – that it would be impracticable, unreasonable, or unfair to offer the land back, or the land had changed too significantly in character – would all be abolished; and
- land taken without paying compensation would be offered back with no payment.[697]

Also, a new section would be inserted to cover situations where land had not been used, or was no longer being used, for the purposes for which it was acquired. Former owners or their successors could apply to the Land Valuation Tribunal for a solatium (compensation) payment for the loss of the land and/or the loss of opportunities associated with the land.[698]

The Bill passed its first reading in the House and was referred to the Local Government and Environment Committee.

The main way in which this Bill could have assisted the claimants in this inquiry was the removal of all exceptions to the offer-back requirement. Te Whānau a Te Ngarara, however, were also concerned about the limitation of offer-back requirements to successors in title, and hoped that this Bill could be amended to change the Public Works Act definition of successors. In their joint brief of evidence, Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill told us:

696. Te Ururoa Flavell, 17 June 2009, NZPD, vol 655, pp 4419, 4420

697. Public Works (Offer Back of and Compensation For Acquired Land) Amendment Bill 2007 (2009), cl 5; LINZ, departmental report to the Local Government and Environment Committee, February 2010, pp 2–3, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLGE_ADV_00DBHOH_BILL8033_1_A35197/land-information-new-zealand-departmental-report

698. Public Works (Offer Back of and Compensation For Acquired Land) Amendment Bill 2007 (2009), cl 6; LINZ, departmental report to the Local Government and Environment Committee, p 3

> We had instructed our lawyer Leo Watson to try and remedy this by making submissions to the Select Committee which was hearing submissions on amendments to the Public Works Act. A copy of his submission on our behalf in August 2009 . . . refers to the unfairness of this 'successor in title' rule and uses the airport as an example. Nothing has changed in that regard.[699]

The claimants provided us with Leo Watson's submission on behalf of Te Whānau a Te Ngarara to the Local Government and Environment Committee about this Bill. The submission was also made on behalf of various successors:

- Te Oti Ropata, successor to Te Oti Ropata (Ngarara West B7 2C);
- Norma Ellison and Yvonne Mitchell, representing the successors to Kaiherau Takurua (Ngarara West B7 1);
- Ria Erskine and Philip Love as successors to Pirihira Te Uru (Ngarara West B5); and
- Hari Jackson and his siblings, Peti Isherwood, and Hemi Rangikauwhata as successors to Pirihira Te Uru (Ngarara West B5).[700]

For the issues relevant to this section of the chapter, Mr Watson raised the definition of legal successors in section 40 of the Public Works Act (which was not addressed in the Bill), the valuation at which land was to be offered back, a particular exception to offer-back requirements which had been missed out of the clause abolishing exceptions, and the need for a Treaty clause in the Public Works Act.

Mr Watson submitted to the committee that the Bill still limited offer back of land (and payment of the proposed solatium) to former owners and their legal successors as defined in section 40(5) of the Public Works Act. Mr Watson argued that the definition of successor, which was confined to the immediate successors of the former owners, 'has been unfair to Maori owners and is unnecessarily restrictive'. The definition should be changed, he submitted, to be made consistent with Te Ture Whenua Māori Act 1993. Also, Mr Watson noted that, in the findings of the Tribunal in its report *Te Tau Ihu o te Waka a Maui*, former owners often held their individualised title in breach of the Treaty (see section 7.4 above).[701] Where that was the case, the Tribunal found, it 'may be more appropriate to offer former Maori land back to iwi or hapu communities instead of the descendants of named owners'.[702] Mr Watson therefore recommended to the committee that the Bill should include a 'new definition of "successor" in relation to takings of Maori

699. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 20

700. Leo Watson, submission to Local Government and Environment Committee, 14 August 2009 (doc F5(g)), pp 1–2

701. Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), p 4

702. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Clams*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, p 1443 (Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), p 4)

land', amending the definition in section 40(5) of the Public Works Act, although he did not suggest any particular definition.[703]

It is important to note that all of these changes to the Public Works Act had been proposed by the Minister for Land Information to Cabinet in 2005 as a result of the Crown's review and the submissions of Māori (among others) in the consultation on reform options. The Minister had proposed changing the definition of successors to include present-day successors (in the case of Māori land). He had also proposed that, if the successors could not repurchase the land, a second offer back would be made to the whānau or hapū (see above). Nonetheless, the LINZ review of submissions disagreed with the first point (widening the definition of successors) and dismissed the second point with the statement: 'The Public Works Act cannot address issues relating to ownership of land before it was acquired for a public work.'[704] It is difficult to account for this advice given the reform proposals put to Cabinet by the Minister for Land Information in 2005 (see above).

On the issue of valuation, Mr Watson submitted that the Bill should be amended so that Māori land no longer had to be offered back at current market value, which was often simply beyond the ability of former owners or their successors to pay. He offered three crucial reasons for this proposed amendment. First, the compensation paid to Māori after their land was taken had often been 'insufficient, or less than offered to non-Maori owners' or European lessees. Secondly, the Māori Trustee often negotiated compensation when owners were absent or could not be located, which led to a compromise on valuation, 'often less than the compensation paid to the non-Maori lessees of the land'. Thirdly, land returned to multiple owners would have restrictions on it under Te Ture Whenua Māori Act which affected the value, and this should be taken into account rather than valuing it as currently owned by the Crown or local authority, which would be too high for them to afford. Mr Watson recommended that land be offered back at the equivalent (in today's dollars) of the compensation paid by the Crown when it took the land. He also posed the question to the committee: '[W]hy should the former owners purchase the land again at current market value, when the land has been used for general public benefit'?[705]

These were not reforms proposed to Cabinet in 2005 and LINZ opposed the amendment of the Bill to include the changes proposed by Te Whānau a Te Ngarara.[706]

On the issue of exceptions to the offer-back requirement, Mr Watson pointed to another exception in section 40(4) of the Public Works Act, which allowed the Crown to sell the land to an adjoining owner instead of offering it back in cases where the land could only realistically be used by that owner. Mr Watson argued that this 'remains an unfair exception which has been used by public authorities as

703. Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), pp 4–5
704. LINZ, departmental report to the Local Government and Environment Committee, February 2010, p 35
705. Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), p 5
706. LINZ, departmental report to the Local Government and Environment Committee, pp 19–20

a further mechanism to avoid offer back', and should be abolished along with the other exceptions already covered by the Bill.[707] Following the 2000–03 review, the Minister for Land Information also proposed to abolish all of the exceptions to the offer-back requirement in the Public Works Act save one – 'impracticability' – in the reforms proposed to Cabinet in 2005. The LINZ departmental report in 2010, however, opposed any change to the exceptions in section 40 of the Public Works Act 1981 on the grounds that the 'cost to the Crown from the proposed removal of exemptions would be significant and unwarranted'.[708]

Mr Watson's submission to the committee on behalf of Te Whānau a Te Ngarara also recommended a number of other changes to the Bill, such as the insertion of a Treaty clause in the Public Works Act and a moratorium on all takings of Māori land.[709] We note that the Minister for Land Information had proposed a Treaty clause to Cabinet in 2005, although the details of the clause had not been decided, but LINZ again opposed this in the Bill for a number of reasons:

> The scope of the Bill would only allow a Treaty of Waitangi clause to relate to the provisions covered by this Bill, rather than the entire Public Works Act 1981 (PWA).
>
> Neither the Bill nor the PWA contain a clause binding the Crown. If a general Treaty of Waitangi clause was included in the Bill (relating to the provisions covered by the Bill) it would have little effect on the Crown unless a clause binding the Crown was also introduced.
>
> A Treaty of Waitangi clause would have implications for local authorities. However, the specific implications are difficult to determine without knowing the exact form and wording of a Treaty of Waitangi clause.[710]

PAL made two submissions to the select committee opposing the Bill in its entirety. First, PAL objected to the provisions that land not used for the purpose for which it was taken would have to be offered back, with no more exceptions to the offer-back requirement on the grounds that it was impracticable, unreasonable, or unfair to offer the land back. PAL referred to its commercial aviation development plans, arguing that 'some other commercial development is also essential to support the continued viable operation of a regionally significant airport', but this could not occur if that land had to be offered back. Further, the current exceptions to offer-back requirements were 'appropriate, well established and judicially tested' and 'should be retained'.[711] In its second submission, PAL stated that it received

707. Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), p 5
708. LINZ, departmental report to the Local Government and Environment Committee, February 2010, p 3
709. Leo Watson, submission to Local Government and Environment Committee (doc F5(g)), pp 3–6
710. LINZ, departmental report to the Local Government and Environment Committee, February 2010, pp 41, 69
711. Steve Bootten, submission for PAL, 14 August 2009, pp 1–2, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLGE_EVI_00DBHOH_BILL8033_1_A12727/paraparaumu-airport

an airport from the Crown that was uneconomic, rundown, and requiring infrastructural work. The need to offer back land in the way proposed in the Bill would be 'inconsistent with the fact that Airports hold land for both current and future aviation use, and the nature of all airports is that they need multiple income streams to maintain viability and fund capital expenditure requirements'.[712] Also, PAL was keen to clarify that the Crown, not the airport's current owners, would be responsible for any solatium payments.[713]

LINZ opposed the Bill in its entirety and also disagreed with every part of Mr Watson's submission on behalf of Te Whānau a Te Ngarara.[714] We did not receive any evidence or submissions from the Crown about the position LINZ adopted on this Bill. LINZ considered the Bill unnecessary because 'the purpose of the Bill is already met by current mechanisms for redress and offer-back, available through the Court system and Treaty settlements processes'.[715] The Local Government and Environment Committee considered the Bill unworkable in any case and a significant threat to public works in New Zealand. The Crown, local authorities, SOEs, Crown research institutes, and others would have to offer land back that was still needed for a public work (although not for the same work it was acquired for), and future public works might be adversely affected as well. The merits of solatium payments were not discussed in the committee's report.[716]

Te Ururoa Flavell 'acknowledged the difficulty of amending the Act as his Bill proposes'. In his submission to the select committee, he argued:

> a comprehensive review of section 40 and all sections incidental should be conducted by Land Information New Zealand. In his view, any overall review should include the following matters:
>
> - the inclusion of a Treaty clause in the Act
> - amendments to section 40 that acknowledge and address historical injustices committed under the Act
> - the making of solatium payments by the Crown to beneficiaries
> - the role of the Māori Land Court in determining solatium payments.[717]

The Local Government and Environment Committee noted this point and observed that aspects of the Public Works Act were under review in the second phase of the Government's RMA reforms. This did not include the section 40

712. Sir Noel Robinson, submission for PAL, 15 October 2009, pp [2]–[3], https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/49SCLGE_EVI_00DBHOH_BILL8033_1_A15248/paraparaumu-airport-supp 1

713. Sir Noel Robinson, submission for PAL, 15 October 2009, pp [3]–[4]

714. See LINZ, departmental report to the Local Government and Environment Committee

715. LINZ, departmental report to the Local Government and Environment Committee, February 2010, p 2

716. 'Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill: Report of the Local Government and Environment Committee', June 2010, pp 2–4, https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL8033_1/tab/reports

717. 'Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill: Report of the Local Government and Environment Committee', p 4

offer-back provisions.[718] The last amendments to section 40 were minor changes enacted in 1996.

Thus, no legislative remedy was provided for the grievances raised in the petition and endorsed by the Transport and Industrial Relations Committee in 2004.

7.7.6.5 *Post-hearing development: another review of the Public Works Act*

On 23 January 2020, the Crown filed supplementary closing submissions. In those submissions, Crown counsel advised that, since the filing of closing submissions in 2019, the Crown was 'presently in the process of developing a package of proposals for legislation to amend the Public Works Act 1981 in ways which will have positive outcomes for Māori in relation to Māori land while balancing the need for accessing land for public works'.[719] The reform proposals, which were said to be in the 'early stages of development' at that time, included amendments to the offer-back regime to

> improve offer-back processes for the return of former Māori land no longer required for public purposes by ensuring that proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand.[720]

Crown counsel submitted that one aim of the proposals was to enable the return of more land to Māori, supporting the land retention principles in Te Ture Whenua Māori Act. The reform aims were:

- the improved recognition of the unique characteristics of Māori land and the association of Māori with their land holdings;
- better facilitating the return of former Māori land to former owners, including improved communication around this process, where it is no longer required for public works;
- supporting the principles of retention of Māori land contained in Te Ture Whenua Māori Act 1993; and
- providing for land owners to use their land to fulfil their development aspirations as well as retain and re-establish the connection of Māori land owners with their land.[721]

Thus, the review proposals would amend the Public Works Act to 'improve the offer-back regime' and 'provide a better chance for whanau, hapū and/or iwi to regain ownership of their whenua'. The details of how exactly former owners

718. 'Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill: Report of the Local Government and Environment Committee', pp 4–5. For the second phase RMA reforms referred to here, see Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims*, *Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 182–189.
719. Crown counsel, supplementary closing submissions (paper 3.3.62), p 12
720. Crown counsel, supplementary closing submissions (paper 3.3.62), pp 12–13
721. Crown counsel, supplementary closing submissions (paper 3.3.62), p 13

and their successors would fit into those proposals, or how the offer-back regime would be amended to give Māori a 'better chance' of getting their land back, were not explained. It is difficult, therefore, to determine how far (if at all) the proposals differ from the 2005 proposals, which, as Te Ururoa Flavell put it, had been 'filed away in the back drawer' and forgotten about.[722]

Crown counsel submitted that the Crown's intention in the review is to improve the ability of Māori to 'realise their cultural and economic aspirations regarding their whenua', and will do so by realigning the Public Works Act 'more towards the principles of Te Ture Whenua Māori Act 1993'.[723]

These are potentially important reforms but the Crown did not file any documentation about the proposals or the review process. The 'proposed changes' were being led by the Minister for Māori Development and the Minister for Land Information, working in 'close consultation with the Minister for Crown Māori Relations and other ministers'.[724]

Claimant counsel submitted in reply to the Crown:

> Crown counsel now refers to an intended review of the legislation (Crown January [2020] submissions), but there is no opportunity in this jurisdiction for airport claimants to test whether the Crown review is Treaty compliant, as no evidence has been adduced.
>
> Given that Public Works Act issues arise so prominently in the Te Atiawa inquiry, and particularly in relation to Paraparaumu airport, it is respectfully submitted that the current Wai 2200 inquiry should hear directly from Crown officials involved in the Public Works Act review. While a review will not ameliorate the effects of what has occurred to the Puketapu hapū, it might avoid a similar situation occurring to other whanau in the future, and the Tribunal's guidance could be invaluable.[725]

At the time this submission was made in February 2020, however, the hearings and closing submissions had been completed for the Te Ātiawa/Ngāti Awa phase. We expect the Crown will lead evidence on this matter in the Ngāti Raukawa and affiliated groups phase, where it will also have a more general application for all parties in the inquiry. Here, we note that the Crown is clearly aware of the inadequacy of the offer-back provisions of the Public Works Act, as was also demonstrated by the 2005 reform proposals, but no amendments have as yet been introduced or made to remedy the known flaws.

In November 2020, the Crown submitted that the Airport Authorities Act 1966 will be amended to remove any ambiguity over who is responsible for Public Works Act decisions in relation to airport companies. As noted earlier, Kāpiti Airport Holdings Ltd does not accept the Crown's reinterpretation of the Airport Authorities Act 1966, and there has been no litigation on the issue. The Crown's

722. Te Ururoa Flavell, 17 June 2009, NZPD, vol 655, p 4419
723. Crown counsel, supplementary closing submissions (paper 3.3.62), p 13
724. Crown counsel, supplementary closing submissions (paper 3.3.62), p 14
725. Claimant counsel (Watson), submissions by way of reply (paper 3.3.65), p 7

intention is that a new Bill, the Civil Aviation Bill, will replace both the Airport Authorities Act and the Civil Aviation Act with a new piece of legislation. The Crown is consulting with the claimants about the legislative proposal.[726]

7.7.7 PAL applies to KCDC for another plan change

As discussed in the previous section, Te Whānau a Te Ngarara did not obtain a legislative remedy in 2002–09. In the meantime, PAL was sold in 2006 to a company owned by a prominent businessman, Sir Noel Robinson, for an undisclosed sum (said to be 'well under $40 million').[727] In 2007, the new owners proposed a

> thirty-year development plan, which included an airport upgrade, new terminal, along with a commercial business park. The proposed commercial developments raise the question as to whether some of the airport land was surplus to requirements, and thus should have been offered back to the representatives of the former owners. PAL and subsequent owners have argued that commercial developments were necessary in order to maintain the economic viability of the airport.[728]

In order to carry out its development plans, PAL applied to KCDC in 2007 for another private plan change to rezone the land. As in 2000–01, Te Whānau a Te Ngarara opposed the rezoning application although this time the Ministry of Transport did not file an objection. The plan change was based on the fundamental principle of developing the airport for non-airport-related commercial activities without selling any of it, hence the previous zoning change of part of the land to 'residential' would be cancelled. Sir Noel Robinson explained to the Environment Court that the sale of land would deprive the airport of 'potential for a permanent income stream which might be achieved from commercial development' through leasing of airport land. Sale would also (though this was not mentioned by Sir Noel) definitely trigger an offer-back requirement under the Public Works Act 1981. Hence, the new owners of PAL intended to establish a 'business park' on about 70 hectares of airport land with a 'balanced mix of commercial, retail, distribution and manufacturing activities in conjunction with the airport operation'.[729] Thus, PAL sought to 'increase revenue from ground rentals paid by commercial developers to whom land not required for core airport activities will be leased (rather than sold)'.[730]

To free up more land for this commercial development, PAL closed the crosswind north-west/south-east sealed runway, 1,016 metres long, in December 2008. The shorter grass runway that ran alongside it was also slated for closure. A 640-metre grass crosswind runway would be constructed further south for

726. Crown counsel, memorandum (paper 3.2.1078), p 7
727. Bassett-Kay, 'Public Works Issues' (doc A211), p 416
728. Bassett-Kay, 'Public Works Issues' (doc A211), pp 416–417
729. *Cammack v Kapiti Coast District Council* [2009] NZEnvC W069/2009 at 2–4 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 91–93)
730. *Cammack v Kapiti Coast District Council* [2009] NZEnvC W069/2009 at 39 (George Jenkins, papers in support of brief of evidence (doc F41(b)), p 128)

gliders and urgent landings only, allowing 'most of the land previously contained in these runways' to be moved from the zone containing core aviation activities to a zone allowing commercial activities.[731] PAL proposed four 'precincts' for zoning purposes:

- 'Airport core' (41.449 hectares) for 'primarily airport related activities' such as runways, terminal buildings, hangars, cargo facilities, and others;
- 'Airport Mixed Use' (70.6249 hectares) for light industrial, commercial, and retail shopping activities;
- 'Airport Heritage' (0.32 hectares) for the original control tower and a museum; and
- 'Airport Buffer' (14.2429 hectares) to separate airport activities from surrounding houses, which would include a wetland and other environmental features as well as providing for stormwater control.[732]

Hearing commissioners were appointed by KCDC to consider the application. Te Whānau a Te Ngarara objected on the same grounds as they had objected to the previous application in 2000. Their submission was directed 'exclusively at issues of ownership of the land subject to Plan Change 73, the legality of the acquisition of that land from its original owners and its return to those owners'.[733] The Environment Court noted that these matters were not 'justiciable by either the Council or this Court'.[734] The commissioners recommended acceptance of the plan change with some amendments, which KCDC duly endorsed, resulting in four appeals to the Environment Court in 2008. Te Whānau a Te Ngarara appealed to the Environment Court on the grounds that they had not been consulted by PAL and the planned development of the airport would disturb sites of significance to them. Hence, the development would not provide for their ancestral relationship with the land.[735] PAL applied to the court to strike out the Te Whānau a Te Ngarara appeal because it raised matters not included in its original submission to the hearing commissioners but the court rejected this application.[736]

The Te Whānau a Te Ngarara appeal was heard alongside the three others. In respect of surplus land issues, the court accepted that aviation safety would not be affected by the closure of the crosswind runways and the construction of a new, shorter runway further south, thus opening the way for commercial development at the eastern end of the airport. The court also accepted that, for the airport to continue to operate in the future, it needed to 'diversify and maximise its sources

731. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 7–9 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 96–98)

732. Woodley, 'Local Government Issues' (doc A193), p 688

733. *Te Whānau a Te Ngarara v Kapiti Coast District Council* [2008] NZEnvC w078/2008 at 2 (George Jenkins, papers in support of brief of evidence (doc F41(b)), p 180)

734. *Te Whānau a Te Ngarara v Kapiti Coast District Council* [2008] NZEnvC w078/2008 at 2 (George Jenkins, papers in support of brief of evidence (doc F41(b)), p 180)

735. Woodley, 'Local Government Issues' (doc A193), pp 687–692

736. *Te Whānau a Te Ngarara v Kapiti Coast District Council* [2008] NZEnvC w078/2008 at 7–9 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 185–187)

of income'.[737] On the issues raised by Te Whānau a Te Ngarara, the Environment Court noted:

> He [George Jenkins] and other hapu members expressed their concerns as to the way in which Paraparaumu Airport has devolved from an airport established for military aviation purposes and owned by the Government, into a privately owned general aviation facility on which a range of developments has occurred and where further development (including development of a commercial nature) is now proposed.
>
> The evidence of the witnesses for Te Ngarara and the continued presence of a number of hapu members throughout the hearing testified to the strong sense of grievance and bewilderment which they felt as to loss of the airport lands. As Te Ngarara formally conceded, however, matters relating to ownership of the land are beyond this Court's jurisdiction to consider and it would be inappropriate for us to make any comment regarding them.[738]

On the other matters raised by Te Whānau a Te Ngarara, the Environment Court said that it was clear that 'ownership issues were in fact at the heart of what Te Ngarara sought'. Consultation issues were therefore dismissed as not relevant, especially since PAL had consulted the iwi organisation as well as tried to consult with Te Whānau a Te Ngarara. The simple fact was that Te Whānau a Te Ngarara were 'implacably opposed' to the application, and were not prepared to consider ways other than ownership through which their relationship with the airport land could be recognised.[739]

There was also the issue of significant sites on the airport land which might be disturbed by development work. Archaeologists for PAL (Mary O'Keeffe) and Te Whānau a Te Ngarara (Susan Forbes) agreed that a nearby urupā extended into the north-west corner of the airport at the north of the current runway. They also agreed that archaeological sites were located inside the airport, including a pā site in the centre of the main runway. They did not agree, however, on the extent of the urupā or the 'means of mitigating effects on known and likely evidence (of archaeological sites)' in the development area.[740] PAL accepted that it would need approval from the Historic Places Trust for work to further modify the airport lands, and that extensive work would require a controlled activity consent from KCDC as well. As a result, the plan change included a series of controls on

737. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 6–24, 43–44 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 95–113, 132–133)

738. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 47–48 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 136–137)

739. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 51–54 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 140–143)

740. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 55–57 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 144–146)

earthworks and their possible impacts on sites of significance to tangata whenua.[741] The court concluded:

> We accordingly conclude that Plan Change 73 appropriately recognises and provides for those matters identified in ss 6(e), 7(a) and 8 RMA. We appreciate that our findings in that regard do not satisfy the specific concerns of Te Ngarara as to ownership of the airport land but it is beyond our jurisdiction to consider that matter.[742]

7.7.8 The Crown declines to intervene in 2009–10, leading to a private settlement in 2012

Having lost in the Environment Court in 2009, Te Whānau a Te Ngarara looked for other means of redress. As discussed above, they supported the Māori Party's Public Works (Offer Back of and Compensation for Acquired Land) Amendment Bill and also tried to get the definition of successors in section 40 widened through this Bill.[743] They also threatened PAL with legal action. Claimant counsel submitted:

> The private airport company refused to acknowledge that any land was surplus to airport requirements (including in the context of significant commercial and retail development on the lands), meaning that successors in title could only have recourse to the High Court. Proceedings were threatened, which ultimately led to a settlement for those who satisfied the 'successors in title' definition under the Public Works Act.[744]

The High Court was an expensive and by no means certain remedy which was only considered as a last resort. In October 2009, after the Environment Court's decision was issued, Leo Watson, who had acted as counsel for Te Whānau a Te Ngarara in their failed Environment Court appeal, advised Sir Noel Robinson of their intention to take legal action:

> Thirteen descendants of former landowners have instructed their lawyer to go to the High Court to have about 85 hectares of the 127ha block offered back to them under Section 40 of the Public Works Act.
>
> . . . . .
>
> Lawyer Leo Watson represented the whanau in its failed appeal to the Environment Court against Kapiti Coast District Council's approval of a plan change in April, paving the way for the airport redevelopment.

741. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 58–62 (George Jenkins, papers in support of brief of evidence (doc F41(b)), pp 147–151)

742. *Cammack v Kapiti Coast District Council* [2009] NZEnvC w069/2009 at 62 (George Jenkins, papers in support of brief of evidence (doc F41(b)), p 151)

743. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), pp 19–20

744. Claimant counsel (Watson), closing submissions (paper 3.3.61), p 21

> Mr Watson is now representing 13 descendants of former landowners, who owned 68 per cent of the land. He said he had been instructed to take the case to the High Court and had told Sir Noel of the action.
>
> 'The land that is not required for the airport and is surplus to requirements must be offered back. We will be seeking declarations that land not required for the airport be offered back to all those who are entitled,' Mr Watson said.
>
> Sir Noel said that none of the airport land was surplus to requirements.[745]

In the meantime, the Mayor of Kāpiti Coast, Jenny Rowan, and Darren Hughes (who had lost the Ōtaki seat in the 2008 election but returned to Parliament as a list member) 'became involved in mediating negotiations between representatives of the former owners and PAL'. Hughes negotiated a 'settlement offer to take to the Crown'.[746] We received no evidence about the contents of this offer but it was intended to resolve the dispute about surplus land and section 40 offer-back rights. The 'settlement offer' was referred to the Attorney-General, Chris Finlayson, because of the legal issues involved. In April 2010, the Attorney-General was reported to be examining the claims of Te Whānau a Te Ngarara. Heather Bassett provided an article from the *Kapiti Observer*, dated 6 April 2010, which stated:

> Former Maori landowners of Paraparaumu Airport expect the Attorney-General, who is now looking at their claim, to 'recite the same old heartbreaking story'.
>
> Claims by Te Whanau a Te Ngarara and the Maclean family, who had land taken under the Public Works Act, became the responsibility of Attorney-General Chris Finlayson in January.
>
> Te Ngarara chairperson George Jenkins said the whanau were expecting the Attorney-General, 'a lawyers' lawyer, to recite the same old heartbreaking story that the law provides the company the ability to develop other purposes without first offering it back'.
>
> The general feeling was one of 'despair', he said.
>
> Media reports last year that the whanau had instructed lawyer Leo Watson to take the case to the High Court were 'incorrect' and no decision had been made on whether to go to court, Mr Jenkins said.
>
> Te Ngarara had instructed Mr Watson to prepare, not to file.
>
> Taking the case to court was identified as an option, among many, but it was not the preferred one because of the costs and emotional upheaval, Mr Jenkins said.
>
> The whanau's preference was to establish a partnership with the airport company, which would provide the greatest outcome for both the whanau and the company, Mr Jenkins said. . . .
>
> A spokesman for Mr Finlayson, Ben Thomas, said the Attorney-General was considering, on behalf of the Crown, whether it was appropriate to enter into negotiations.

745. 'Iwi Takes Fight for Airport Land to Court', 15 October 2009, http://www.stuff.co.nz/national/2964799/Iwi-takes-fight-for-airport-land-to-court

746. Bassett and Kay, 'Public Works Issues' (doc A211), p 418

> At this stage he was still gathering information so he could make an informed decision based on what had already occurred, he said. 'There are disputes about the acquisition of the land for the airport, transfer of the airport to Paraparaumu Airport Limited, and whether any land at the airport is surplus, and so should have been offered back to the previous owners or their successors.'
>
> Mr Finlayson had not made personal contact with the claimants or their lawyer, as he was 'gathering information on the background to the dispute', said Mr Thomas.
>
> The matter was handed over to the Attorney-General earlier this year 'because of the legal issues involved'.
>
> The ministers who had previously been 'kept informed' about the airport claims issue had been transport minister Steven Joyce, and associate transport minister Nathan Guy.[747]

Later in 2010, the Attorney-General confirmed that the Crown would not get involved in the negotiations about the airport.[748] We received no information from the parties as to exactly what settlement proposal was put to the Crown or why the Crown chose not to get involved in the matter.

The Crown's witness, Nigel Mouat, drew a distinction between 'non-aviation leases that complemented the airport use', such as 'restaurants, cafes, fuel stations, mechanics, rental cars, etc',[749] and commercial development that was unrelated to the airport. His evidence was that the commercial development of land after the closure of a runway did render that land surplus to airport requirements. He stated that the Ministry of Transport 'did not foresee, and could not have foreseen, in 1995, that the lands later deemed surplus to the airport operations (both the Avion Terrace residential area *and the lands at the eastern end of the airport which is now commercially developed*) would not be offered back to the original owners.' (Emphasis added.)[750]

The Crown's post-hearing change of position indicates that the Crown should have become involved when the claimants (again) raised the issue that airport land had become surplus and should be offered back. As Crown counsel put it: 'once land is surplus to requirements for the Kāpiti Coast Airport, the land should be referred to the Chief Executive of LINZ to consider and comply with ss 40 and 41 of the PWA on behalf of the airport company'.[751] We also note that section 40(1) states that land must be offered back (unless one of the statutory exceptions applied) where any land was 'no longer required for that public work', was not required for any other public work, and was not required for an exchange under section 105. The company did not need to decide to *sell* land for it to be 'no longer required for that public work', and this distinction ought to have been very apparent to the Crown in 2010, especially since the Minister for Land Information

747. 'Despair over Paraparaumu Airport Claim', 6 April 2010 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Wai 609 folder, IMG2238)
748. Bassett and Kay, 'Public Works Issues' (doc A211), p 418
749. Mouat, brief of evidence (doc G7), p 6
750. Mouat, brief of evidence (doc G7), p 4
751. Crown counsel, memorandum (paper 3.2.1078), p 4

had seen the necessity of a law change in 2005 to narrow the scope of surplus land and avoid litigation (see section 7.6.6). This law change (as with all the other proposed reforms) was not carried out. Nonetheless, Crown counsel in this inquiry did not accept that any land had become surplus at the airport since the sale of Avion Terrace, although the Crown's witness did accept that commercial development had made some airport land surplus.

The Crown submitted in August 2021:

> The AAA deems an airport operated by an airport authority which is not a local authority (ie, an airport company) to be a Government work for the purposes of the PWA. The PWA empowers the Minister or the Chief Executive of LINZ to act under the PWA in respect of Government works. It follows that the powers in the PWA, including ss 40 and 41, are to be exercised by the Minister or the Chief Executive of LINZ in relation to land held for an airport operated or managed by an airport company because it is a (deemed) Government work.
>
> The Crown considers that this is reinforced by the purpose of the deeming provision s 3D of the AAA to ensure Crown involvement where land acquired under the PWA is then transferred to a private entity not accountable to the public in the same way as the Crown or local authorities.
>
> Section 3A(6A) of the AAA further clarifies that the Crown is responsible for decision-making under the PWA offer-back provisions in respect of land owned by an airport company. . . .
>
> In a scheme where airport companies could be privatised and sold by the Crown or local authorities, Parliament ensured that the statutory power of decision to offer back land taken under the PWA for an airport remained with a publicly accountable body. . . .
>
> The Crown's view is therefore that powers under the PWA, including ss 40 and 41, are to be exercised by either the Minister or Chief Executive in relation to the Kāpiti Coast Airport.[752]

On the basis of these new submissions, it is clear that the Crown should have become involved in this offer-back dispute. If land had become surplus at the airport without a decision on the part of the company to sell it, then the Crown had to exercise its powers under the Public Works Act to offer the land back (possibly at less than market value) unless one of the statutory exceptions to the offer-back requirement applied. As noted above, this was not the Crown's position in 2009–10 when this further dispute between the company and Te Whānau a Te Ngarara developed and was referred to the Crown. This was in contrast to the position in 2000 (see section 7.7)

The development of the airport business park got under way with the construction and opening of a Mitre 10 Mega Store in 2011. The name of the airport was changed to Kāpiti Coast Airport in the same year. In 2012, Sir Noel Robinson sold 75 per cent of the shares in PAL to new investors, and the company was renamed

752. Crown counsel, memorandum (paper 3.2.1078), pp 5–6

Kapiti Airport Holdings Ltd (KAHL).[753] Further work began in 2012 for a building to house a New World supermarket and other shops.[754] After the Crown's refusal to negotiate or otherwise get involved in 2010, private dealings occurred between the airport company and individual successors in 2012. This was explained in the joint brief of evidence of Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill:

> There began a campaign of consultation with the successors in title of the original owners of the lands taken by the Crown for the Airport. Each individual whānau with interests in particular blocks were contacted without being given knowledge of who or when other parties were or would be approached. KAHL had already decided on a settlement sum which would be distributed to the various parties according to the percentage of land taken from their tupuna, and in exchange, the successors in title were to agree to waive their rights under section 40 of the Public Works Act to ever have the land offered back to them. There was no room for negotiation on the settlement sum. It was take-it or leave-it.
>
> The really mind-blowing aspect of this settlement was that the airport company would only deal with those 'successors in title' which they had researched would have been entitled to an offer-back of the land under section 40 if the land was surplus. (The airport company maintained that the land was not surplus, but that it was protecting its position if the land ever did become surplus).[755]

Although this was a private settlement, we note the claimants' distress over their inability to get the law amended in 2009 to broaden the definition of 'successor' in the Public Works Act (see section 7.7.6). This meant that only the immediate successors to former owners were entitled and not the other descendants, with the result that many whānau missed out on any payment.[756] They had also failed in their bid to get the Crown involved in a resolution of whether land had become surplus and should be offered back. Hari Jackson and his co-witnesses explained why the confidential settlement was accepted in 2012 instead of going to the High Court, which had been their original intention:

> Why did some of our whanau reach a settlement? Our whanau were exhausted, depleted in resources, and the prospect of costly High Court litigation to try and fight the case was beyond us. It was a gun to the head. As Hari and Poiria pointed out at the whānau meeting to discuss the terms, this seemed to be the last chance to get even a small financial return from the now prime real estate the Airport lands had become.

753. Also referred to as Kapiti Coast Airport Holdings Ltd.

754. 'Todd Family takes Major Kapiti Airport Stake', 29 August 2010, https://www.stuff.co.nz/business/industries/7566821/Todd-family-takes-major-Kapiti-airport-stake

755. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 19

756. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), pp 19–20

> They were understandably ready to try and salvage something from a lifetime of trying to find justice for their tupuna and their whenua.
>
> So with fear that our living entitled relatives (all in their 80's) may not see any resolution, plus the fact that all other parties had already agreed to the offer, a sad signing of this private settlement took place in front of our whanau. We are aware that for some other whanau who descend from other original owners of airport lands, there was no settlement, no resolution, and a bitterness remains.
>
> We are all caught up in this lop-sided and one-sided situation, created by Crown rules and processes which are contrary to our tino rangatiratanga as Puketapu Hapu.[757]

Norma Ellison, who was one of the successors in title along with her sisters, told us that the settlement excluded many descendants of the original owners. 'We are hurt', she said, 'that the unfairness of the "successors in title" rule has resulted in a bitterness due to the lack of resolution or settlement for those descendants'.[758] As discussed in section 7.7.6, the Public Works Act review of 2000–03 and the reform proposals put to Cabinet in 2005 would have changed this restriction, enabling an offer back to the current generation of successors and – if they could not accept it – a second offer back to the hapū.

According to George Jenkins, 'Te Whanau a Te Ngarara faded out of action over the next couple of years after it turned out that only a few individuals of those that left us actually received a payout.' Their only hope for justice, he said, 'was now held by the Waitangi Tribunal'.[759]

7.7.9 Conclusions and Treaty findings

7.7.9.1 Did section 3A(6A) of the Airport Authorities Act provide sufficient protection, and did the Crown provide appropriate remedies when sought by the claimants?

The simple fact is that section 3A(6A) did not protect the successors of the former owners because of the way in which the Crown interpreted it prior to the recent change of position in 2020. The Crown has conceded this specifically in respect of the company's sale of Avion Terrace, stating that the Crown was wrong to take the view that 'responsibility for considering offer back sat with the company' and, as a result, the Crown had 'failed to take appropriate action to ensure the protective mechanisms in section 40 of the Public Works Act' were fulfilled. Crown counsel conceded that the 'acts and omissions of the Crown regarding the application of the offer back provisions in the Public Works Act to the land at Avion Terrace cumulatively mean that the interests of the former Ngāti Puketapu owners were

757. Hari Jackson, Poiria Love-Erskine, Matthew Love-Parata, Takiri Cotterill, and Rowan Cotterill, brief of evidence (doc F5), p 20
758. Norma Ellison, brief of evidence (doc F24), p [3]
759. George Jenkins, brief of evidence (doc F41), p 14

not properly considered or protected' when Paraparaumu Airport Ltd sold it. This was acknowledged to be a breach of Treaty principles.[760]

If the Crown is not correct in its reinterpretation of the legislation, then the Crown's failure was that it did not ensure that it retained oversight or the ability to enforce section 40 obligations, and then failed to correct this omission after the sale of Avion Terrace as well. Either way, the Crown's acts and omissions were in breach of the principle of active protection.

We cannot know whether the Crown would have offered back the Avion Terrace land if it had exercised the section 40 responsibilities in 1999. The Crown had decided it would be 'impractical' to offer the land back in 1984 because houses had been built on it.[761] That was at a time when the Crown intended to sell the house sites to the tenants. In the 1990s, however, the company intended to sell Avion Terrace to a buyer that would remove the houses and develop the land. In that circumstance, the Crown may well have decided that it was not impracticable or unreasonable to offer the land back. In any case, we are satisfied that the claimants were prejudiced by the Crown's acts and omissions in respect of Avion Terrace.

It is also clear that the Crown at the time considered that the law would need to be amended to fix the perceived 'compliance and enforcement shortcomings of legislation divesting Crown-owned works to private providers'.[762]

If, as the Crown now argues, the Crown had always retained the Public Works Act decision-making responsibilities for Government works, including airport lands owned by airport companies, then the claimants never actually needed to conduct their long campaign to get the Airport Authorities Act amended. Te Whānau a Te Ngarara made representations to Ministers in 1999–2000 and were advised by the Minister in Charge of Treaty of Waitangi Negotiations that their only remedy was to take legal action against the company. After the loss of their High Court case in 1995 and the award of costs against them, they were highly reluctant to take that path. Instead, they embarked on a campaign to get the law changed, including submissions to select committees and joining in with a petition to Parliament. They also gave evidence in the auditor-general's inquiry, which followed on from the select committee inquiry into the 2002 petition. The details of their campaign for law reform and redress are set out in sections 7.6.3–7.6.6. None of these efforts were successful because the Crown declined to introduce specific amendments to the Airport Authorities Act 1966 (including in response to the 2004 select committee recommendations), and instead from 2000 to 2005 the Crown preferred to see the necessary law change carried out through a general reform of the Public Works Act.

Reform options to deal with the perceived issue of oversight and enforcement were included in the consultation on the review of the Act. As a result of

760. Crown counsel, memorandum (paper 3.2.1223), pp 2–3

761. Assistant Land Purchase Officer to Secretary for Transport, 23 February 1984 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCN5634-DSCN5635)

762. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

that process, the Minister for Land Information proposed a series of reforms to the Public Works Act, including the establishment of a 'central agency to make rules for consistent use of the new legislation by the Crown, local authorities and requiring authorities, and provide for monitoring and auditing', and 'registration of any offer back obligation on the title to the land'. Also, the Crown would make offer-back decisions for land transferred from the Crown to private providers.[763] When Cabinet decided to defer the public works reforms in 2005, nothing more was done by the Crown on this matter until very recently.

The terrible irony is that, according to the Crown's new position on the meaning of section 3A(6A), none of this work was necessary in the first place because the Crown was already responsible for Public Works Act decisions in relation to Government works.

At the same time as Te Whānau a Te Ngarara pursued legislative remedies, they and some other groups representing descendants of the former owners objected to zoning changes that indicated commercial development of the airport would occur without any offer back of land. On the earliest application for zoning changes, the Crown also objected on the grounds that 52 hectares of land was evidently surplus and should be offered back to the former owners' successors. Neither the Crown nor the claimants were able to convince hearing commissioners that this was an RMA matter. As we see it, the Crown ought to have exercised its Public Works Act responsibilities under section 40 and made an offer back of the land that it considered to be surplus on the basis of the airport company's commercial development plans, such as the land to be rezoned as residential.

When the issue arose again with further zoning change applications (followed by significant commercial development of land by leasing instead of sale), the Crown declined to get involved (see section 7.7.8). Again, we consider the Crown's position that it is responsible for all Public Works Act decisions for Government works required it to intervene as requested, although we did not receive any details as to the settlement that the Crown was being asked to get involved with in 2009–10.

In all, the Crown has pursued two remedies since 2000: the Public Works Act review and reform and the objection filed to the earliest zoning application. Neither of these remedies achieved anything. The multiple remedies pursued by the claimants, including representations to Ministers, submissions to select committees to obtain a law change, the petition to Parliament, the RMA processes for zoning change applications, and the attempt to obtain Crown intervention in 2009–10, have also proven ineffective because the Crown opposed the specific legislative changes or took no effective action. The Crown's recent decision that LINZ is responsible for public works decisions in respect of airport companies has come after the legal successors reluctantly accepted a settlement from the company after

763. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', no date (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), pp [17], [21]–[22])

all their attempts to obtain a remedy had failed. It is not clear how or whether the Crown's change of position will provide any kind of remedy for them.

We find that the Crown's omissions following the sale of Avion Terrace have breached the principles of active protection and partnership; the Crown failed to work with the claimants to provide a remedy and failed to provide a remedy of its own, despite having acknowledged in 2000–05 that a remedy was necessary. The claimants have been prejudiced by the Crown's Treaty breach. They eventually gave up hope and accepted a private settlement (the terms of which are not relevant or known to the Tribunal). The Crown's recent change of position indicates that a remedy may not have been necessary after all because the Crown was responsible for section 40 decisions all along. This adds further depth to the Crown's omissions, especially since the Crown argued strongly in 2000 that 52 hectares of airport land had become surplus and should be offered back.

We accept that, if the Crown had exercised the section 40 responsibilities in 2000 or at any other time, it is possible that the land may not have been offered back – the Crown may have found that it was impracticable, unreasonable, or unfair to offer any land back. The uncertainty of the outcome does not mitigate the Crown's Treaty breach. It does highlight, however, that there may have been issues about the offer-back provisions of the Public Works Act itself. We turn to that next.

7.7.9.2 *Did section 40 of the Public Works Act 1981 provide sufficient protection?*

The claimants argued that section 40 of the Public Works Act was not Treaty compliant and did not provide sufficient protection, especially in respect of its limitation of offer-back requirements to successors in title. According to the claimants, that limitation was inconsistent with tikanga and Te Ture Whenua Māori Act 1993. The Crown did not make any submissions on this point.

Following the review of the Public Works Act in 2000–03, the Crown accepted that significant reforms were required to ensure that the Crown's Treaty obligations were recognised and met in the public works regime. This would require a Treaty clause in the Act (among other things). The Crown also considered that it was necessary to strike a better balance between the rights of former landowners whose land had been taken compulsorily and the public good. Matters had also been complicated by corporatisation and privatisation with no corresponding amendments to the Public Works Act 1981. In terms of the adequacy of section 40 to protect the rights of former individual Māori landowners, their descendants, and their hapū, the Minister for Land Information proposed to Cabinet in 2005 that the offer-back provision should apply to all generations of successors for Māori land, and – if they were unable to repurchase it – then there would be a second offer back to the hapū. Also, the Minister proposed to tighten up the transfer of land to another public work without offer back and the statutory exceptions to offer back (which are extremely broad), so that the only exception to offer back in the case of surplus land would be that it was impracticable to offer the land back. Unfortunately, these reform proposals were abandoned when the whole of the Public Works Act reforms were deferred and ultimately discontinued – 'filed

away in the back drawer' as Te Ururoa Flavell said in Parliament[764] – for reasons unknown.

Crown counsel did not make any concessions about section 40 or the offer-back and disposal provisions of the Public Works Act 1981. Nor did the Crown comment on the 2009 Public Works (Offer Back of and Compensation For Acquired Land) Amendment Bill or Leo Watson's submission to the select committee on that Bill. The Crown, however, did submit in supplementary closing submissions in January 2020 that the Crown was developing proposals to amend the Public Works Act that would minimise the compulsory acquisition of Māori land. We are not concerned with that here so we focus on the issue of offer-back proposals. There, the Crown proposed to

> improve offer-back processes for the return of former Māori land no longer required for public purposes by ensuring that proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand.[765]

The proposed amendments would improve the regime by giving a 'better chance for whānau, hapū and/or iwi to regain ownership of their whenua'. This in turn would 'improve their ability to realise their cultural and economic aspirations regarding their whenua and will align the regime more towards the principles of Te Ture Whenua Māori Act 1993'.[766] But the proposals were in the early development stage and no details could be provided.[767]

As far as we are aware, no proposals have yet been put out for consultation but we expect the Crown to update us on this issue later in the inquiry.

In our view, the Crown's general admission that there is a need to better align the Public Works Act with Te Ture Whenua Māori Act and improve offer-back arrangements for not just individual owners but 'whānau, hapū and/or iwi' accords with the need seen by the Crown for significant reforms to the offer-back provisions in 2005. We conclude, therefore, that the Crown was and is aware that the Public Works Act offer-back provisions are not consistent with Treaty principles. Certainly, our finding is that they are not, and that the claimants have been significantly prejudiced by the deficiencies of section 40 of the Public Works Act, the lack of a Treaty clause in the Act, and the Crown's failure to implement timely reforms. If the Crown had proceeded to legislate for at least some of the reforms proposed by the Minister in 2005, the situation of the claimants would have been greatly improved prior to their private settlement with the airport company (which was restricted as the law mandated in 2012 to successors in title). We make no comment on that private settlement, which was made without prejudice to the ability of the claimants to have their claims heard and reported upon.

764. Te Ururoa Flavell, 17 June 2009, NZPD, vol 655, p 4419
765. Crown counsel, supplementary closing submissions (paper 3.3.62), p 13
766. Crown counsel, supplementary closing submissions (paper 3.3.62), p 13
767. Crown counsel, supplementary closing submissions (paper 3.3.62), p 14

Finally, the issue of when land is to be considered surplus is currently governed by the provisions of section 40. There are no criteria in the Act other than that the land is no longer needed for the public work. In this inquiry, the Crown's position was that land can be developed for commercial purposes unrelated to airport requirements if that development is necessary to keep the airport commercially viable and therefore operational. As a result, the Crown's position in this inquiry was that no land has become surplus since the sale of Avion Terrace, in contrast to the Crown's position back in 2000–01 when it objected to the company's application for a zoning change. On this issue, the Minister for Land Information's reform proposals in 2005 included an amendment so that land could only be considered surplus if the land-holding authority decided to dispose of it. This would fit well with the Crown's position in this inquiry, but the Minister was conscious of the need not to make repurchase unaffordable because of commercial development and improvements. The possibility of discounts or a requirement that improvements be removed was mooted, although the Minister advised Cabinet that no blanket provision to this effect could be introduced (see section 7.6.6.2 for the details). In our view, this underlines the need for reform on this complex issue, and we note – as stated by the Minister in 2000 – that privatisation was not anticipated in 1981. The new private providers operating as a business are an overlay on the provisions of the Public Works Act. This observation is very apt in our view, and we agree with Crown counsel that it is necessary to realign the Public Works Act to better protect Māori land and to better provide for the return of that land to Māori when it is not needed for a public work.

Public Works Act issues more generally will be considered further in later volumes of this report.

CHAPTER 8

THE WAIKANAE RIVER

8.1 Introduction

In this chapter, we address claims about ownership and control of the Waikanae River. We discussed the great significance of the river as a taonga to Te Ātiawa/Ngāti Awa in chapter 2 (see section 2.5.3). The claimants also raised environmental issues about the Waikanae and other waterways which will be addressed in a later volume of the report.

The Mangaone, Ngatiawa, Reikorangi and Rangiora Rivers converge in the Reikorangi Valley, in the Tararua Ranges, to form the Waikanae River. The Waikanae then flows through a gap in the foothills and down to the Kāpiti Coast, where a 'total catchment area of 125 kilometres is discharged into the sea at Waikanae Beach.'[1] At the time of the arrival of Te Ātiawa/Ngāti Awa in the district, the Waikanae River branched into two channels just below where the railway bridge is today. The main channel, the Waikanae, continued to flow south-west across the coast to the sea. The Waimeha, which was 'the same size as the main river below the point of divergence, flowed north-west across the coastal lowlands' before turning south and rejoining the Waikanae 'about a kilometre inland from the Waikanae rivermouth.'[2] The upper reaches of the Waimeha River appear to have dried up some time between 1890 and 1896, possibly due to drainage by settlers for their new farms, but the lower stretches survived, fed by small streams and wetlands.[3]

In this chapter, we focus mostly on the lower stretches of the Waikanae River, where the issues of most concern to the claimants have arisen. The claimants argued that the Crown has deprived them of ownership and control of the river through the operation of the native land laws, compulsory takings for river control purposes, and the vesting of control in 'a number of public bodies' – formerly the catchment board, more recently the regional council. The Crown, they argued, has made 'no attempt to ensure ownership and control of the Waikanae River should remain or, once lost, be returned' to Te Ātiawa/Ngāti Awa ki Kāpiti.[4]

The Crown made no submissions on the allegations about ownership, other than to concede that individualisation of title under the native land laws made

1. Ross Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways: Ownership and Control', 2018 (doc A205), p 12
2. Chris and Joan Maclean, *Waikanae*, 2nd ed (Waikanae: The Whitcombe Press, 2010), pp 172–173
3. Chris and Joan Maclean, *Waikanae*, p 173
4. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 33

land more susceptible to fragmentation and alienation. Nor did the Crown respond specifically on the compulsory takings of riparian land, other than to state (as noted below) that the Manawatu Catchment Board was not a Crown agent. The Crown did make some general points about all public works takings. Each taking must be assessed, the Crown suggested, in terms of whether there was consultation prior to the taking, whether an alternative site was considered, whether alternatives to acquiring the freehold were considered, and whether the impact of the taking in terms of landlessness was assessed. On the control issues, the Crown argued that the board was not an agent of the Crown, and nor was it operating on behalf of the Crown. The Crown also argued that Māori interests in the Waikanae River have been recognised at the local level since 1989, citing the Waikanae Floodplain Management Plan and the Waikanae ki Uta ki Tai project as examples.

Thus, the claimants and the Crown did not agree on any of the issues raised in respect of the Waikanae River. In our analysis of those issues, we have confined ourselves as far as possible to the issues of ownership and control. As noted, environmental issues about the river and other waterways will be considered in a later volume. What was unique about the Waikanae River is the particular form of title granted by the Native Land Court in 1891 and the problems that have plagued the claimants as a result. The surveyors who prepared the plans, both the composite plan and the sketch plans attached to each certificate of title, drew a hard 'right-line' boundary in the centre of the riverbed. They also did so for the Waimeha River. As far as we know, this feature is unique to the claims of Te Ātiawa/Ngāti Awa ki Kāpiti in this inquiry district. As a result of the right-line boundary, legal ownership of the bed was granted to the individuals who held a Crown-derived title for the riparian blocks, as we discuss in more detail later. One consequence was that the sale of riparian sections removed ownership of the bed and sometimes access to the river from Te Ātiawa/Ngāti Awa. Another consequence was the taking of some of the last remaining sections for flood protection works; the unique title to the riverbed was a key reason for the takings, according to the catchment board and the Ministry of Works engineers.

We also discuss the flood protection works more generally in this chapter, as well as the degree of supervision and control exercised over the catchment board's operations by the Soil Conservation and Rivers Control Council and the Minister of Works. The role of the Minister and the Ministry in the compulsory takings of Māori land for flood protection purposes is also considered. Although the issue of alternative sites could not arise in the instance of protecting riparian land from flooding and erosion, we have assessed whether Māori owners were consulted prior to the takings, whether it was necessary for the board to acquire the freehold, whether it was necessary to acquire the freehold by compulsion, and whether compensation was arranged fairly with the Māori owners. In this chapter, we have focused on the aspects of the public works regime necessary to discuss these particular takings.

Finally, we consider the two examples proposed by the Crown in terms of how local government now recognises Māori interests in the Waikanae River. Although

there was not much evidence filed on these two examples, we have made use of the Waikanae Floodplain Management Plan and the Waikanae River Environmental Strategy from the online publications of the Greater Wellington Regional Council.

We turn next to summarise the parties' arguments in more detail.

8.2 The Parties' Arguments

8.2.1 The claimants' case

Claimant counsel submitted that the Crown has breached the principles of the Treaty by failing to 'ensure that Te Ātiawa retained ownership and control over the Waikanae River and other waterways of importance to them'. Further, the claimants argued that the Crown has actively 'removed ownership and control of the Waikanae River and the other waterways within the rohe from Te Ātiawa and limited their access to those waterways'. In the claimants' view, this was a breach of the Crown's duty to act 'fairly, reasonably and in good faith to enable Te Ātiawa to exercise tino rangatiratanga and kaitiakitanga over their whenua, awa, taonga species and sites of particular cultural or spiritual significance'.[5]

The claimants also argued that the non-navigable river was bounded by riparian land sections of the Ngarara block in which the riverbed was 'expressly included in the title', despite the common law *ad medium filum aquae*[6] presumption being 'clearly a rebuttable presumption' in the case of the Waikanae River. Following that initial flaw in the title, the 'Crown and Local Government . . . acquired sections of riparian land' from Māori through 'compulsory purchase for the purposes of soil conservation or as reserves'.[7] The claimants argued that, as a result, 'the ownership of the Waikanae Riverbed is a patchwork of private and public owners whilst responsibility for the effective management and control of the River lies with a number of public bodies but primarily with Greater Wellington Council'.[8] Claimant counsel submitted that the Crown should 'work with Te Ātiawa to establish a joint management body for the Waikanae River and its tributaries' and should also investigate in consultation with the iwi the 'precise pattern' of riverbed ownership so that 'an assessment can be made, both by the Crown and Te Ātiawa of returning to the ownership of Te Ātiawa'.[9]

Claimant counsel submitted that the Crown's 'prevention of Ngati Awa ki Kapiti's right to exercise Tino Rangatiratanga over their waters led to dire environmental consequences'.[10] This arose, the claimants argued, as a result of the 'incorporation of the fate of the river into the land title paradigm introduced by the Crown in the late nineteenth century'.[11] The claimants also argued that the loss of

5. Claimant counsel (Jones), closing submissions (paper 3.3.49), pp 6, 32
6. To the middle of the bed of a river or stream.
7. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 32
8. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 33
9. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 33
10. Claimant counsel (J Mason), closing submissions, 2 December 2019 (paper 3.3.55), p 42
11. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways: Ownership and Control' (doc A105), p 78 (claimant counsel (Mason), closing submissions (paper 3.3.55), p 42)

'ownership and control rights' meant loss of control of the river's resources and an inability to exercise kaitiakitanga and protect those resources from the ensuing environmental damage. Much of that damage, it was claimed, arose from flood protection works.[12]

8.2.2 The Crown's case

The Crown conceded that individualisation of title under the native land laws made the lands of Te Ātiawa/Ngāti Awa 'more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Ātiawa/Ngāti Awa', in breach of the principles of the Treaty of Waitangi.[13] The Crown made no submissions, however, in response to the claimants' specific grievances about loss of ownership of the riverbed. In respect of the loss of control over the river, the Crown disclaimed any responsibility for the flood protection works and other activities carried out by the Manawatu Catchment Board. In the Crown's view, 'it is not clear what Crown actions or omissions in relation to flood control measures may be said to be the cause of a Treaty breach'. Crown counsel submitted that, prior to 1941, flood control works were private initiatives and 'not a matter for state assistance'.[14] Although this changed from 1941, the Crown's view was that rivers and flood protection works were controlled at the local level:

> From 1941, the Crown established a unified regulatory framework within which local bodies could carry out flood control measures, in the form of the Soil Conservation and Rivers Control Act. The Act provided for the establishment of local catchment boards to minimise and prevent damage from floods and erosion and promote soil conservation. The Manawatū Catchment Board was the relevant authority for the Waikanae river catchment. The Catchment Board was not part of the Crown, nor was it operating on its behalf.[15]

Crown counsel submitted that in 'more recent years, Māori interests have been recognised at [a] local level' through the 'local council's 1993 flood protection plans for the Waikanae River Flood Plain seeking to provide protection of wāhi tapu'.[16] Also, the Department of Conservation's 'Waikanae River: Mountains to sea Restoration Project' has created a 'collaborative process with iwi for the restoration of the Waikanae River'.[17] This project has provided opportunities for the department (DOC) and 'relevant local authorities to build new Treaty partnership approaches'.[18]

12. Claimant counsel (Mason), closing submissions (paper 3.3.55), p 42; claimant counsel (Jones), closing submissions (paper 3.3.49), pp 34–35
13. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 21
14. Crown counsel, closing submissions (paper 3.3.60), p 189
15. Crown counsel, closing submissions (paper 3.3.60), p 189
16. Crown counsel, closing submissions (paper 3.3.60), p 190
17. Crown counsel, opening submissions, 12 August 2019 (paper 3.3.47), p 11
18. Crown counsel, closing submissions (paper 3.3.60), p 171

The Crown did not make any specific submissions about the catchment board's compulsory taking of Māori land for flood control purposes or about the provision for local authorities to take land under various statutes, including the Soil Conservation and Rivers Control Act 1941. Generally, the Crown submitted that each taking must be assessed on a case-by-case basis. Further, the public works regime applied to both Māori and non-Māori. In the Crown's view, therefore, each taking should be assessed on its own in terms of whether there was:

- 'consultation and a proper process';
- consideration of other possible sites if feasible;
- consideration of alternatives to 'outright acquisition', such as some other form of tenure; and
- consideration of whether the owners would be rendered landless by the taking.[19]

8.3 Ownership and Control: Individualised Title

The Māori conception of rivers and other water bodies was in total contrast to that of the English common law. As stated in *The Whanganui River Report*, a river was possessed by a tribe as 'a water resource, a single and indivisible entity comprised of water, banks, and bed'. The Whanganui River Tribunal commented that there was 'nothing unexpected in that' because '[i]t is obvious that a river exists as a water regime and not as a dry bed'. Thus, '[r]endering the native title in its own terms, what Atihaunui owned was a river, not a bed, and a river entire, not dissected into parts'.[20] This concept was not confined to the Whanganui region. Judge Acheson, in a well-known decision on Lake Omāpere in Northland, found that the lake was owned by Ngāpuhi as an indivisible body, including both bed and water, with its own distinctive mauri (life force).[21] In the *Te Whanganui-a-Orotu Report*, the Tribunal found that Judge Acheson's decision could have been applied to Te Whanganui-a-Orotu (Napier Inner Harbour) with only minor modifications to take account of its status as a lagoon.[22]

For the Waikanae River, Rawhiti Higgott explained to the researchers for the inland waterways report that water was one of the properties guaranteed in the 'undisturbed possession' of Māori by article 2 of the Treaty of Waitangi. The 'Māori approach' to this form of property, he said, 'is one that requires respect, for spiritual reasons, of that property'. It was therefore important not to confuse the kind of rights and relationships Māori had with their 'property' for the English conceptions of property. Mr Higgott noted:

19. Crown counsel, closing submissions (paper 3.3.60), p 55
20. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 337
21. Waitangi Tribunal, *Report on Stage 1 of the National Freshwater and Geothermal Resources Claim* (Lower Hutt: Legislation Direct, 2012), pp 39–41
22. Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, 2nd ed (Wellington: GP Publications, 1997), p 203

> When the British people came here to New Zealand, they came from a society where they had cattle and sheep and theirs was an agricultural focus on land. But water to them was merely ancillary to the land. Whereas Māori came from a completely different tradition. Māori were focused on water, which was their number one priority. Or better put, the land is surrounded by our water. Putting water at the top, rather than used as just part of our land. Water was the most precious thing to us.[23]

The iwi draft kaitiakitanga plan (intended as an iwi management plan for RMA purposes) was provided to us by Mahina-a-rangi Baker. The plan stated that relationships with the Waikanae River have 'informed the development of our collective identity as Te Ātiawa ki Whakarongotai'. The river was 'layered with a history of intimate relationships between various whānau and the River', with historical and present-day mahinga kai sites that sustained and nourished the whānau who lived by the river in many pā and kāinga.[24] Wetlands were also a particular resource, connected to the rivers but with their own names and mauri. Mahina-a-rangi Baker spoke about the Waimahoe, the Kaitoenga, and 'what we refer to now as the Waikanae Estuary sort of in the area of Arapawaiti and the Waimeha Lagoon'.[25] The network of rivers, streams, and wetlands could be traversed by waka and connected the people to each other. Cultivations were important but the water bodies and the sea were the key sources of food, and the health of those water bodies and the species that lived within them was also of key importance.[26] As stated in the draft iwi kaitiakitanga plan:

> The health of certain key natural features in our rohe are also integral to the mauri of our rohe and our people. The Waikanae River is a highly valuable taonga and the protection and enhancement of its mauri is of paramount importance. At times it's been referred to as the lifeblood of our people.[27]

The claimants argued that individualisation of title had a profound impact on their customary rights in respect of the Waikanae River.[28] As we discussed in chapter 4, title to the Ngarara block was individualised in 1873 and a large part of the block sold to the Crown (Ngarara East). For the remainder, the owners tried to keep the Ngarara West block undivided as the only way to maintain their collective authority over, and possession of, their ancestral lands and waters. This included the Waikanae River, which was not affected by the change of title in 1873.

23. Rawhiti Higgott, Te Āti Awa wānanga, Whakarongotai Marae, 6 June 2016 (Huhana Smith, 'Inland Waterways Cultural Perspectives Technical Report', 2017 (doc A198), p 151)
24. 'Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 13)
25. Transcript 4.1.10, pp 153–154
26. Transcript 4.1.10, pp 153–156
27. Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 35)
28. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 33

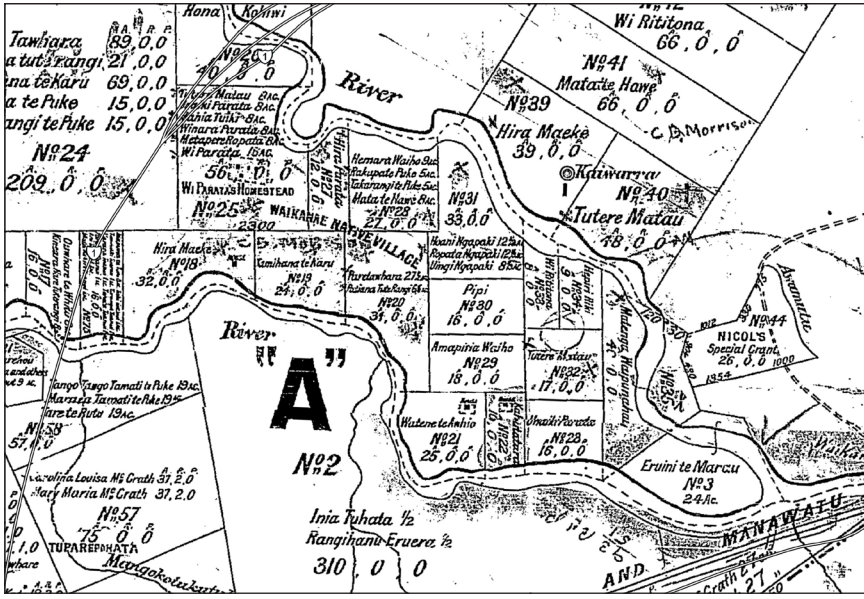
Hapū sometimes quarrelled over eel weirs and fishing rights in the river and other waterways, as recorded in the minutes of the Ngarara rehearing, but there is no record of any struggle with the very small number of settlers who were in occupation in the 1880s.[29]

The major impact of individualisation on the river came in 1890–91, when the 1887 partition was reheard as directed by the Ngarara and Waipiro Further Investigation Act 1889. As set out in detail in chapter 4, this Act empowered the Native Land Court to separate and locate every individual interest in an extreme form of individualised title, regardless of the Māori owners' wishes. This broke up the community's remaining control over and possession of the undivided bulk of Ngarara West. Through the court's use of its powers under the 1889 Act, the block was divided into Ngarara West A (79 subdivisions) and Ngarara West C (41 subdivisions), all of which were surveyed in 1892.[30] Wi Parata and the majority of the owners tried to prevent the court carrying out this extreme individualisation of their title. They had opposed a rehearing and any partitioning at all, and they sought an injunction from the Supreme Court to stop the process but were unsuccessful. The terms of the 1889 Act were clear and empowered the Native Land Court to carry out this further individualisation of the title, a provision included in the Act on the recommendation of the Ngarara commission.

Following the unsuccessful Supreme Court litigation, the majority of owners had to give up their opposition. They reached a voluntary arrangement among themselves as to where interests would be located, assisted by a surveyor who sketched this arrangement on a plan. For the remainder, the Native Land Court awarded various sections, the extent of which impacted on the agreed allocation of the majority (see chapter 4 for the details). The Waikanae River was mostly used as a natural boundary for blocks in the voluntary arrangement but it also passed through some blocks.[31] The river mouth and estuary were included in Ngarara West A14, A64, and A65.[32] It is clear from this and the minutes that the legal ownership of the river itself was not on anyone's minds. That is, they did not consider that they were dividing the river into segments as well as the land, a task which had been imposed upon them in the first place by the court acting under the mandatory powers conferred by the Ngarara and Waipiro Further Investigation Act.

When the owners of Ngarara West A2–A79 and Ngarara West C1–41 received their new titles derived from the Crown, the English common law potentially applied to the ownership of the riverbed. The common law in respect of rivers has been discussed in a number of Tribunal reports. Essentially, the English common law does not recognise that flowing water can be owned, hence rivers were treated as land covered by water. Only the bed and banks of rivers could be owned. Where

29. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways: Ownership and Control' (doc A205), pp 13, 15
30. Ngarara West B was awarded to Puketapu individuals in 1887. This block is discussed in chapter 7.
31. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 21, fig 8
32. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 56

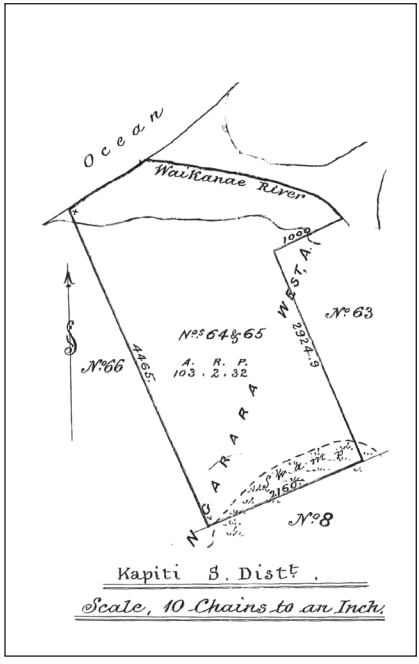


Map 13: Part of the 1892 composite survey plan, SO13444, showing the dotted line in the centre of the Waikanae River and Waimeha River.

a river was the boundary between blocks, the bed was not normally included in the land titles. This was a very different conception than that of Māori, as discussed above. There was also a *presumption* in English conveyancing law that the owners on each side owned the bed of a river to an imaginary line running along the centre, the *ad medium filum aquae*[33] rule. This presumption could be rebutted by the terms of a Crown grant or by the facts of the surrounding circumstances. Where a river ran through a block, the landowners were the legal owners of the riverbed.[34] For the tidal stretches of a river (including the mouth), the common law position in England was that the Crown was the 'presumptive owner . . . unless the contrary is proved either by a Crown grant or by "continuous occupation" of sufficient duration to establish a lawful title under the rules of adverse possession.'[35]

It is not necessary for us to assess whether the *ad medium filum* presumption applied to the Waikanae River. For blocks bounded by the river, the titles derived from the Crown included the riverbed to the middle point. The 1892 survey plan had a line running along the middle of the Waikanae River (and the Waimeha River from the point at which it diverged from the Waikanae – see map 13). This

33. To the middle point of the river
34. Waitangi Tribunal, *The Whanganui River Report*, pp 16–17
35. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 51



Map 14: Block plan of Ngarara West A64 and A65, showing the line in the centre of the river mouth extending to 'Ocean'.

treatment of the bed was replicated in the plans attached to the certificates of title for each of the riparian blocks.[36]

At the river mouth, the line on the plans terminated in the sea at a point labelled 'Ocean' (see map 14). Under the English common law, the Crown was the presumptive owner of the foreshore and tidal stretches of a river, but this was a 'presumptive title only which can be displaced by proof of a Crown grant or continuous occupation'.[37] Again, this common law doctrine would not have applied to the tidal stretches of the Waikanae River, for which the owners had titles derived from the Crown and registered (in some cases) under the Land Transfer Act. In 1903, the Crown proposed to amend the Coal-mines Act to vest the beds of navigable rivers in the Crown. This was enacted by Parliament as section 14 of the Coal-mines Amendment Act 1903. This new provision has not been applied to the Waikanae River. Apart from occasional comments by Crown officials, the Waikanae was not considered navigable within the meaning of the 1903 Act.[38] Even if the river

36. Barry Rigby, summary of 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report', 14 January 2019 (doc A214(b)), map, p 3; Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 21–23; Ross Webb, answers to questions in writing, April 2019 (doc A205(d)), pp [1]–[2], [8], [12], [15]

37. Richard Boast, *The Foreshore*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1996), p [24]

38. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 24, 31

was navigable, the 1903 Act excepted any riverbeds that had been Crown granted, which would have included the Waikanae River (as noted above).[39]

Surveyors sometimes used this kind of fixed 'right-line' boundary instead of the natural course of the river if a river changed its course constantly.[40] The Tauranga (Waimana) River was an example of this in the Te Urewera inquiry district. The Tribunal in that inquiry commented that this type of boundary 'took the treatment of rivers as land to a new level, displacing the *ad medium filum* presumption in favour of fixed, surveyed lines'.[41]

Surveyors did not often use this kind of right-line boundary for rivers. Instead, the land boundary was usually the water's edge and it moved depending on the movement of the river. The resultant changes to ownership of riparian blocks were governed by the doctrine of accretion and erosion.[42] There is no explicit evidence as to why Crown surveyors chose right-line boundaries in 1892 for the riparian lands in the official plan of the Ngarara West A and C subdivisions. The surveyors presumably considered the course of the river too migratory to use it as a land boundary. It must be noted that the purpose of the survey was not to clarify ownership of the river but to provide certainty in terms of titles to the new land blocks bounding the river. Due to the rarity of this kind of riparian boundary, however, there was later some confusion about what it actually meant. Historian Ross Webb provided evidence of a debate among officials in the 1930s and 1940s.[43]

The Chief Surveyor wrote to the Under-Secretary for Lands in 1935 with a query about the 'Centre line boundary' of Ngarara West A63. This riparian block was purchased by Hannah Field in 1892. In 1913, it was partitioned between Hannah's brother-in-law, W H Field, and Hannah's daughter and son-in-law, Hannah White Udy and Leonard Lewis Udy.[44] In 1928, the survey office had accepted a new official plan for A63A and A63B. The river had 'eroded and accreted and [the] plan was approved with the new boundaries to the middle of the new course accordingly'.[45] The Chief Surveyor commented that the old plan for Ngarara West A63 and Ngarara West A15 (on opposite sides of the river) showed the boundary between these blocks as a line in the middle of the river. He noted that it was 'most improbable' that the surveyors at the time had intended the 'boundary line in the river' as 'merely . . . a meandering line; the general interpretation of the plan appears to suggest that although it is not drawn exactly in the middle in places, it is intended to represent the middle line of the river'.[46]

39. Coal-mines Act Amendment Act 1903, s 14(1)
40. Waitangi Tribunal, *Te Urewera*, 8 vols (Wellington: Legislation Direct, 2017), vol 7, p 3316
41. Waitangi Tribunal, *Te Urewera*, vol 7, p 3353
42. Chief Surveyor to Under-Secretary for Lands, 5 October 1935 (Ross Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 874–875)
43. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 30–34
44. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition', 7 June 2018 (doc A203), pp 79, 113
45. Chief Surveyor to Under-Secretary for Lands, 5 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 875)
46. Chief Surveyor to Under-Secretary for Lands, 5 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 874)

The Chief Surveyor therefore inquired whether his office had made a mistake in accepting a new riverbed boundary for the A63 partitions. He asked the Under-Secretary for direction on the question:

> 'Where the certificate of title boundary has issued to the middle line of the river, can the land in such title be accreted to or eroded, thus allowing for the ownership to be adjusted accordingly, assuming of course that the river movement has been slow and imperceptible'.
>
> Usually where titles issue to the riparian boundary or bank, the accreting or eroding has been allowed on the assumption that prima-facie the soil of the bed of the river – ad medium filum aquae – is vested in the owners of the banks; a presumptive ownership to middle of river.
>
> Does the same apply to the former instance?
>
> I would be obliged if a decision on the above could be given for future guidance.[47]

Thus, surveyors themselves were not sure what the legal effect of a right-line boundary was if the course of the river moved, leaving the old bed as dry land and submerging another part of the block or a neighbouring block.

The Under-Secretary referred the Chief Surveyor's questions to the Solicitor-General.[48] Norman Arthur Foden, Acting Crown Solicitor, responded with a legal opinion in late October 1935. In sum, the opinion was that the line drawn in the middle of the river was not a 'fluctuating' one (as it would be if the boundary was the water's edge and the *ad medium filum* presumption applied) but rather it was a 'fixed' boundary. This was because 'a line fixed after survey and recorded on a plan from which Crown Grants or Titles are to be issued is immutable'. Foden considered that the *ad medium filum* presumption in the common law only applied to the use of a river as a natural boundary and not to survey plans in which 'mathematical lines have in the vast majority of cases, if not in all, been adopted instead of natural boundaries'.[49] In coming to this conclusion, Foden relied on an American case which essentially held that the survey was an integral part of the title that the grantor (the Crown in the case of Ngarara West A63A) intended to convey to the grantee:

> Some observations in the American case of *Middleton v Pritchard* (38 Am Dec 112) express in an adequate fashion the rational basis of the opinion I have formed: 'The maps, plans and field notes of the governmental surveys, by reference, become a part of the evidences of title, to enable the grantee to identify his boundary and lands . . .

47. Chief Surveyor to Under-Secretary for Lands, 5 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 875)

48. Minute, 8 October 1935, on Chief Surveyor to Under-Secretary for Lands, 5 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 874)

49. Acting Crown Solicitor to Under-Secretary for Lands, 29 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 871–872)

these distinct acts of the grantor must explain qualify control or determine the interpretation construction and extent of the grant.'

Applying these dicta to the present case, it seems to me impossible to contend that the certificate of title to Ngarara West A63 can comprise any less land than that shown within the boundary lines shown on the earlier plans and title, or that the original boundary line must be shifted to suit the changed course of the river.[50]

At the time the official plan was produced in 1892 for the Ngarara West A and C subdivisions, all survey plans had to be certified as 'approved' by the Surveyor-General.[51] Private surveyors still operated but the Crown also conducted some surveys, and, according to the evidence of Dr Rigby, Crown surveyors prepared the 1892 plan. It was a composite plan made from the field surveys.[52] The court approved the plan as well. The riparian block plans attached to each certificate of title included the right-line riverbed boundary, as noted above. The Crown was careful, however, not to pass title to the riverbed on to settlers who purchased land from the Crown that it had acquired from Māori owners of Ngarara West C.[53] The survey plan of the area selected by the Waikanae Fruit Grower's Association, which was prepared in 1892–93, 'explicitly excludes riverbeds'.[54] This included the beds of rivers where they ran though the blocks rather than forming a natural boundary between blocks. The surveyors recorded on the plan: 'The Waikanae and Ngatiawa Rivers are not included in the Sections through which they run.'[55] When settlers purchased riparian blocks directly from Māori owners, however, the riverbed title was transferred to the middle line.[56] Settlers and some Māori owners eventually obtained land transfer titles (which replaced Crown grants).

By the 1950s and 1960s, it was common knowledge among the Ministry of Works, the Soil Conservation and River Control Council, and the Manawatu Catchment Board that riparian landowners had legal ownership of the bed of the Waikanae River to the centre line. As a result, when the course of the river changed, the doctrine of accretion and erosion did not apply.[57]

The *ad medium filum aquae* presumption that riparian owners held title to the centre line could be rebutted by the facts of any particular case, including the question of whether the presumption was part of Māori customary law. The Te Urewera Tribunal found that the leading modern case on this issue is the Supreme

50. Acting Crown Solicitor to Under-Secretary for Lands, 29 October 1935 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 872–873)

51. Native Land Court Act 1886, s 79

52. Native Land Court Act 1886, s 84; Waitangi Tribunal, *Te Urewera*, vol 3, pp 1202–1204; Rigby, summary of 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report' (doc A214(b)), pp 2–3

53. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 34

54. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 34

55. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), fig 8

56. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 33

57. See, for example, Chief Engineer to Soil Conservation and Rivers Control Council, 22 February 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 182).

Court's decision in *Paki (No 2)*.[58] The Tribunal summarised the relevant aspect of the decision as:

> All four Supreme Court judges considered that the *Wanganui River* decision about the applicability of the *ad medium filum* presumption was at best of doubtful authority, that an investigation of local Maori custom was required, and that if local Maori custom involved separate ownership of a river from the adjoining land, then the *ad medium filum* presumption would not apply to a Native Land Court title or its subsequent conveyance.[59]

Further, the Supreme Court held that the presumption can be rebutted by a 'continuing interest by Maori riparian owners in fisheries or other resources or attributes' of a river.[60] It is not necessary to go into the details of the *Paki* decision, however, because the riparian blocks in the present case had a fixed boundary at the mid-point of the riverbed. There is no evidence in the minutes for the Ngarara rehearing that the Te Ātiawa/Ngāti Awa owners intended to divide their river up into a series of individually owned segments. As discussed in chapter 4, the majority of owners opposed any division of the Ngarara West block and went to the Supreme Court to try to stop the Native Land Court from separating out all their individual interests on the block plan. Their legal challenge was unsuccessful because the Ngarara and Waipiro Further Investigation Act 1889 clearly empowered the Native Land Court to do this, regardless of their wishes and in the face of their direct opposition. One consequence of this forced individualisation was the series of new titles that explicitly included the bed and mouth of the Waikanae River.

Individualisation of title 'made the lands of Te Āti Awa/Ngātiawa ki Kāpiti more susceptible to fragmentation, alienation and partition and contributed to the undermining of the traditional tribal structures of Te Āti Awa/Ngātiawa ki Kāpiti', as the Crown has conceded.[61] The Crown also accepted that its native land laws 'did not provide for the legal recognition of the full range of complex and overlapping traditional land rights previously held by Māori'.[62] We agree. We also observe that the native land laws did not provide for the legal recognition of the full range of complex customary rights in respect of taonga water bodies such as the Waikanae River. As a result of the individualisation forced on most of the Te Ātiawa/Ngāti Awa owners in 1891, customary rights in the river were contravened by the creation of a legal, individual, saleable property right in the bed and mouth, which were treated purely as if they were dry land rather than an integral part of a taonga water body. According to the Te Ika Whenua Rivers Tribunal, the Crown ought to have created a form of title for rivers that conferred a proprietary right to a river

58. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC) at [87], [100]
59. Waitangi Tribunal, *Te Urewera*, vol 7, p 3314
60. *Paki v Attorney-General (No 2)* [2015] 1 NZLR 67 (SC) at 87, 100 (Waitangi Tribunal, *Te Urewera*, vol 7, p 3328)
61. Crown counsel, closing submissions (paper 3.3.60), p 29
62. Crown counsel, closing submissions (paper 3.3.60), p 29

and 'practically encapsulated within the legal notion of ownership of the waters thereof'.[63] The Te Urewera Tribunal also found that a key issue was that the native land laws at the time did not provide any special form of title for taonga such as a river or even a form of community title for the vesting of a natural resource in which all the iwi had customary rights.[64]

The evidence is clear that the Te Ātiawa/Ngāti Awa owners did not intend to give up their rights to the river or their control of use of the river when they sold riparian blocks. The result was a contest between settlers and Māori until the number of settlers swamped the local Māori population and most riparian blocks had been sold out of Māori ownership. In 1901–02, Natanahira (Hira) Parata built Mahara House as a 'kind of guest house and fishing lodge'. Dr Rigby reported that Hira Parata authorised his guests to fish in various parts of the river, including the spot called 'Love's Corner'.[65] H R Elder, who leased Ngarara West C23 from the Parata whānau, objected to this, writing to Hira Parata: 'Every fisherman . . . who is stopping at Mahara House tells me that you tell him he can fish in my water. I have never given . . . any such general permission. I expect every one who fishes in my water to ask [for] my consent first.'[66] Dr Rigby considered it likely that, in the context of the situation at the time, Hira Parata 'ignored Elder's claim'.[67]

W H Field also tried to control fishing in the lower reaches of the Waikanae River as well as in the Waimeha Stream and Ngarara Stream.[68] Field's land purchasing activities have been discussed in chapter 5. In 1912, he granted exclusive whitebaiting rights to Matai Kahawai and to his Māori farm workers for a fee, allowing them to catch whitebait 'in the Waimeha and Ngarara streams . . . so far as they run through my property'.[69] This only lasted a few weeks. Field had to give up this attempt to control whitebaiting due to 'community and customary opposition'.[70] In 1914, Field considered either banning all whitebaiting or ejecting Hira Parata from the whitebaiting stand that he had constructed at the mouth of the Waimeha Stream – as discussed above, the Waimeha branched off from the Waikanae River, and it also had a fixed right-line boundary in the 1892 plan. Dr Rigby commented:

> Having witnessed the defeat of his 1912 'concessions', Field probably had second thoughts about expelling Parata from his Waimeha whitebaiting stand. Field's view of his rights clashed with Hira's. Field probably backed off when he realised that Hira

63. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), p 124
64. Waitangi Tribunal, *Te Urewera*, vol 6, pp 2768, 3079–3080, 3093
65. Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues Report', December 2018 (doc A214), p 319
66. H R Elder to Hira Parata, 26 February 1906 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 319)
67. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 319
68. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 343–344
69. W H Field to Matai Kahawai, 4 October 1912 (Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 343)
70. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 343

would stand his ground on what amounted to customary rights. Even though Te Ātiawa/Ngāti Awa lost much of their land during the early twentieth century, they continued to assert fishing rights.[71]

As more riparian blocks were sold to settlers, Māori access to the river became an issue in some cases. In 1923, L H Greenaway complained to the Native Minister on behalf of himself and Hira Parata about the loss of access – it appears that an informal agreement with the new owners as to access was not being honoured.[72] Settlers such as Field, on the other hand, complained about Māori continuing to exercise customary rights. In 1917, he 'took umbrage' at the harvesting of lacebark from his riverside lacebark trees, which was used for 'decorative purposes at an Easter Lady Liverpool fundraiser to support wartime hospitals'.[73] Field apparently 'accused Hira Parata's wife of complicity in what he regarded as a criminal act', writing to her that 'she should have known better, because he purchased from Hira the land upon which the trees grew'.[74] Apart from occasional mentions such as this, any struggle between the purchasers of riparian blocks and the customary users of the river is largely absent from the documentary record.

By 1952, all the blocks with title to the river mouth and estuary had been sold apart from Ngarara West A14B on the northern side of the river.[75] Earlier disputes about access to the river mouth had generally involved settlers squabbling among themselves. Around the time of the First World War, when a series of complaints were made to the Marine Department about access, the course of the river had moved southwards (a regular occurrence) and the river mouth was located at Ngarara West A73 and A74, both of which were in the ownership of a local settler, Thomas Fletcher.[76] By the mid-twentieth century, the river mouth had moved again.[77]

The last piece of Māori land at the river mouth, the 96-acre Ngarara West A14B2B3, was sold to the Waikanae Land Company in 1967. The company also purchased the adjacent A14B1 in 1969. It wanted to create a marina and a residential subdivision, and for that reason purchased about 120 acres of estuary land for development.[78] As part of this work, the company intended to carry out works that would 'stabilise the mouth of the Waikanae River at its most northerly approach

71. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 344
72. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 26
73. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 344
74. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 344
75. Walghan Partners, 'Block Research Narratives: Ngatiawa Edition', 7 June 2018 (doc A203), p 108; Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 56–57
76. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 57–60; see also the maps in Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 323–325.
77. Chris and Joan Maclean, *Waikanae*, pp 191, 193; John Easther, 'Kapiti Coast Floodplain Management Plans: Waikanae River Archive', 1991 (doc A197(f)), pp 59–61
78. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 60; Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), p 48

to the sea'.[79] We have already discussed the company's purchase of the A14B1 block in detail in our priority report on the Kārewarewa Urupā.[80] In that report, we found that the system for selling land at meetings of assembled owners, which had very low quorum requirements, was in breach of the principles of the Treaty as it applied to A14B1.[81] We have no specific evidence about the meeting of assembled owners for the sale of the larger A14B2B3 block in 1967, but it is likely that the quorum for that meeting also fell well short of a majority, given the situation of Te Ātiawa/Ngāti Awa owners at that time.

The company's purchase of Ngarara West A14B2B3, and its plans for large-scale development of the estuary land, raised issues about legal ownership of the river mouth. Ross Webb quoted a letter from the Minister for the Environment to one of the scheme's objectors in November 1972, which stated:

> The Company holds a rather unique land title which extends to the centre of the Waikanae river as it was in 1894; this was well to the south of the present river mouth. The Company owns all the land to which you refer but it does not own the water which covers the riverbed or tidal land.[82]

The 'unique land title' arose as a result of the right-line boundaries surveyed for the Waikanae River in 1892, and the Crown could not claim title to the tidal part of the river. Due to English common law rules, however, the company was not considered to have title to the water that covered the land. The original boundary of Ngarara West A14 was the fixed line in the centre of the river.[83] Changes of the river's course meant that the company's purchase of the remaining parts of A14 encompassed land on both sides:

> The land purchased by the Company in 1967 was based on the original boundary from the 1890s on the north of the river, but due to changes in the river mouth, 35 acres was on the south side. Furthermore, because the Company had bought most of the swampland, the Company owned most of the freehold title to the estuary including the bed of the river.[84]

79. Percy B Allen to Minister for the Environment, 13 November 1972 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 286)
80. Waitangi Tribunal, *The Kārewarewa Urupā Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2020), pp 17–22
81. Waitangi Tribunal, *The Kārewarewa Urupā Report*, p 23
82. Minister for the Environment to M P Scott, 17 November 1972 (Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 60)
83. Webb, answers to questions in writing (doc A205(d)), p [1], fig 1
84. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 60–61

Apart from the land at the river mouth, much of the riparian land in Māori ownership had been sold by 1925. Most of their remaining riverbed title was then taken compulsorily for flood control works in the 1960s (discussed below).[85]

Despite the gradual loss of riparian ownership, Te Ātiawa/Ngāti Awa continued to assert and exercise their fishing and other customary rights in the Waikanae River, such as gathering water cress and berries. Rawhiti Higgott observed that 'karakia are still performed in the river for different occasions'.[86] Tutere Parata, who grew up in the 1950s and 1960s, explained that these customary practices were a matter of survival for his and other whānau:

> My father was an avid eel catcher and with the market gardens we never starved, but it was part of living in those times. We never had a lot of money, you know family benefit day we were lucky to get an ice cream. In those days you could go to the shop and everything was on the book until family benefit day, and that's how it was . . . But those times were pretty tough for Māori in general, the 50s, when I was a kid. It must've been even harder in the 30s. That's what I mean about living off the land . . . you never got paid the same as others, so because [he] had a big family he had to feed them. Where he was working, he questioned his pay one day because his colleague that worked alongside him was getting more money. And his boss said, 'well you Māori can live off the land, that's why you don't get as much as your colleague here'. That's something I'll never forget being told that. So I guess that's where it started, he had to feed his family and that's the way it was.[87]

Rawhiti Higgott learnt to fish for tuna in the river when he was growing up:

> Uncle Jim use to take me eeling in the Waikanae River and Waimea stream. We would use milk worms from under the flax for our bait. We would use a strand of flax looped in a circle with the flax thread through the worm. The eel would grab the worm and we would flick the rod and eel on to the bank where we were fishing off, we caught many eels. I used to go to other spots eeling as well, but those places have now been replaced with roads or houses.[88]

Urban expansion, flood protection works, and other factors have led to some restriction of customary practices. The inland waterways researchers explained that '[a]ccess to and customary use of some waterways was and is still possible', partly through relationships or 'agreements with the new [land]owners'.[89] These

85. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 25–26; Webb, answers to questions in writing (doc A205(d)), pp [2]–[3]

86. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 56

87. Tutere Parata, Te Āti Awa wananga, Whakarongotai Marae, 6 June 2016 (Smith, 'Inland Waterways Cultural Perspectives Technical Report' (doc A198), p 150)

88. Rawhiti Higgott, brief of evidence (doc F3), p 51

89. Helen Potter, Aroha Spinks, Mike Joy, Mahina-a-rangi Baker, Moira Poutama, and Derrylea Hardy, 'Inland Waterways Historical Report', August 2017 (doc A197), p 70

kinds of agreements, however, were vulnerable to changes of owners, including later generations of the same family.[90] Rawhiti Higgott told us:

> The river is shallow now and the watercress and berry spots have slowly disappeared from where we used to get them. Many of the areas around the river became 'flood-prone' and willow trees are now scattered along the river banks to slow down the flooding.
>
> I remember gathering watercress one day with my mum. She was in her 70s at the time and was visiting me from Auckland. There was a watercress spot where she would go when she was younger. Anyway, the owner of the property came out and saw us, he told us to *'get off my property, you are trespassing and you are not to come back'*. My mum looked at him and said, *'John Dixon, don't you remember me, Hinemoa, we went to Waikanae school together and I have always got watercress from here'*. Well, he was most apologetic towards my mum and allowed us to continue. I suppose it shows how current 'landowners' might not understand that kai was gathered from certain places by certain people. Didn't matter who owned the land, it was accessible to any whanau member. This was the same place where me and Uncle Jim used to eel from. [Emphasis in original.][91]

This point was reinforced by Kristie Parata, who told the researchers for the inland waterways report:

> Changes of the cultural values around us in the community has had an impact. I remember Dad telling me a story about getting told off by residents for trying to access our mahinga kai. Attitudes from the changing population impacted us, [which] made us feel whakamā about doing these practices.[92]

Environmental changes have also had a crucial impact on the continued exercise of customary rights in the river. Tutere Parata, who grew up in the 1950s and 1960s, told us:

> Fishing in the Waikanae river and sea was a regular activity for me and my whanau 20–50 years ago, however I would be reluctant to set the net or catch fish from the estuary at certain times now. In fact, some summers the estuary is smelly with slime growing on the river edge. I sure wouldn't eat fish from the river in those times. Today, we might be lucky to get a couple of kahawai, kanae (mullet) and maybe a patiki (flounder) in a set net in the river.

90. Transcript 4.1.17, pp 341–342
91. Rawhiti Higgott, brief of evidence (doc F3), pp 55–56
92. Kristie Parata, Te Āti Awa wananga, Whakarongotai Marae, 6 June 2016 (Smith, 'Inland Waterways Cultural Perspectives Technical Report' (doc A198), p 174)

> This was very different from when I was growing up, I have really seen the changes right before my eyes. We never had pollution in the river. Today we have algae bloom which we had never seen or heard of in my childhood.[93]

Apihaka Mack told us that the Waikanae River 'used to contain an abundance of eels, fresh water kōura and kahawai for Ngātiawa ki Kapiti'. She added:

> Today, the State Highway widening has detrimental effects to Waikanae River and other tributaries. The construction has led to silt run off [to] the river. The cow effluent run off in the Waikanae river has been an environmental disaster. The spraying of pesticides along river banks, [which] destroyed watercress and puha patches, also interferes with the quality of water.[94]

We note these issues here, but environmental impacts on waterways will be addressed in a later volume of this report. The main point is that Te Ātiawa/Ngāti Awa continued to fish in the river and take their customary resources from the water and banks despite changes in ownership of the riparian lands, but access and destructive impacts on river resources became an issue as the twentieth century progressed. Te Ātiawa/Ngāti Awa have never knowingly or willingly relinquished their rights in respect of the Waikanae River. We turn next to consider an issue that exacerbated the access and control problems: the Waikanae flood protection scheme and the compulsory taking of the remaining Māori riverbed titles in the lower stretches of the river for flood protection.

8.4 Ownership and Control: Manawatū Catchment Board and Flood Protection Works

8.4.1 The need for flood protection works

Prior to the 1880s, Te Ātiawa/Ngāti Awa lived alongside the Waikanae River and other waterways without having to worry about significant floods. Mahina-a-rangi Baker told us that her tūpuna could 'live right next to the kai without suffering too much from flood risk'.[95] Ms Baker stated in her evidence:

> These streams were gravel bottomed, they did not have the large load of sediment or mud that rivers and streams do today. They were able to move freely. These factors and their connection to wide wetland structures gave them a large flood carrying capacity. When there was high rainfall, and they flood, as all streams regularly do, they were slow to rise and fall. They didn't flash food to the extent that they do today, where they rise quickly, and often breach their narrow banks. They were safe waterbodies to settle on in part because their flood risk was low.

93. Tutere Parata, brief of evidence, 17 January 2019 (doc F2), p 5
94. Apihaka Tamati-Mullen Mack, brief of evidence, 10 May 2019 (doc F42(b)), p 70
95. Transcript 4.1.10, p 153

> The Waikanae River was also gravel bottomed but more powerful and not as steady as the other smaller streams. Today when we talk about the geomorphology of the Waikanae River, we describe it as having a short watershed, or catchment length, which has always been true. However, the natural meander of the Waikanae, and the wetlands that could be found connected to it also provided more flood carrying capacity, and safety to the communities here.[96]

Māori managed and protected the wetlands that sustained them:

> Maori extended the swamps and natural watercourses to sustain and improve their food supply. Channels were dug to interconnect the bodies of water to provide a means of access through the dense lowland forest and swamp-lands. Maori management of the floodplain and exercise of rangatiratanga protected and maintained the fragile wetland environment.[97]

European settlement of the district resulted in widespread deforestation, drainage of wetlands, and land development that made the lower-lying parts of the catchment prone to floods.[98] After the 1890–91 rehearing, some members of the Māori community at Waikanae became separate, individual owners of riparian blocks, who then faced erosion and loss of land from their sections when the Waikanae River changed its course. Flooding exacerbated this problem. As Mahina-a-rangi Baker described, the 'pre-existing framework that was based on interdependence and thus the interconnectivity of the many that was supported by the wetland system' was compromised by individualisation of title.[99] Māori interests operated at two levels after 1891: the hapū and whānau who had the customary rights, including fishing and other customary practices; and the individual riparian owners who faced economic loss from the erosion or flooding of their properties. For some of those owners, the damage to their sections from 'disastrous river erosion' was so great that it led to the sale of riparian blocks, such as the sale of Ngarara West A19 and A20 by Raniera Ellison to W H Field in 1912. Other Māori owners contributed some money to early attempts at flood protection works.[100]

W H Field raised the issue of flooding in Parliament in 1903, advising the House that deforestation in the upper reaches of the catchment meant that 'the water had come down the Waikanae River with greater suddenness, and in greater volume than heretofore, and the result was that in many cases the adjoining valuable lands which included beautiful forest reserves were washed away'.[101] From 1903 to

96. Mahina-a-rangi, speaking notes for Ngā Korero Tuku Iho, 22 April 2015 (doc A148), pp [1]–[2]
97. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), pp 6–7
98. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 15–20; Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 11
99. Mahina-a-rangi, speaking notes for Ngā Korero Tuku Iho, 22 April 2015 (doc A148), pp [2]–[3]
100. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 319, 342
101. W H Field, 29 July 1903, NZPD, vol 124, p 52 (Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 37)

1940, the problem of floods and erosion was frequently brought to the attention of the Crown, which responded that the protection of private property – whether European or Māori land – from flooding was not the role of the central government. Ministers and officials advised setting up a river board, which needed a petition from the majority of the ratepayers in the affected district. W H Field's appeals to the Crown in the 1920s and 1930s underlined the poverty of the Māori owners, the damage to Māori (and his own) land that was occurring, and the impossibility of establishing a river board if the Māori owners refused to support the petition. In 1913, some ratepayers did try to establish a special rating district to raise a loan, but a number of owners, mostly Māori, petitioned against the inclusion of their names in the petition.[102]

In 1931, Field appealed to the Native Minister, Apirana Ngata, for assistance, writing that a

> large area of fine alluvial river flat land belonging to Natives has been washed away, and at one spot where every flood is doing irreparable damage, several Native habitations are threatened. The erosion has reached within a chain or two of their buildings, and unless effective action is at once taken, some of these buildings are in imminent danger of being washed away.[103]

Ngata undertook to make inquiries.[104] He was advised by the engineer-in-chief of the Public Works Department that the protection works would cost about £600 but that it was essential that a river board be established because further works would undoubtedly be necessary in future.[105] The district engineer commented in July 1931 that the majority of good land being affected 'belongs to the Maoris who do not pay rates'.[106] We discussed the problems that Te Ātiawa/Ngāti Awa faced with rating in chapter 5. The end result was that no river board was established; it appears that neither the Māori nor the European riparian owners were prepared to pay for river protection works through a river board.

8.4.2 The Soil Conservation and Rivers Control Act 1941

The situation changed significantly with the passage of the Soil Conservation and Rivers Control Act 1941. As late as 1940, the Minister of Public Works, Robert Semple, 'continued to state that private owners should be responsible for

102. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 37–42
103. W H Field to Native Minister, 23 June 1931 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 495)
104. Native Minister to W H Field, 6 July 1931 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 496)
105. Engineer-in-chief, Public Works, to Under-Secretary, Native Department, 29 August 1931 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 498)
106. District Engineer, 'Waikanae River Erosion', 13 July 1931 (Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 41)

flood protection, and that it was not a matter for state assistance.'[107] The new Act addressed the ad hoc approach to drainage, flood protection, and soil conservation throughout the country by centralising the administration of these matters. The Act provided for the establishment of district catchment boards with powers to manage river and drainage works. As with river boards, local ratepayers were still expected to contribute funds for flood protection works.[108] The Act also gave catchment boards powers to compulsorily take land for the purposes of flood protection and soil conservation under the Public Works Act 1928. Section 135(a) empowered the boards to

> Take, in manner provided by the Public Works Act, 1928, or purchase, or otherwise acquire and hold any land, or any estate or interest therein, within or outside its district, which in its opinion may be necessary or convenient for the carrying-out of any of [its] powers or functions[.]

The 1941 Act established a two-tier structure in which the catchment boards were supervised at the national level by a Soil Conservation and Rivers Control Council. We will consider this Act more generally in a later volume of this report. Under section 11(1)(k) of the 1941 Act, the council had the responsibility of 'supervision and control of the activities of Catchment Boards'. This included approving and providing subsidies for projects or for the purposes of compulsorily acquiring land for soil conservation or flood control works. In this way, the council was effectively a Crown delegate, with broad powers and direct authority over the local authorities responsible for flood protection. The Minister of Works also had to approve the boards' actions in certain cases. Before a board could carry out any works, for example, it had to submit the 'plans and details of the works' to the Minister and the council, both of whom had to give approval and could insist on alterations or prescribe conditions as they saw fit.[109]

The membership of the council was a balance of senior Government officials (usually heads of departments) and local government representatives. An Opposition attempt to give 'local body and farming representatives a dominant position' on the council was defeated during the Bill's passage through Parliament.[110] In 1941, the council consisted of the Engineer-in-Chief of the Public Works Department, the Under-Secretary for Lands, and a Public Works Department official nominated by the Minister. Two local government representatives were appointed by the Governor-General on the recommendation of the Minister. The final member was nominated by the Minister as 'representing agricultural and pastoral interests'.[111] The membership was later extended to include the Director-General of the Department of Agriculture, the Director of Forestry

107. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 42
108. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 44
109. Soil Conservation and Rivers Control Amendment Act 1954, s 4
110. Michael Roche, *Land and Water: Water and Soil Conservation and Central Government in New Zealand, 1941–1988* (Wellington: Department of Internal Affairs, 1994), p 45
111. Soil Conservation and Rivers Control Act 1941, s 3

(head of the State Forest Service), the Secretary to the Treasury, and additional members nominated by the Minister. The local representation was also increased to maintain parity.[112] The Māori Affairs Department, however, was not represented on the council, and no member was appointed as representing Māori interests. Farmers were thus given special representation because of their interest in the subject matter of the Act but Māori were not, despite their position as Treaty partners and their crucial interest in the taonga water bodies that would be managed, controlled, and transformed under the Act.

8.4.3 The Manawatu Catchment Board's Waikanae River scheme

The Manawatu Catchment Board carried out some minor works in the late 1940s but a serious flood in 1955 accelerated the completion of a river control scheme:

> The 1955 Scheme followed the design philosophy of many of the other schemes of its day. This was based on the assumption that the existing form of the river could be redefined to a more stable course that would be substantially cheaper and simpler to maintain than the unimproved channel. Multiple channels and uncontrolled 'meandering' were replaced with a single channel on an improved alignment. Development of diversion cuts, clearing of unwanted willow and vegetation, strengthening of bank protection in places recognised as points of permanent erosive attack, and the introduction of groynes and plantations were established to hold the new alignment. In hindsight, the wisdom of these measures can be questioned. The early confidence is indicative of the short practical experience the engineers had in the management of steep NZ gravel rivers.[113]

The benefits were estimated in 1955 as:

- 600 acres would benefit from erosion protection.
- 50 acres of built up land would be flooded if erosion was not prevented.
- 100 acres which flooded in Feb '55 would be protected by stopbanking.
- 50 acres to benefit from improved drainage.
- The river controlled as a whole would benefit the whole district.[114]

No consideration was given to environmental issues or impacts on fish habitat; the sole concern was to protect land from erosion and flood damage.[115] The works included 'live protection works', the planting of willows to stabilise river banks and help prevent erosion.[116] Mahina-a-rangi Baker commented that the flood protection works have 'removed the appropriate native riparian vegetation and

112. Soil Conservation and Rivers Control Amendment Act 1946, s 3; Soil Conservation and Rivers Control Amendment Act 1952, s 2(1); Soil Conservation and Rivers Control Amendment Act 1959, s 3
113. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 14
114. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 31
115. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 40–41
116. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 31

planted in their place exotic tree species', which has had a 'cascade effect on local fauna, as native insects typically only occupy native tree species.'[117] The planting of new trees on the river banks required fencing to protect them from stock. The board assumed that, in order to build and maintain these fences, it would need to acquire a 'narrow belt of land along the rural reaches (predominantly the left bank)'. A land acquisition programme was therefore included in the design and costings of the scheme in 1955.[118] Both the Minister and the Soil Conservation and Rivers Control Council had to approve the Waikanae River scheme before it could be given effect.[119]

The scheme's land acquisition programme and the works to alter the nature and course of the lower stretches of the river were of great importance to Māori. There was no consultation, however, with Te Ātiawa/Ngāti Awa before the scheme was finalised.[120] Nor does it appear that the board consulted Māori riparian owners. The only information on pre-scheme consultation comes from the Waikanae River archive. This summary of file entries has a record for 12 March 1955:

> *Scheme Promotion*. MCB [Manawatu Catchment Board] attended a meeting convened by Mr Greenaways with 15–20 settlers and representatives of the Horowhenua County Council and Hutt County Council at Puriri Street & Greenaways Road. The purpose of the meeting was to impress on the Board the necessity for a flood and erosion control scheme for the Waikanae River. Recent damage and flooding had occurred in areas hitherto considered immune. The MCB made clear to the meeting:
>
> - Work on the Scheme proposals was nearing completion.
> - The area effected was to be classified and rated. The rates were likely to be high as the rating area was small.
> - Prior to the Scheme program approval and funding, only works on a private contributory basis would be carried out.[121]

This appears to have been the only consultation carried out before the scheme was adopted by the board. Attendance at the meeting was limited to a few 'settlers'. In 1957, another public meeting was held to 'explain Right Bank Scheme Works' before they were carried out. About 20 affected owners were advised of the board's intentions at the meeting. Those who attended supported the works but we have no information as to whether any Māori owners were notified or attended.[122] There was no requirement to consult with Māori or consider Māori values and interests in the Soil Conservation and Rivers Control Act 1941 or its subsequent amendments. We have no evidence about the process to classify riparian land for the special rating required for the scheme or whether Māori owners had input to that

117. Mahina-a-rangi Baker, brief of evidence (doc F11), p 41
118. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 31
119. Soil Conservation and Rivers Control Act Amendment Act 1948, s 10
120. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 77–78
121. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 36
122. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 37

process. There is some evidence, however, that the board's rates contributed to the loss of Māori land along the river.

8.4.4 Was it essential for the catchment board to acquire the riverbed?

One question that arises for our inquiry is whether the board really needed to acquire full ownership of the riverbed in order to achieve its ends. Certainly, many owners agreed to the required fencing and cooperated with the board.[123] The case for acquisition was put to the Soil Conservation and Rivers Control Council by the board's chief engineer in 1960, based on the unusual titles that owners had to the Waikanae riverbed, the revenue that the board could get from owning the shingle, and the scheme requirement of protecting the trees along the banks:

> The acquisition of land along this river is desirable particularly as titles in this area originally extended to the centre of the river and were not variable according to the accretion as they are in many rivers. It is also desirable, from the point of view of controlling the removal of shingle from the river and for the revenue which can be obtained from this source. The main object, however, is to ensure that stock do not damage our work and that trees planted along the river are under the control of the Board and able to be felled and used as we wish.
>
> The legal position, when the land does not belong to the Board, is far from satisfactory and we are unable to force our requirements in many cases.[124]

Under the Soil Conservation and Rivers Control Act 1941, catchment boards had sweeping powers that enabled them to pass bylaws and carry out flood protection works, and to require landowners to carry out such works (or to refrain from certain activities). Some powers were centralised in the council by a major amendment Act in 1959.[125]

From the evidence available to us, the issue of the board's powers in respect of the bed of the Waikanae River was first raised in 1954, the year before the design of the scheme was completed. A Waikanae Beach settler, J S Hill, complained to the Soil Conservation and Rivers Control Council about the damage caused by stock wandering on the riverbed. The chair of the council, Engineer-in-Chief W Newnham, replied that stock damage was a concern in many places where a river had been used as a boundary. In other cases, where a boundary had been fixed on the banks, riparian owners could 'legally be required to fence'. In the case of the Waikanae River, where the boundary was a 'surveyed line which was the centre of the river at the time of the survey', changes to the course of the river meant that 'the true boundary is in some places on one side of the river and in other cases on the opposite side'. It was 'not practicable to fence boundaries in

123. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 45–48
124. Chief Engineer, Manawatu Catchment Board, to Soil Conservation and Rivers Control Council, 22 February 1960 (Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 47)
125. Roche, *Land and Water*, pp 63–65; Soil Conservation and Rivers Control Act 1941, ss 131–140

river beds', and owners could not be prevented from allowing their stock access to the river. In some cases, however, it had been possible for the board to get farmers to 'fence the banks by mutual agreement', surrendering 'the land in the river bed and the free access to it for animals'. But, as in the case raised by Mr Hill, 'one man can wreck the whole scheme', and the 'only remedy' was for 'the Catchment Board to acquire the river bed by purchase'.[126]

Newnham concluded:

> Much has been done to exclude stock by mutual agreement and, when comprehensive river control schemes are undertaken, river beds and banks are purchased as river control reserves. Nevertheless, wandering stock is a menace to bank protection works in many rivers but, failing agreement amongst riparian owners, there is no alternative to acquisition.[127]

There was an option, therefore, of seeking the agreement of riparian owners to fencing before outright acquisition of the land was required, although all owners would need to agree for a voluntary arrangement to succeed. The position of the Soil Conservation and Rivers Control Council was that catchment boards needed to own the whole of the riverbed rather than restricting acquisition to the land of owners who did not agree to keep stock out of the river and away from any riparian trees. Potentially, this would be an expensive exercise.

On 18 March 1960, the Chief Soil Conservation and Rivers Control Engineer responded to a suggestion that the board negotiate agreements about fencing with riparian owners instead of acquiring the land. The issue arose partly because of a claim by Real Properties Ltd, a company that owned riparian land, which demanded high compensation or an easement to allow the continued access to the river for various purposes, including watering of stock.[128] The Real Properties Ltd claim spooked the catchment board, which asked the council to approve a large increase in its budget for land acquisition. The board considered that it would need to 'proceed with care and not take the land by proclamation in case we should find ourselves involved in very heavy expenditure'. If the price was too high, then the board would simply not purchase the land. The board's chief engineer disagreed, for the reasons outlined above – that the land titles extended to the middle of the river (unlike most other rivers), the board needed to control shingle extraction and obtain the revenue from it, and the board needed to prevent stock damage to its new riparian plantations. The council's view was sought on how the board should proceed.[129]

126. W L Newnham to J Hill, 17 November 1954 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 137)

127. W L Newnham to J Hill, 17 November 1954 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 137)

128. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), pp 46–47

129. Chief Engineer, Manawatu Catchment Board, to Soil Conservation and Rivers Control Council, 22 February 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 182)

The council's chief engineer responded:

> The inclusion of river bed in land titles, particularly where there is a river control scheme, is most undesirable. On the other hand the scheme could not face up to such claims as that made by Real Properties Ltd. Mr Fancourt's suggestion that the Board obtain agreements and then maintains the river fences appears at first sight to be a desirable compromise, but it would undoubtedly lead to a lot of trouble in future.[130]

The outcome of this debate was that the council's chief engineer recommended allowing the board to buy up as much of the bed as it could at 'reasonable cost'. He advised the council:

> This is desirable even if some landowners hold out for more than the Board is prepared to pay them. *Purchases will be by negotiation* and most of the land will be obtained at reasonable prices. With cattle from these properties excluded, the Board expects that public opinion will force the remaining owners to control their stock more effectively. [Emphasis added.][131]

The council accepted this advice and authorised the board to 'acquire all the river bed you can at reasonable prices', approving expenditure of £5,000 for that purpose.[132]

In 1962 and 1964, the same arguments were repeated within the Ministry of Works to justify the board's ongoing programme of land acquisition: some owners had been cooperative and allowed the board to erect fences to protect riparian planting, others had not, and therefore it was necessary to acquire the whole bed of the river to give the board 'undisputed control'.[133]

Our focus is on the sections of the riverbed that were still in Māori ownership. In our view, it was not essential for the catchment board to acquire the freehold of those sections as the only alternative to negotiating an agreement about fencing. The board's main objective, to protect the willows and poplars that it had planted along river banks, could have been achieved by negotiation. The evidence is clear

130. Chief Soil Conservation and Rivers Control Engineer to Chief Engineer, Manawatu Catchment Board, 18 March 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 181)

131. Chief Soil Conservation and Rivers Control Engineer to Chairman, Rivers and Drainage Committee of the Soil Conservation and Rivers Control Council, 10 June 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 192)

132. Secretary, Soil Conservation and Rivers Control Council, to Chief Engineer, Manawatu Catchment Board, 22 June 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 193)

133. Resident Engineer to District Commissioner of Works, 16 January 1962; Resident Engineer to District Commissioner of Works, 6 May 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 209, 377)

that it was in fact possible to negotiate such agreements.[134] Further, it was open to the catchment board to lease the land instead of acquiring the freehold in the event that an agreement about fencing could not be reached with particular owners. The board would not have obtained the revenue from shingle extraction that it wanted but it would have been a stretch for the board to justify taking land for that purpose alone. The Soil Conservation and Rivers Control Act 1941 empowered the board to take, purchase, or 'otherwise acquire and hold any land, *or any estate or interest therein*' (emphasis added), using the powers of the Public Works Act 1928 where necessary, which means that leasing was envisaged and provided for in the Act.[135] Māori owners may well have been prepared to lease the riverbed part of their land to the board for a small or no rental in return for retaining the mana of ownership and protecting the remainder of their sections from erosion and flooding. The fact is, however, that the board never dealt with the Māori owners personally at all, whether to discuss fencing, a lease, a purchase, or anything in respect of the river protection works. Instead, all the Māori land acquired by the board was taken compulsorily.

We turn next to consider whether, if the board did need to acquire the freehold, it was essential for the board to take the extreme step of acquiring Māori land by compulsion.

8.4.5 Was it essential for the board to take Māori land compulsorily?

Four pieces of Māori land were taken compulsorily for the Waikanae River scheme:

- Part Ngarara West A3C (8a 2r 11p);
- Ngarara West A21D (6a 1r 36p);
- Part Ngarara West A22A1 (1r 21.4p); and
- Part Ngarara West A22A2 (2r 39.7p).[136]

The catchment board was determined to acquire as much of the bed of the Waikanae River as possible. Some owners were willing to negotiate agreements about fencing and there was no opposition to the scheme when it was proposed in 1955. Clearly, many riparian owners wanted to get protection for the rest of their land from flooding and erosion, and so were prepared to sell the riverbed portion of their titles for what the Ministry of Works called 'nominal' sums.[137] The board's rationale for taking Māori land by compulsion rather than negotiating a purchase was explained by the catchment board to the Ministry of Works in 1962:

> On the 22nd June, 1960, the Soil Conservation & Rivers Control Council gave approval to this Board to acquire all the river bed at reasonable prices . . . A number of

134. See, for example, Chief Engineer, Manawatu Catchment Board, to Secretary, Soil Conservation and Rivers Control Council, 4 July 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 195).

135. Soil Conservation and Rivers Control Act 1941, ss 131, 135(a)

136. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 49

137. Land purchase officer, Ministry of Works, to Valuation Department, 12 October 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 410)

> pieces were transferred to the Board for the consideration of one shilling, but the area shown on the attached proclamation is Māori Land required by the Board and is thus to be taken by Proclamation. I should be pleased if you could enter into negotiations via the Māori Land Court for compensation to be paid to the Māori owners.[138]

This approach of taking Māori land compulsorily *because* it was Māori land, while at the same time negotiating purchases or takings by agreement with the owners of European land, reflects the policies followed by the Crown in respect of Paraparaumu Aerodrome (see chapter 7). As noted above, the board's plan was to proceed carefully, avoid taking land by proclamation, and acquire land where it could be obtained for 'reasonable' prices. European owners were contacted and their views ascertained but Māori land for the Waikanae River scheme was taken compulsorily automatically in all cases. There were also some compulsory takings of European land but, as far as the evidence shows, only in instances where the owners would not agree to a nominal sum (or at all).

A January 1960 report, for example, stated that 'six property owners have agreed to the taking of their areas without compensation'. Of the other land under consideration at that time, J A Godber was 'not prepared to give an area' of about an acre and wanted £375 for it. Miss M Godber would 'not agree to give 2r 32p' but the issue of compensation had not yet been discussed with her. Two other owners would not agree to their land being taken (the provisions for taking by agreement are discussed in chapter 7). The Girls' Life Brigade was still considering the question, and discussions had not yet been held with another owner, Mr Barclay. D K Buchanan had refused to 'sign an agreement' in respect of his 24 acres.[139]

The four pieces of Māori land were discussed in this report, which noted that the 'taking of an area of Maori land of 8a 2r 11p adjacent to the shingle plant [Ngarara West A3C] has been held up by a clerical error and so has two small Maori areas of 0a 1r 21.4p [Ngarara West A22A1] and 0a 2r 39.7p [Ngarara West A22A2]'. The fourth piece (Part Ngarara West A21) was referred to as the 'Rameka Estate',[140] with the comment that it had been resurveyed to reduce the area that would be taken. No discussion with the owners was mentioned, nor was any consideration given as to whether they would enter into a voluntary agreement. Instead, the land was simply to be taken. There was anticipation about the views of the owners of Ngarara West A3C; the report stated that 'it appears' the Māori owners of that land were 'prepared to claim compensation for shingle rights as this area is immediately below the Board's land on which the shingle company is operating'. How exactly the board knew this is unclear.[141]

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138. Secretary, Manawatu Catchment Board, to District Commissioner of Works, 14 June 1962 (Potter, Spinks, Joy, Baker, Poutama, and Hardy, 'Inland Waterways Historical Report' (doc A197), p 93)

139. 'Waikanae Scheme Land Acquisition', 13 January 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 183)

140. The estate of Rameka Watene, deceased.

141. 'Waikanae Scheme Land Acquisition', 13 January 1960 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 183)

In all other cases, there had been direct discussion and negotiation with the European owners (or discussion was planned). Negotiated agreements had been arranged with some for the taking of their land by agreement. There was a stark difference between how the Māori owners were treated vis-à-vis the European owners.

In our view, it was not necessary to take Māori land compulsorily for the purpose of fencing off riparian trees from stock, and certainly not without any previous attempt to acquire the leasehold or (if necessary) the freehold by negotiation and voluntary agreement.

8.4.6 The role of the Ministry of Works in the takings

The taking authority was the Manawatu Catchment Board but the Ministry of Works played an integral role. First, the Minister of Works had to approve the Waikanae River scheme, which included the land acquisition programme, and could require changes to be made. Secondly, the Minister of Works had to approve each taking individually. Thirdly, the Ministry of Works arranged the compensation for the Māori land takings. The Soil Conservation and Rivers Control Council had to approve the amount paid for compensation.

We have no evidence about how the Minister decided to approve the scheme. We do, however, have evidence about the Ministry's role in arranging compensation (see below) and the requirement for the Minister to approve each taking.

The process for taking land was for the catchment board to prepare a memorial asking the Governor-General to take the land. The Resident Engineer had to write a report to the District Commissioner of Works explaining why it was necessary to take the land and recommending that the taking proceed. The Resident Engineer also had to certify that the land to be taken was not 'occupied by any building, yard, garden, orchard, vineyard, ornamental park, pleasure ground, cemetery or burial ground' (which were exempt from taking without the signed consent of the owner or the prior consent of the Governor-General in Council). After receipt of the Resident Engineer's report, the district commissioner wrote a further report to the Commissioner of Works, explaining why the taking should be approved. The commissioner then made a recommendation to the Minister to approve the taking, which the Minister had to sign. After this process, the Minister would sign the proclamation taking the land.[142]

The question arises as to whether the Minister's approval was a formality required for the legalities of the taking, since the catchment board (not the

142. See Manawatu Catchment Board, memorial to Governor-General, 17 October 1961; Resident Engineer to District Commissioner of Works, 16 January 1962; District Commissioner of Works to Commissioner of Works, 8 February 1962; Resident Engineer to District Commissioner of Works, 26 March 1962; Commissioner of Works, minute to Minister of Works, 2 April 1962; Minister of Works, signature on District Commissioner of Works to Commissioner of Works, 11 April 1962; proclamation, 11 April 1962; Resident Engineer to District Commissioner of Works, 6 May 1964; District Commissioner of Works to Commissioner of Works, 13 May 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 209, 210, 215, 217–219, 377, 382); Public Works Act 1928, s 18; Public Works Amendment Act 1948, s 14.

Minister) was the taking authority. We did not receive submissions on this point. Without commenting on local authority takings in general, we note that the Soil Conservation and Rivers Control Amendment Act 1954 required the Minister to approve each catchment board work as well as the whole scheme.[143] Hence, an engineer's report recommending the taking was a prerequisite for the Minister's approval. On the other hand, the step of signing the proclamation was a formality.

8.4.7 Ngarara West A3C

In 1953, the owners of several blocks – A3B2, A3C, A3D1, A3D2, and A3E – had consolidated and partitioned land for house sites, which became known as A3C1–A3C16 (about 4.5 acres). The remainder of the land was called the Ngarara West A3C residue (about 14 acres). The Manawatu Catchment Board decided to take 8 acres 2 roods 11 perches from the residue block.[144] This land 'spanned the river with 2 roods 11 perches taken from the northern bank, 3 acres of riverbed and 5 acres south of the river'.[145] The notice of intention was published in the *New Zealand Gazette* on 3 August 1961.[146]

We have no direct evidence as to whether notice was served on the Māori owners. As discussed in chapter 7, section 22(3) of the Public Works Act 1928 stated:

> The provisions of this section requiring the names of the owners and occupiers of the land to be shown on the plan thereof, and requiring copies of the notice and description referred to in this section to be served upon the said owners and occupiers and upon all other persons having an interest in the land, shall have no application to any Native who is an owner or occupier of the land or has an interest therein unless his title to the land is registered under the Land Transfer Act, 1915. Entry on the Provisional Register shall not be deemed to be registration within the meaning of this subsection.

Thus, the requirement to serve notice on owners did not apply to Māori owners whose title was not registered in the land transfer system. The documentation prepared for this taking showed that the owner of Ngarara West A3C registered under the Land Transfer Act was still the Otaraua chief Eruini Te Marau, who had long since died.[147] It is safe to conclude, therefore, that notice was not served on the unregistered owners and, as a result, they had no opportunity to express a view or file an objection to the taking of their land.

143. Soil Conservation and Rivers Control Amendment Act 1954, s 4
144. Suzanne Woodley, 'Local Government Issues Report', June 2017 (doc A193), pp 519–520
145. Heather Bassett and Richard Kay, 'Public Works Issues', November 2018 (doc A211), p 262
146. District Commissioner of Works to Commissioner of Works, 8 February 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 219); *New Zealand Gazette*, no 48, 3 August 1961, p 1101
147. CT216/235 Part, 13 December 1961 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 206)

The catchment board sent the requisite memorial, asking the Governor-General to take the land, in October 1961.[148] As noted above, an engineer's report was required before the Minister could approve the taking.[149] The Resident Engineer supplied this report in January 1962:

> As you are no doubt aware, the bed of the Waikanae River is included in the titles of the various adjoining landowners, and this makes it very difficult for the Catchment Bd to protect, from stock, its willows and poplars, which have been planted in quantity to control erosion and reduce flood drainage. Some owners have proved co-operative and permitted the erection of protective fencing, others have not.
>
> To give the Board undisputed control of the river bed, it has embarked on a programme of land acquisition, which is being furthered as opportunity offers, and as finance becomes available.
>
> The area of 8a 2r 11p, now under review, is mainly shingle river bed and of little value for farming purposes. It belongs to native owners and compensation will be determined by the Maori Land Court. Its acquisition will give the Board full control of a troublesome reach of the river, enable it to construct and maintain such works as it thinks fit, and safeguard plantings of willow and poplars on the area. It is in the best interests of all concerned that the land should be so acquired.[150]

The district commissioner supported these justifications for taking the land, emphasising in a report for the Commissioner of Works that the land was 'valueless' and that 'ownership of the land will enable the Board to provide fencing and prevent damage to the planting by stock'.[151] The commissioner recommended that the Minister, William Goosman, approve the taking, which Goosman duly did in April 1962.[152] The 'value' was measured by the Ministry of Works in terms of farming only, which took no account of any other values which the Māori owners had for the river and the riparian land; as noted above, it is highly unlikely that the owners were notified or had an opportunity to put forward their views before the Minister approved the taking. The proclamation taking the land was gazetted in April 1962.[153]

148. Manawatu Catchment Board, memorial to Governor-General, 19 October 1961 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 210)

149. District Commissioner of Works to Commissioner of Works, 8 February 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 219)

150. Resident Engineer to District Commissioner of Works, 16 January 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 209)

151. District Commissioner of Works to Commissioner of Works, 8 February 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 213)

152. Commissioner of Works, minute to Minister of Works, 2 April 1962; Minister of Works, signature on District Commissioner of Works to Commissioner of Works, 11 April 1962; proclamation, 11 April 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 215, 217)

153. Extract from *New Zealand Gazette*, 26 April 1962, no 27, p 663 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 406)

In June 1962, the Manawatu Catchment Board asked the Ministry of Works to arrange compensation for the taking of Ngarara West A3C. As far as the board was aware, the owners were 'Mrs H Jenkins and seven others', represented by a Raumati Beach law firm.[154] The Ministry's land purchase officer responded that the board's solicitor had to lodge the application with the Māori Land Court but the Ministry would give 'every assistance', including arranging a special Government valuation and liaison with the board's solicitor before the court hearing.[155] In this case, 'every assistance' also included an attempt by the Ministry to negotiate an out-of-court agreement with the owners' solicitor over compensation. This failed because it turned out that the solicitor only represented some of the owners. As a result, the land purchase officer recommended to the board that 'the best move would be to let the application proceed and leave it to the Court to decide', and to have the board's engineer present at the hearing to 'counteract any claim for value of shingle'.[156]

The Valuation Department's special valuation named the owners as Patrick Paddon, Hau Tamati, and 'others'. The land was valued at £215, although there was a note that the land had already been used in part for protection work, and 10,094 cubic yards of metal had been removed from the bed. The owners had been promised a royalty payment of ninepence per cubic yard by the Waikanae Shingle Company. The valuer reported that the residue of Ngarara West A3C would be 'greatly protected' by the works.[157] It is unclear whether the protection afforded the residue was taken into account in the valuation.

The owners were represented in court by a Mr Philips (solicitor for the majority), and their valuer put a slightly higher value on the land of £225. The court, however, awarded £450 plus £21 for the owners' legal costs and £9 16s for witness expenses. The increase was made because the valuers for both sides had failed to take 'metal potential' (the value of the shingle) into account. The board's engineer explained that another 5,000 cubic yards would be removed from the site in future, and it was agreed in court that £225 would be a 'reasonable' value for the shingle. The court also ordered the Waikanae Shingle Company to pay the royalties, which had been held by the company pending settlement of the compensation. This backlog of royalties would be paid to the Māori Trustee to distribute to the owners.[158] The District Commissioner of Works and the chairperson of the

154. Secretary, Manawatu Catchment Board, to District Commissioner of Works, 14 June 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 407)

155. District Land purchase officer to Manawatu Catchment Board, 19 September 1962 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 409)

156. Land purchase officer to F C Opie, solicitor for the Manawatu Catchment Board, 27 June 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 428)

157. Valuation Department, 'Urban Valuation and Report', 27 May 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 426); Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 51

158. Land Purchase Officer to District Commissioner of Works, 1 August 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 430)

Soil Conservation and Rivers Control Council both approved payment of the compensation awarded by the court,[159] which meant that no appeal would be filed by the Ministry or the board against the decision.[160]

We discussed the impact of rating law on Ngarara West A3C in chapter 5. At the time the court hearing for the compensation was advertised in the pānui, the Horowhenua County Council had applied for a receivership for the A3C residue block to recover £117 in rates arrears.[161] The block had been subject to various receiverships and rates charging orders but the compensation from the taking was used to pay off all the outstanding charges. Nonetheless, rating charges continued to accumulate on the block. The remainder of the Ngarara West A3C residue block was later vested in the Māori Trustee for compulsory sale under section 109 of the Rating Act 1925, despite the strong opposition of Rangitoenga Tamati and other owners. The Minister of Māori Affairs approved the vesting order in February 1968.[162] The sale of the residue block in 1970 for non-payment of rates is discussed in chapter 5. Here, we note that by a combination of the Soil Conservation and Rivers Control Act, the Public Works Act, and the Rating Act, the Māori owners of Ngarara West A3C residue were deprived of the whole block, including their access to the Waikanae River.

8.4.8 Change to the compensation system in 1962–63

In the nineteenth and early twentieth centuries, Māori leaders were concerned about the use of the Native Land Court to determine compensation instead of the more specialist court used to decide compensation for Europeans. According to historian Cathy Marr, the Native Land Court was originally used to 'determine the individuals who were entitled to compensation', and the responsibility for assessing compensation was also 'given out of administrative convenience'.[163] Māori objections faded, however, as the court became increasingly protective of their interests, and the judges' 'understanding of the special problems facing Maori land was by then also often acknowledged'.[164] Ms Marr observed that the 'lack of expertise of the court in assessing compensation became an issue again' by the middle of the twentieth century. This was because 'compensation law became increasingly complex and again there were concerns that Maori land might be suffering a disability as a result'.[165] Due to these concerns and the large body of complex case law in respect of compensation, the Crown decided to transfer jurisdiction from the

159. Minutes on Land Purchase Officer to District Commissioner of Works, 1 August 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 431)
160. Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 208
161. 'Supplementary Panui', 19 March 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 415, 417); Woodley, 'Local Government Issues' (doc A193), pp 519–521
162. Woodley, 'Local Government Issues' (doc A193), pp 520, 523–530
163. Marr, *Public Works Takings*, p 130
164. Marr, *Public Works Takings*, p 130
165. Marr, *Public Works Takings*, pp 142, 143–145

Māori Land Court to the Land Valuation Court. This was done through the Public Works Amendment Act 1962.[166]

Compensation was usually negotiated with European landowners after notification of intention to take the land but before the land was actually taken. If agreement could not be reached between the owners and the taking authority, compensation was determined by the Land Valuation Court (established in 1948). Introducing this proposed amendment to Parliament in 1962, the Minister, W S Goosman, stated:

> Clause 6 removes the present requirement in the Public Works Act that compensation payable to Maoris for land taken is to be assessed by the Maori Land Court. This provision enables the Maori owner, either personally or through the Maori Trustee, to reach agreement with the Crown on the compensation payable, or failing agreement, to have the compensation assessed by the Land Valuation Court instead of by the Maori Land Court. Where the Maori Trustee is acting on behalf of any of the Maoris concerned, the compensation is to be paid to the Maori Trustee and he is to distribute it.[167]

This speech might have implied some degree of choice on the part of the Māori owners in appointing the Trustee to negotiate on their behalf, but the Crown's intention was for the Māori Trustee to negotiate and agree to compensation for all Māori land taken if the land had more than one owner. This was likely intended to assist the public works process by ensuring that compensation could be arranged for blocks with large numbers of multiple owners and no trustees or management committee. Māori trusts and incorporations were able to negotiate their own compensation under the new legislation.[168] But the Act was a very blunt instrument because it defined multiple ownership as more than one owner, whereas previous legislation had usually set that bar at more than 10 owners.[169] Alternative methods of managing the problems associated with multiple ownership were readily available to the Crown. A meeting of assembled owners, for example, could have been convened to discuss and decide on any compensation figure negotiated by the Trustee, with the alternative of going to the Land Valuation Court if the owners were dissatisfied. This instrument of owners' meetings, which was used for many other decisions to be made by multiple owners under the Māori Affairs Acts, was disregarded in the public works regime until 1974.[170]

As a result, Māori owners were even more disempowered by the 1962 Act than under the previous system, in which the Māori Land Court had to decide

166. Marr, *Public Works Takings*, pp 143–145; Bassett and Kay, 'Public Works Issues' (doc A211), p 33

167. W S Goosman, 21 November 1962, NZPD, vol 332, p 2783

168. Public Works Amendment Act 1962, s 6; Marr, *Public Works Takings*, pp 142–143

169. See, for example, Māori Affairs Act 1953, s 215.

170. For this and other reforms to the public works regime, see Māori Affairs Amendment Act 1974, ss 69–76; Marr, *Public Works Takings*, p 138; Bassett and Kay, 'Public Works Issues' (doc A211), p 33.

compensation. Out-of-court agreements were sometimes reached between the owners (usually through a lawyer or some other representative) and the taking authority, as we saw above in the case of Ngarara West A3C. The court still had to make the final determination. Under the 1962 Act, however, the Māori owners had no ability to affect the outcome at all; if there was more than one owner, then the Māori Trustee was empowered by the statute to negotiate the compensation, decide whether the compensation was acceptable, and decide whether to take an offer that was too low to the Land Valuation Court. The only role allowed the owners was to receive payment from the Trustee.[171] Thus, if the owners were not notified of the taking, they might not find out that their land had been taken until they received a payment from the Māori Trustee. This was especially the case in respect of the Waikanae flood protection works discussed above because the board had constructed those works several years before the land was actually taken.

The new compensation provisions of the Public Works Amendment Act 1962 took effect on 1 April 1963.[172] We turn next to see how this new compensation system worked in practice for the remaining pieces of Māori land taken for flood protection in the 1960s.

8.4.9 Ngarara West A21D

In a proclamation dated 5 March 1963, two pieces of Ngarara West A21 were taken for soil conservation and river control purposes. These were described as Part Ngarara West A21 (4a 2r 1p) and Part Ngarara West A21 (1a 3r 35p).[173] We have no direct evidence as to whether owners were notified, but we note that the designation of the title as 'Parts Section 21, Ngarara West A' was out of date, and the owner was considered by the board to be the Rameka Watene Estate.[174] In fact, the land taken by the proclamation had been partitioned as Ngarara West A21D in 1960 and awarded to Teera Collins and June Erica Moewaru Ngaia.[175] Since the board was unaware of this, it is highly unlikely that the owners were notified or had the opportunity to file an objection. In May and August 1963, the board asked the Ministry of Works to arrange compensation with the Rameka Watene Estate.[176]

As in the case of Ngarara West A3C, the Ministry took responsibility for the compensation process. The Ministry obtained a special Government valuation in February 1964, which stated that the area of 6.5 acres was zoned residential but was actually located on the 'river side of [the] stopbank' constructed by the catchment board. The land was either covered by the river or 'forms a part of the low

171. Public Works Amendment Act 1962, s 6; Marr, *Public Works Takings*, pp 142–142, 204
172. Public Works Amendment Act 1962, s 6(5)
173. Extract from *New Zealand Gazette*, 14 March 1963, no 16, p 327 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 440)
174. 'Waikanae Scheme Land Acquisition', 13 January 1960; Manawatu Catchment Board to District Commissioner of Works, 19 August 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 183, 442
175. Webb, 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205), p 52
176. Manawatu Catchment Board to District Commissioner of Works, 19 August 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 442)

lying banks and is broken by watercourses'. This area was valued in financial terms at £100.[177] The board's solicitor began to prepare the application to the Māori Land Court to determine compensation. Some confusion arose, however, as to whether the new process established by the Public Works Amendment Act 1962 should be followed. The board's solicitor advised that the provisions of the Act had come into effect on 1 April 1963. Compensation claims would need to be taken directly to the Māori Trustee or, if agreement could not be reached, referred to the Land Valuation Court. The Land Purchase Officer, E L Staples, had advised that the board should negotiate any claims for less than £200, the Ministry should negotiate higher claims, and in fact the Ministry would prefer to negotiate all claims.[178] Staples' superiors at the Ministry disagreed, however, and instructed him to follow the pre-1963 process. This was because the proclamation took effect on 18 March 1963, prior to the new Act coming into effect. Staples was directed to approach the Māori owners to see if agreement could be reached before the Māori Land Court sat to determine the compensation.[179]

The confusion persisted because the Māori Trustee took a different view and tried to negotiate with the board, stating that it was acting under section 6 of the 1962 Act, and this delayed the compensation process.[180] The board refused the compensation offered by the Trustee in 1964–65, stating that the Land Purchase Officer had been 'advised on two occasions to arrange a settlement with the Maori owners'. The board asked the Māori Trustee to negotiate directly with the Ministry of Works.[181] The Trustee ignored this request and reiterated its offer to the board of £200 plus costs of £35 and interest from the date of actual taking (when the board began work on the land) of 2 August 1957 (£85 16s 9d). The Trustee also threatened the board that interest would continue to accrue if the claim was not settled by 2 March 1966.[182] The juggling over responsibility continued with the board once again asking the Ministry of Works to negotiate the compensation.[183] The Land Purchase Officer then negotiated an agreement with the Māori Trustee to settle for the offered sum of £320 17s 9d. The land was reportedly in 'rough growth', subject to flooding, and partly shingle riverbed. It was valued at £30 an acre, which

177. District Valuer, 'Urban Valuation and Report', 14 February 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 446)

178. Manawatu Catchment Board solicitor to the board's secretary, 26 April 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 444)

179. Minute, 8 May 1963, on Manawatu Catchment Board solicitor to the board's secretary, 26 April 1963 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 444)

180. District Officer to Manawatu Catchment Board solicitor, 15 February 1966 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 452)

181. Manawatu Catchment Board to Māori Trustee, 21 January 1965 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 449)

182. District Officer to Manawatu Catchment Board, 15 February 1966 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 452)

183. Manawatu Catchment Board to District Commissioner of Works, 22 February 1966 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 453)

was considered 'in line with other settlements for similar land on this river and is reasonable'.[184]

Thus, the Māori owners were not consulted about the taking, had no opportunity to object, and were excluded from any input at all into the compensation process. Their values for the river (and access to the river) were not considered. The board continued to refer to the land throughout the process as belonging to the Rameka Watene estate without any reference to the actual owners.

8.4.10 Ngarara West A22A1 and Ngarara West A22A2

Part Ngarara West A22A1 (1r 21.4p) and Part Ngarara West A22A2 (2r 39.7p) were taken for the Waikanae River scheme in May 1964. The board also intended to take five other pieces of riparian land in European ownership, all under an acre in size apart from one section of about 24.5 acres.[185]

The Resident Engineer provided a report accompanied by a plan of the land, recommending that the Minister approve the takings. The usual arguments were put forward as to why the board needed to own the land:

> As you are no doubt aware, the bed of the Waikanae River is included in the titles of the various adjoining landowners, and this makes it very difficult for the Catchment Board to protect from stock its willows and poplars which have been planted in quantity to control erosion and reduce flood damage. Some owners have proved co-operative and permitted the erection of protective fencing; others have not.
>
> To give the Board undisputed control of the river bed, it has embarked on a programme which it is steadily pursuing of land acquisition. The areas now under review form part of that programme.[186]

The Resident Engineer also certified that the land was not occupied by any 'building, yard, garden, orchard, vineyard, ornamental park, pleasure ground, cemetery or burial ground'. In terms of value, he also advised that the land was mainly 'shingle river bed of little value for farming'. In sum, the Resident Engineer stated: 'I recommend that its acquisition be proceeded with.'[187]

The district commissioner endorsed this recommendation to the Commissioner of Works, stating that the land was 'of little value' but was required for riparian planting. Ownership of the land was necessary because the board had to 'provide fencing and prevent damage to the planting by stock'. The Resident Engineer had

184. Assistant Land Purchase Officer to District Commissioner of Works, 24 March 1966 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 457)

185. Extract from New Zealand Gazette, 28 May 1964, no 31, p 872 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 464)

186. Resident Engineer to District Commissioner of Works, 6 May 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 377)

187. Resident Engineer to District Commissioner of Works, 6 May 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 377)

'reported favourably on the proposal'. The board had issued a notice of intention to take the land, and all the 'statutory requirements' had been met.[188]

As with the previous blocks, there is no direct evidence about notification but it is clear that the owners were not notified. The notice of intention to take the land was gazetted on 6 June 1963.[189] The documentation obtained from the district registrar for the taking in April 1964 showed that the registered owners of Ngarara West A22A1 under the Land Transfer Act were Hoani Tamati (half share), Ngarutapuke (quarter share), and Matai Kahawai (quarter share). The registered owner of Ngarara West A22A2 was Te Puni Tamati.[190] All of this information was out of date. As at 1958 (the last change of title), there were nine owners in the Māori Land Court title for A22A1, none of whom were registered as owners under the Land Transfer Act. Te Puni Tamati, the owner of A22A2, had died. His widow, Sylvie Tamati, had a life interest. There were six children entitled to succeed but no succession orders had been made in the Māori Land Court.[191] The non-registration of Māori land ownership in the land transfer system was a common problem which still affected a 'large proportion' of Māori land and was well known to the Māori Affairs Department at the time.[192] In 1967, three years after the taking, the secretary of the catchment board was 'of opinion that A22A1 & A22A2 may be owned by J Hill, the adjoining owner'.[193] It is clear that the board had not identified the owners for notification prior to the taking.

After the procedure in the previous case (Ngarara West A21D) was worked out, there was no more uncertainty as to who was responsible for arranging compensation: the Ministry of Works knew to deal with the Māori Trustee, and the Trustee knew to deal with the Ministry (not the catchment board). The Ministry contacted Māori Affairs in January 1967 to ascertain whether Ngarara West A22A1 and A22A2 were in fact still Māori land or had been sold to J Hill, as the catchment board believed to be the case. The Māori Land Court advised the correct owners for these two blocks (as set out above).[194] The Land Purchase Officer proceeded to negotiate compensation with the adjoining owner, Mr Hill, for his land, but

188. District Commissioner of Works to Commissioner of Works, 13 May 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 382)

189. District Commissioner of Works to Manawatu Catchment Board, 8 February 1968 ((Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 477)

190. 'Waikanae River Bank Protection: Manawatu Catchment Board, Part Ngarara West, area 1r 21.4p', 29 April 1964; 'Waikanae River Bank Protection: Manawatu Catchment Board, Part Ngarara West, area 2r 37.9p', 29 April 1964 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 465–466)

191. 'Schedule of Ownership Orders: Ngarara West A22A1', undated (February 1967); Assistant District Officer, Māori Affairs, to head office, 13 November 1968 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 471, 929)

192. Marr, *Public Works Takings*, p 138

193. Minute, 13 January 1967, on District Commissioner of Works to Manawatu Catchment Board, 13 January 1967 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 468)

194. District Commissioner of Works to District Officer, Māori Affairs, 13 January 1967; Māori Land Court Registrar to District Commissioner of Works, 8 February 1967 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 469, 472)

compensation for the Māori land had to be negotiated with the Māori Trustee. In November 1967, the Ministry of Works offered the Māori Trustee $90 plus interest and costs, on the basis that half of the land had 'gone to river' and the other half acre consisted of 'shingly river terrace'.[195]

In June 1968, the Māori Affairs Department responded that the offer was 'far too low' and a valuation would have to be obtained:

> Admittedly, portion of the take was river and shingly river terrace but, from plans available and, unfortunately, not a personal inspection of the property, it would seem the owners have lost their riparian rights and possibly some rights in respect of the taking of shingle, if not royalty. Possibly you could advise us whether the owners had any rights to this shingle both at the time of the take and at the present time.
>
> We cannot but consider the offer low when over one quarter of the combined blocks have been taken. The paddock value of the piece taken would be over $500. Possibly the Manawatu Catchment Board would also be prepared to waive outstanding rates.[196]

The Ministry replied that the proposed $90 was based on amounts 'already paid by the Crown for similar land in the area'. A recent award by the Land Valuation Committee,[197] which considered compensation for an adjoining piece of land, had regard to 'riparian rights and shingle potential'. Thus, there was no point in obtaining a valuation but the Ministry would increase its offer to $100.[198]

Nonetheless, the Māori Trustee engaged J H Flowers (introduced in chapter 5) as a registered valuer to negotiate with the Ministry of Works. Flowers checked with neighbouring owners, whose compensation had included a sum of money for the loss of 'water rights' but not for the loss of shingle. In the latter case, the Land Valuation Court had 'declined to award compensation for metal rights'. The land was eroded and had not been valued for rating purposes by the county council, although rates were owed to the catchment board. According to Flowers, this left little scope for negotiation as 'a Court would have been unable to establish a real value'. He therefore appealed to the Ministry for 'more generous treatment than the $100' on the grounds that the land was 'Maori owned etc'. A compromise was reached involving $200 for Ngarara West A22A1 and $300 for A22A2 (including $140 for 'water rights' in each case). Flowers also agreed that no interest would be paid from the original date of entry onto the land, even though compensation was finalised 12 years after the fence was built and five years after the land was taken.

195. District Commissioner of Works to Manawatu Catchment Board, 10 March 1967; District Commissioner of Works to Māori Trustee, 22 November 1967 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 474–475)

196. District Officer to District Commissioner of Works, 14 June 1968 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 482)

197. Land Valuation Committees dealt with claims in the first instance. The committees' decisions could be appealed to the Land Valuation Court.

198. District Commissioner of Works to District Officer, 5 July 1968 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 484)

The compensation would include an additional $35 to pay the Māori Trustee's costs.[199]

The water rights payments were made because the construction of the fence and the taking had 'cut off practical and legal access to the river'. The $140 for each block was seen by the Ministry of Works as a 'contribution towards the cost of an alternative bore water supply'. In addition, the Manawatu Catchment Board would have to write off the outstanding rates as part of the settlement. Although Flowers had called for generous treatment, the Land Purchase Officer noted that the increased compensation was 'in line with the settlement for an adjoining comparable property, and is reasonable' (despite having also said this about the original offer of $90).[200] The Ministry proposed the final amount of compensation to the Chairperson of the Soil Conservation and Rivers Control Council for approval, which was duly given. It is important to note that the council, not the board, made the final decision on the recommendation of the Ministry.[201]

These compulsory takings ended Māori ownership of the lower stretches of the bed of the Waikanae River apart from some land at the mouth (discussed above). According to the evidence of Ross Webb, all the other riparian blocks had been alienated.[202] In total, the Manawatu Catchment Board acquired just over 72 acres of land in the lower stretches of the Waikanae River.[203] Most of that land was European land at the time it was acquired.[204] In addition to the takings of the Māori land discussed above, the catchment board's rates also played a role in section 109 vesting orders (discussed in chapter 5), resulting in the compulsory vesting of four other blocks in the Māori Trustee for sale.[205]

8.5 Control of the Waikanae River after Acquisition of the Bed

8.5.1 Who controlled the river prior to 1989?

The catchment board finished construction of its Waikanae River scheme in 1964, including works to 'improve the alignment of the river' and reduce erosion of the banks, stopbanks to control flooding, and drainage of remaining wetlands. The board continued to manage and control the river until 1972, when responsibility was transferred to the Wellington Regional Water Board. The catchment board resumed management of the river in 1982 until regional councils were created,

199. J H Flowers to Māori Trustee, 18 January 1969; District Officer, file note, 3 July 1969 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 934–935, 936)

200. Land Purchase Officer to District Commissioner of Works, 25 March 1969 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), pp 488–489)

201. Commissioner of Works to Manawatu Catchment Board, 6 May 1969 (Webb, papers in support of 'Te Atiawa/Ngati Awa ki Kapiti – Inland Waterways' (doc A205(a)), p 491)

202. Webb, answers to questions in writing, (doc A205(d)), pp [2]–[3]

203. Potter, Spinks, Joy, Baker, Poutama, and Hardy, 'Inland Waterways Historical Report' (doc A197), p 169

204. 'European land' was not renamed 'general land' until 1975 in section 16 of the Māori Purposes Act 1975.

205. Woodley, 'Local Government Issues' (doc A193), p 588

after which the Wellington Regional Council assumed control of the river in 1989.[206] A Māori role in decision-making on local government bodies was virtually non-existent in the inquiry district prior to 1989.[207] According to the Crown, this situation changed significantly after 1989. Crown counsel raised two examples of the inclusion of Māori in decision-making about the river: the Waikanae River floodplain management plan developed by the Wellington Regional Council; and a Department of Conservation (DOC) project for the restoration of the Waikanae River to full health.[208] We discuss each of these examples in turn.

8.5.2 The Waikanae River Flood Plain Management Plan

According to the Crown, Māori interests have been 'recognised at [a] local level' through the regional council's Waikanae River flood plain management plan, which was first developed in 1993.[209] We did not receive any evidence about this management plan or how it recognised Māori interests.

Mahina-a-rangi Baker, who was the Pou Takawaenga Taiao for Te Āti Awa ki Whakarongotai Charitable Trust at the time of the hearings, gave evidence that the current management of flood protection works did not reflect their interests. Ms Baker stated: 'Te Āti Awa ki Whakarongotai have never ceded their tino rangatiratanga over the Waikanae River as a taonga, and yet all the decision-making that relates to flood protection works has not involved us in a way that acknowledges this.'[210] One essential problem for the iwi was the regional council's decision to keep the Waikanae River inside a '35 metre width channel for its length'. This fundamental design of the river was developed by the regional council 'without input from iwi'. The natural meander of the original braided river thus could not be restored to any extent, and the council's insistence on maintaining the river inside this channel involved 'a range of highly destructive practices on the river'.[211]

It was unlikely that any amount of iwi input would change this fundamental design of the flood protection works, which has been driven by engineering considerations since the 1950s and the vulnerability of the local community living on the flood plain of a highly modified catchment. Since 1980, the Kāpiti Coast has had one of the 'highest growth rates in New Zealand', and most areas 'previously considered part of the natural flood plain of the Waikanae River are now used for residential housing or zoned for that purpose'. As a result, many residential areas 'remain prone to flooding from the Waikanae River or tributary catchments'.[212] On the other hand, the Māori relationship with the river is of paramount importance to the iwi. As Ms Baker put it:

206. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 13
207. Woodley, 'Local Government Issues' (doc A193), pp 819–821
208. Crown counsel, closing submissions (paper 3.3.60), pp 171, 190
209. Crown counsel, closing submissions (paper 3.3.60), p 190
210. Mahina-a-rangi Baker, brief of evidence (doc F11), p 41
211. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 40–41
212. Easther, 'Kapiti Coast Floodplain Management Plans' (doc A197(f)), p 13

> Since [the 1820s], our relationship to our rohe, and the Waikanae River in particular, has informed the development of our collective identity as Te Ātiawa ki Whakarongotai. The river is layered with a history of intimate relationships between various whānau and the River. There are many historical and present day kāinga and mahinga kai sites along the length of the river that have been accessed to sustain and nourish the whānau that reside there. This intimacy of our relationships to the natural world means that we have inherited a cultural memory of how natural features like waterways should look, taste, smell, sound, feel and behave.[213]

The Waikanae floodplain management plan referred to in closing submissions by Crown counsel was finalised in 1997. There was a five-year process to develop its objectives, policies, and guidelines for management of the flood protection works, future flood risks, and, to some extent, of the river itself. The extent to which Te Ātiawa/Ngāti Awa have been consulted on river and flood protection management since 1993 is not a matter on which we have detailed evidence. We rely in this chapter on the text of the planning documents as published by the regional council. They suffice to illustrate the key issues raised by Te Ātiawa/Ngāti Awa as the iwi sought to work with the council in the new environment created by the Resource Management Act 1991.

As part of the work to develop the floodplain management plan, the regional council commissioned 'Ati Awa ki Whakarongotai' in 1993 to prepare a '*Tikanga Maori* investigation and report'. (Emphasis in original.)[214] Rawhiti Higgott prepared the report, which, as explained by Aroha Spinks and the waterways research team,

> described and mapped the wāhi tapu within the Waikanae River floodplain and surrounding areas so that they could be safeguarded from future flooding . . . Higgott stated that while some wāhi tapu were respected, particularly urupā, others were not and especially if there was a clash with commercial interests. In his report he also stated that councils often had difficulties in recognising non-urupā wāhi tapu as sites of spiritual significance.[215]

Managing the flood risk to these wāhi tapu was thus a significant concern for Te Ātiawa/Ngāti Awa as at 1993, and one which they felt had not been taken seriously enough by local councils. In addition, the iwi report described water quality issues of importance to Māori, the 'cultural and spiritual values with respect to the resources on/in the floodplain', and 'Ati Awa's past, present and future viewpoint

213. 'Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 13–14)

214. Wellington Regional Council, *Waikanae Floodplain Management Plan: The Community's Plan for the Waikanae River and its Environment* (Wellington: Wellington Regional Council, 1997), p 19, https://schooltravel.gw.govt.nz/document/94/waikanae-river-floodplain-management-plan

215. Potter, Spinks, Joy, Baker, Poutama, and Hardy, 'Inland Waterways Historical Report' (doc A197), p 161

on the river and floodplain'. These issues were considered through the lens of 'locations of sites of special value' to the iwi,[216] and this was reflected in the policies developed for the management plan.

The planning process was directed by the Kapiti Floodplain Management Committee, a sub-committee of the regional council's Landcare Committee. The floodplain committee had representatives from community groups, the regional and district councils, and iwi representatives – two each from Te Ātiawa/Ngāti Awa and Ngāti Raukawa. In addition, the council consulted with the Whakarongotai marae committee.[217] We have no details about the consultation undertaken as part of the planning process. The 1997 management plan summarised the consultation as:

> Ati Awa ki Whakarongotai hold mana whenua over the Waikanae area and have been involved in the planning process, via consultation with the Council, since 1991. This has included:
>
> - Representation at Regional level as well as on the KFMC [Kapiti Floodplain Management Committee].
> - Discussions held with the iwi on how they were to be involved in the Floodplain Management Plan.
> - A presentation made to the Marae Committee in July 1991.
> - Representation made in October 1992.
> - Hui to present the iwi perspective on Resource Management held in June 1993.
> - Discussions as to the aspirations and preferences of the iwi held in July 1993.[218]

The consultation revealed major concerns about how the Waikanae River was being managed, including for flood protection purposes. First, the iwi did not want the course of the river to be 'dredged or altered', which was a key aspect of how the river was artificially maintained within a narrow corridor to prevent flooding. Secondly, Te Ātiawa/Ngāti Awa maintained that the Waikanae River was 'polluted and mismanaged'. They wanted the council to develop a plan to reduce pollution and involve iwi in monitoring the health of the river. Thirdly, Te Ātiawa/Ngāti Awa wanted the council to recognise rāhui imposed on the river and to support procedures for 'making the public aware of such Rahui'. Fourthly, they wanted the council to be 'aware of the importance of iwi feelings when identifying waahi tapu sites', to consult appropriately about those sites, and to take note of silent files about sites of importance to them. Finally, the iwi said that they wanted to be involved in the management of the Waikanae River in accordance with the principles of the Treaty.[219]

From the consultation, the committee identified a key issue of relevance to the particular management plan as the need for the council to take account of

216. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 19
217. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 20
218. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 55
219. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 56

the principles of the Treaty in any '*evaluation and determination of flood mitigation options*' (emphasis in original). The Treaty principles to be considered were listed in the plan as partnership, active protection of 'Maori rights and interests', and good faith, with active protection the key principle: '*Iwi in the Region seek active protection of their interests in respect of watercourses and their management*' (emphasis in original). Iwi were also concerned that their role as kaitiaki of water bodies was not adequately recognised, and that there were 'few opportunities to manage water bodies according to tikanga Maori'. In this case, the regional council accepted that active protection required protection of the relationship between tangata whenua and 'resources of significance to them', which 'may include the principle of tino rangatiratanga', and active protection of resources managed by the council. Iwi also wanted '*active participation in the decision-making process*' (emphasis in original), but this was interpreted by the council as a need for consultation.[220]

One fundamental matter of concern to Māori was the mauri of the Waikanae River. Damming or 'otherwise altering the natural flows and fluctuations of water bodies' had been identified as a concern relevant to the mauri and the impact of flood protection works. In addition, the works had the potential to affect sites of special significance along the river, including mahinga kai and wāhi tapu, which in turn affected the mana of the iwi and their ability to 'provide manaakitanga' to visitors in the traditional way.[221] The council accepted in the text of the plan:

> Sites of special spiritual, historic or cultural value include waahi tapu, mahinga kai, and areas where pure water was used for ritual purposes. These sites may be adversely affected by flood mitigation works. In some cases, sites may have been destroyed or be no longer visible; nevertheless, tangata whenua still consider them to be waahi tapu. It is therefore important that the values and concerns of tangata whenua are included when working through options for flood mitigation works.[222]

As a result of this analysis of the consultation carried out and the issues identified by it, the committee agreed to three objectives in the plan:

- to take the principles of the Treaty into account when managing water bodies;
- to 'ensure the duty of consultation is fully carried out'; and
- to recognise and provide for the relationship of Māori with fresh water, ancestral sites, wāhi tapu, and 'other taonga within the beds of rivers and lakes' in making decisions about flood mitigation options.[223]

The floodplain management plan had a set of four policies to meet these objectives: to discuss and identify sites of significance with tangata whenua; to recognise those sites; to discuss protection and access issues regarding those sites; and to

220. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 56
221. Wellington Regional Council, *Waikanae Floodplain Management Plan*, pp 56–57
222. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 57
223. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 57

have regard to Māori values and customary knowledge when evaluating options for flood mitigation works. The method proposed in the plan for achieving all of this boiled down to one thing: consultation about significant sites along the river. This would occur through existing processes, including the regional council's memorandum of understanding with iwi, the resource consent process, and the Kāpiti Coast district plan. Consultation would ensure that lists and plans of significant sites remained up to date, and ongoing consultation would ensure that those sites were 'noted and evaluated in the assessment of options for flood mitigation works and other development'.[224]

The final part of the section dealing with Māori issues and Treaty issues explained why consultation about sites was the final (and only) answer to all the matters raised by Te Ātiawa/Ngāti Awa:

> Understanding the Treaty is an ongoing process as is understanding its principles. The objectives, policies and methods recognise the principles of the Treaty, and the necessity to incorporate these principles within the process for assessing and carrying out flood mitigation works.
>
> Meaningful consultation is an important part of partnership and ongoing communication. The process of consultation enables recognition of the local knowledge, values and experience of the tangata whenua. Consultation provides for the identification and protection of sites of special value to tangata whenua, and enables their cultural values to be recognised and provided for when assessing flood mitigation options.[225]

When the floodplain management plan was updated in 2013 after a 10-year review, there were no amendments to the sections relating to Māori issues and policies.[226]

Environmental issues in respect of rivers and other waterways will be addressed in a later volume of the report. We note here, however, that an environmental strategy for the Waikanae River was produced in 1999 as a result of the work done to prepare the floodplain management plan.[227] On the role of Māori in management of the Waikanae River, the Te Atiawa ki Whakarongotai Charitable Trust's comments on the strategy were reported in an updated version in 2014 as:

- Te Ātiawa/Ngāti Awa should be partners (not consultees) in the development of the strategy, so that a 'shared vision and objectives' could be established that recognised and protected their tino rangatiratanga. This would

224. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 57
225. Wellington Regional Council, *Waikanae Floodplain Management Plan*, p 57
226. Wellington Regional Council, *Waikanae Floodplain Management Plan: The Community's Plan for the Waikanae River and its Environment*, reprinted 2013 with addendum, 2013, https://archive.gw.govt.nz/assets/floodprotection/Waikanae-FMP.pdf
227. Wellington Regional Council, *Waikanae River Environmental Strategy: An Outcome of the Waikanae Floodplain Management Plan* (Wellington: Greater Wellington Regional Council, 2014), p 1, https://www.gw.govt.nz/assets/Documents/2021/11/WaikanaeRiverEnvironmentalStrategylowres_2.PDF

include partnership in 'prioritising and implementing protection and improvement methods', but the charitable trust as the iwi body lacked the resources to participate appropriately.

- The council should support and resource the iwi to produce an environmental plan as an iwi document. This would better communicate their views and values in planning processes, rather than relying on ad hoc work by individuals who had to volunteer their time to contribute to or make comments on council planning documents.
- The council's environmental strategy was too heavily focused on ecological concerns at the expense of 'social, cultural and economic considerations'. As a result, there was 'some distance' between how the council and the iwi would prioritise their different approaches to 'protection and improvement, and what each Treaty partner is trying to achieve through such a strategy'.
- The council should develop a project to identify mahinga kai and species of significance to Te Ātiawa/Ngāti Awa so that the protection strategies could better uphold the values of the iwi.
- The council should work with Te Ātiawa/Ngāti Awa to identify specific elements of the environmental strategy that the iwi could be involved in implementing, including for (a) restoring indigenous vegetation and habitat, especially in mahinga kai sites, (b) restoring fish habitat, especially in mahinga kai sites, and (c) improving and restoring mahinga kai sites and taonga species of special significance.
- The council should carry out a regular 'Iwi Walkover' of river sites with representatives from Te Ātiawa/Ngāti Awa.[228]

We have no evidence as to how any of these specific iwi concerns about the environmental strategy have been dealt with or progressed by the regional council. One achievement has been the development of a draft iwi kaitiakitanga plan, which was intended partly as an iwi management plan for use in RMA processes. Specifically, the draft plan provided information on the relationship of Te Ātiawa/Ngāti Awa and their culture and traditions with their ancestral lands and waters (section 6 of the RMA). It also provided 'policy that, if supported and abided by, could demonstrate how persons exercising functions [under] the RMA could have regard for the kaitiakitanga of TAKW [Te Ātiawa ki Whakarongotai]' (section 7 of the RMA). It also set out 'information on the key interests of TAKW that should be subject to active protection' under section 8 of the RMA.[229]

In 2018, the Te Ātiawa ki Whakarongotai Charitable Trust's submission on the 'Long Term Plan' still sought an enhanced role for the iwi in terms of partnership as well as significant changes to flood protection management.[230] Thus, issues

228. Wellington Regional Council, *Waikanae River Environmental Strategy*, pp 13–14, https://www.gw.govt.nz/assets/Documents/2021/11/WaikanaeRiverEnvironmentalStrategylowres_2.PDF

229. 'Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 7)

230. Andre Baker, chairperson, Te Ātiawa ki Whakarongotai Charitable Trust, submission, 27 April 2018 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 128–131)

about partnership and the involvement of the iwi in management of the river have continued to arise. The council's answer to these issues in the 1997 floodplain management plan was limited to consultation rather than involving the iwi more significantly in the management of the river. This approach was not changed when the management plan was updated in 2013. Te Ātiawa/Ngāti Awa have continued to seek a greater role, and the claimants' closing submissions called for joint management of the Waikanae River and its tributaries.[231] Rawhiti Higgott told us: 'What we have left we must look after, by these waterways returning to our care or at least co-management.'[232]

These comments about consultation are specific to the Waikanae River. We address waterway and some local government issues more broadly in a later volume of the report. That will include consideration of Ara Tahi, a group established by the Greater Wellington Regional Council for iwi input, and Te Whakaminenga o Kāpiti, the Kāpiti Coast District Council's advisory forum.[233]

8.5.3 Waikanae ki Uta ki Tai Project

The other positive development raised by the Crown in closing submissions was a DOC project being carried out in collaboration with Te Ātiawa/Ngāti Awa and local authorities.[234] Jack Mace, the Operations Manager/Pou Matarautaki for DOC in the Kāpiti–Wellington district, gave evidence about the early stages of setting up the Waikanae ki Uta ki Tai Project ('Waikanae River: Mountains to Sea Restoration Project'). Mr Mace explained that DOC's role in river restoration work arose from its functions in preserving indigenous fisheries and advocating for the conservation of 'natural and historic resources generally'. One of the reasons the Waikanae River was chosen for the project was the 'urging of Te Atiawa ki Whakarongotai' for DOC to get involved in a 'coordinated initiative to restore the river'.[235] DOC was also 'constantly looking at how it can improve ways that it works with iwi in conservation matters.'[236]

A hui was held on 5 March 2019 at the Otaihanga Boating Club, at which the Minister of Conservation 'announced that the River has been chosen as one of 14 priority river catchments for restoration to a healthy functioning state, attracting significant new DOC funding'.[237] Collaboration with iwi and community groups was a key requirement, and the fundamental goal was to 'slow the decline in New Zealand's biodiversity'.[238] Mr Mace added:

231. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 33
232. Transcript 4.1.10, p 81
233. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 8–11
234. Crown counsel, closing submissions (paper 3.3.60), p 171
235. Jack Mace, answers to questions of clarification, 29 July 2019 (doc G5(c)), pp 7–8
236. Jack Mace, brief of evidence, 8 July 2019 (doc G5), p 25
237. Mace, brief of evidence (doc G5), p 25; Mace, answers to questions of clarification (doc G5(c)), p 8
238. 'Message of Minister of Conservation to 5 March 2019 Waikanae River Mountains to Sea Project' (Jack Mace, papers in support of answers to questions of clarification (doc G5(d)), p 3)

> Since that hui, DOC has been working with interested parties to set up a collaborative process for the River's restoration. Our earliest engagements have been with Te Ātiawa ki Whakarongotai as our Treaty partner. Whilst it is too early to discuss details, DOC is viewing the Project as an opportunity to *learn from the shortfalls of the past* and to position mana whenua early and centrally in governance arrangements and ongoing work programmes. DOC believes iwi have a lot to contribute, including in governance and leadership; in development of the vision and values for the Project, and in establishing environmental, social and economic research and monitoring frameworks. Success will be measured in terms of the River's restoration and DOC's relationship with mana whenua over the next ten years and beyond. [Emphasis added.][239]

Claimant counsel asked Mr Mace what 'shortfalls of the past' had been identified by DOC. Mr Mace responded that the Waikanae ki Uta ki Tai project was

> an opportunity to establish a Crown/iwi relationship from the outset that will properly reflect their status as the Treaty partner and provide resources for their input to the Project. We are still working through details, but it is expected to include financial resources and a Crown/iwi governance oversight entity.[240]

As noted, this project was at a very early stage at the time of the hearings so we are not in a position to draw any conclusions about it, except to note that it appears to be a promising initiative if it develops along the co-governance lines referred to by Jack Mace.

8.6 Treaty Findings

The Waikanae River is a 'highly valuable taonga' to Te Ātiawa/Ngāti Awa.[241] As discussed in section 8.3, the Crown accepted that the native land laws 'did not provide for the legal recognition of the full range of complex and overlapping traditional land rights previously held by Māori'.[242] In the case of the Waikanae River, the Crown failed to provide a special form of collective title for rivers that are tribal taonga, nor did it provide a form of title that could encompass a river as an indivisible water body made up of bed, banks, and water. Instead, the bed of the river was included in the riparian land titles through the use of right-line survey boundaries when title to Ngarara West was divided into multiple, individually owned blocks under the Ngarara and Waipiro Further Investigation Act 1889.

The Crown's failure to provide an appropriate form of title and the consequential division of the riverbed into individual parcels along with the land was a breach

239. Mace, brief of evidence (doc G5), pp 25–26
240. Mace, answers to questions of clarification (doc G5(c)), p 8
241. 'Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 35)
242. Crown counsel, closing submissions (paper 3.3.60), p 29

of the article 2 guarantee of tino rangatiratanga over taonga. It was also a breach of the principle of active protection, which required the Crown to actively protect the relationship of the iwi to their taonga and the possession of their taonga for so long as they wished to retain it. The claimants were prejudiced because they lost possession of the riverbed, which was legally transferred to individual owners and alienated along with the land. This in turn led to issues of control of the river's resources and access to the river and its resources, which have further prejudiced Te Ātiawa/Ngāti Awa. It is clear from the Ngarara West rehearing and subdivision hearing that the iwi never intended to relinquish their customary rights to the river. They have continued to assert and exercise those rights since 1891 to the extent that they were able to after the issue of title by the Native Land Court and the alienation of riparian blocks out of individual Māori ownership.

Control of the river was further undermined by local government, particularly the establishment of the Manawatu Catchment Board and the Soil Conservation and Rivers Control Council. The council and the Minister approved a flood control scheme that included a plan to acquire the riverbed. Māori were not consulted, as far as the evidence available to us suggests. Further, the Soil Conservation and Rivers Control Act 1941 enabled the board to acquire any estate or title, including leasehold instead of acquisition of the freehold. It was also open to the board to make an agreement or attempt to purchase the freehold if an agreement over fencing or riparian planting could not be reached. The board did purchase European (later general) land and deal personally with the owners of that land but made no attempt to do so for any of the few remaining pieces of Māori riparian land on the lower stretches of the Waikanae River. In section 8.4, we set out the details as to how the Minister approved the compulsory taking of Māori land. In each case, taking advantage of the power accorded by section 22(3) of the Public Works Act 1928, the board took the Māori land compulsorily without notifying the owners or giving them an opportunity to object, in contrast with how the European land was taken when agreement to sell could not be reached. The 1962 amendment to the Public Works Act disempowered Māori owners further by taking away any rights or opportunity to be involved in the process to agree the compensation for their land unless it was held in sole ownership. The Minister of Works approved all these takings, as was required under the Soil Conservation and Rivers Control Act 1941.The council, which had senior Crown officials among its members, also approved the takings and the amounts of compensation.

We find that, in respect of the takings of Māori land for flood protection works, the Public Works Act 1928 and the Public Works Amendment Act 1962 were in breach of the principles of active protection and equity. The rights accorded the owners of European/general land to be notified of the intention to take their land, to lodge an objection, to negotiate compensation, and to appeal to the Land Valuation Court if an acceptable agreement was not reached, were denied to the owners of Māori land, except that the owners did have some role in the determination of compensation for the pieces of riparian land taken prior to 1962. We find that the Māori owners were prejudiced by this unfair and discriminatory process. We further find that the principle of equity was breached by the denial of the

opportunity to negotiate a sale, which was made available to most of the owners of general/European land as an alternative to compulsory taking. This discriminatory approach was approved by the council and the Minister when they approved the takings, and the Māori owners were prejudiced thereby. It is difficult to see that the board needed to obtain the freehold at all, given the primary objective was to protect the fencing of riparian planting, but there was no discrimination on this point.

The Crown argued that the lack of control (which had been delegated to the board) was ameliorated after the local government reforms of 1989, with the examples of the Waikanae River floodplain management plan and the Waikanae ki Uta ki Tai project as evidence of a significant improvement in this matter. We will consider these developments further when environmental claim issues are reported on. Here, we note that there is no doubt that the situation has improved significantly since the 1980s, prior to which Te Ātiawa/Ngāti Awa were excluded altogether. The requests of Te Ātiawa/Ngāti Awa for something more than consultation, however, do not appear to have been met in the management of the river. We agree that DOC's Waikanae ki Uta ki Tai project intended to operate on a co-governance basis, but that project was only in the very early stages at the time of the hearings. The Crown has agreed to the inclusion of co-governance arrangements for some rivers in Treaty settlements and that may potentially be available to Te Ātiawa/Ngāti Awa, but the RMA's provision for joint management agreements (2005) or the delegation of authority to iwi (1991) have not been acted upon for Te Ātiawa/Ngāti Awa ki Kāpiti. We will make findings on environmental management and other claim issues in a later volume of this report.

CHAPTER 9

WAIKANAE TOWNSHIP ISSUES

9.1 Introduction

In this chapter, we address some of the specific claim issues raised by Te Ātiawa/Ngāti Awa about the rezoning of land as 'commercial' and the development of the Waikanae town centre in the 1960s. Zoning decisions were made by the Horowhenua County Council, acting under the Waikanae section of the district scheme. District schemes were required by the Town and Country Planning Act 1953, and the various matters to be considered in those schemes were set out in the Act. For that reason, we engage more intensively with the Act than in previous chapters, although there has been some treatment of it earlier in the report. The claimants were particularly concerned about the rezoning of the Parata homestead, the Mahara boarding house section, and the second Parata homestead (Mahara Tamariki), and the impacts of zoning on their papakāinga and marae.

We also discuss the claimants' issues about the creation and management of the Hemi Matenga Memorial Park, which overlooks the township from the steep slope to the east. As we saw during a site visit, residential properties have now spread to the fringes of this reserve, which is an important taonga for Te Ātiawa/Ngāti Awa. The reserve has 'one of the largest remaining areas of kohekohe forest in the Wellington region, and is one of the largest areas of this forest type in the North Island'. It is also home to threatened or endangered species and is controlled by the Department of Conservation.[1] The issues raised by the claimants concerned the Crown's acceptance of the land without payment as a reserves contribution from the Hemi Matenga Estate trustees, as well as their argument that they have been excluded from management and control of the reserve by the department.

Finally, we consider the claim issues raised about the landlocked land adjacent to the Hemi Matenga Memorial Park, which represents some of the very few pieces of Māori land remaining in Te Ātiawa/Ngāti Awa ownership.

The Crown did not make any concessions of Treaty breach in respect of the specific issues discussed in this chapter.

9.2 Rezoning and the Waikanae Town Centre

9.2.1 Introduction

Some of the claimants' specific grievances related to a decision by the Horowhenua County Council to locate the Waikanae town centre west of the railway station,

1. Jack Mace, brief of evidence, 8 July 2019 (doc G5), pp 6–7

which they said resulted in the loss of their papakāinga, the division of the people from their marae, and the hemming in of their marae by the town's commercial centre with negative consequences for the marae. Moira Cooke and Tracey Henare told us that their grandmother Te Aputa Kauri, and others lost their homes through a combination of rating, debts, public works takings, and other factors as

> part of a lengthy process that culminated in the Council turning the whole area into commercial property. The key event in all of this was the Horowhenua County Council deciding that they were going to put the Waikanae town centre on top of the papakainga in the 1950s. From there everything changed, and our family lost most of our remaining land for the new town centre to be developed. Wi Parata's vision of Te Ati Awa being at the centre of the economic and social development was wiped out and our iwi was sidelined.[2]

In this section of the chapter, we discuss the establishment of the papakāinga and the three homesteads of concern to the claimants: the Parata homestead; the site of the Mahara boarding house; and Mahara Tamariki. We also consider the Town and Country Planning Act and the Waikanae section of the district scheme that was developed under that Act. The scheme zoned parts of the papakāinga as commercial rather than residential or rural, which the claimants argued brought about the sale of the Parata homestead in 1962. We also discuss the council's revised district scheme at the end of the 1960s, which resulted in the decision to establish a town or commercial centre, and the impacts of that decision on Mahara Tamariki and Whakarongotai Marae. Finally, we address issues that were raised by the claimants about a recent council decision to construct a park and ride carpark next to the marae on the site of the former Parata homestead.

We begin by setting out the parties' arguments on these matters.

9.2.2 The parties' arguments

9.2.2.1 The claimants' case

The claimants argued that the Horowhenua County Council rezoned their papakāinga, which had been 'in residential use by the whanau since pre-European times, as commercial'. The council did this 'without consultation with the Te Atiawa community residing there'. According to the claimants, the county council 'had the power to effectively destroy the longstanding Te Atiawa community for its own agenda', and the evidence suggests that 'there was little recourse the Whakarongotai community had in order to save it'. While the council theoretically had similar powers over non-Māori communities, 'such a draconian and unfair situation would not have been inflicted on them in the way this was on Whakarongotai'. The Crown had, in the claimants' view, delegated powers to local bodies to make plans (in this case, a district scheme) without 'monitoring their use to ensure that they were used in a Tiriti-compliant manner or rectifying the

2. Moira Cooke and Tracey Henare, brief of evidence, 6 May 2019 (doc F35), p 9

situation when they were not'.[3] Claimant counsel submitted that the rezoning of the land from 'residential' to 'commercial' restricted the use of the land and forced the Parata whānau to sell the Parata homestead. The Crown 'failed to actively protect what little land the claimants still had by the mid-twentieth century', and also failed to require local authorities to protect those remaining interests.[4]

In addition to the district scheme and rezoning, the claimants argued that the council used its powers under the Public Works Act and the Rating Act to acquire papakāinga lands for the town centre. In the claimants' view, the power to take land compulsorily was a tool designed to facilitate 'settler-focused economic development' without any countervailing protection of Treaty rights or Māori interests, and it was not appropriate for the Crown to delegate this power to local authorities without ensuring that the Crown's Treaty responsibilities were delegated as well. The claimants also argued that the development of the town commercial centre was a clear example of this imbalance between settler and Māori interests, citing the 'detriment caused to Te Ātiawa ki Whakarongotai for the benefit of commercial [and] public interests'.[5] The claimants argued that this included the land on which Mahara House had stood, part of which was taken for the purposes of the district scheme in 1958, and Mahara Tamariki, which was acquired under threat of a compulsory taking. The council also purchased or took other land compulsorily for the town centre.[6] The use of compulsion (or the threat of it) was only possible, the claimants submitted, because section 47 of the Town and Country Planning Act gave the council power to take land for the 'wide ranging' purposes of a district scheme. This included the compulsory power to take land for 'regrouping, improvement and development of the said lands for letting or leasing or resale for commercial purposes'.[7]

Claimant counsel submitted that the loss of the Parata homestead (and the other land) had significant cultural as well as economic impacts:

> Consequently, the whanau have been severed from the close physical connection they had with the marae, having been literally over the fence until 1962. It is submitted that the fate of this Parata papakainga at Waikanae is one of the most dramatic and relatively recent examples of the way in which the growth of 'settler' communities using statutory and legal processes actually physically destroyed Maori communities, not only through cultural assimilation or a more diffuse urbanisation process or trend.[8]

3. Claimant counsel (B Gilling), closing submissions, 25 October 2019 (paper 3.3.50), p 28
4. Claimant counsel (B Gilling, S Dawe, and R Brown), closing submissions, 21 October 2019 (paper 3.3.51), pp 86–87
5. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 54–55
6. Claimant counsel (B Gilling and R Brown), memorandum on homesteads, 30 September 2019 (paper 3.2.454), pp 5–8
7. Claimant counsel (Gilling and Brown), memorandum on homesteads (paper 3.2.454), p 6
8. Claimant counsel (Gilling), closing submissions (paper 3.3.50), p 29

On a more recent but related matter, the claimants argued that the Kāpiti Coast District Council and the New Zealand Transport Agency (NZTA) actively undermined their tino rangatiratanga in 2015 to ensure the desired outcome (a park and ride carpark) next to Whakarongotai Marae. This site, where the Parata homestead once stood, was a site of cultural significance. Although the council sought a cultural impact statement, the claimants submitted that the council and NZTA pressured and undermined the marae leadership until they were 'apparently satisfied that they had approval to move ahead with the carpark'.[9]

9.2.2.2 *The Crown's case*

The Crown only responded to some of the specific aspects of the town centre issue, although it made general submissions about public works takings and local government. On the issue of rezoning and the sale of the Parata homestead, the Crown argued that the claimants had a statutory remedy. Section 44 of the Town and Country Planning Act 1953 provided for compensation to be paid to a landowner injuriously affected by the district scheme.[10] The Crown also argued that rezoning the land from residential to commercial 'did not require residents living in homes located on the land blocks which were re-zoned commercial to vacate their homes'.[11] In other words, it cannot be shown that the rezoning forced the whānau to sell the Parata homestead. Instead, '[t]he Crown says that the sale of the homestead was brought about because the whānau were unable to continue to maintain the homestead and much of it had become uninhabitable'. Further, the whānau 'may not have been aware of the zoning change at the time of the sale of the property'.[12] These submissions were based on the evidence of Tutere Parata.[13] Crown counsel also submitted that the Crown would have had no role in a private sale, no reason to assist with the maintenance of a private home, and that there is no evidence the Crown was even aware of the sale.[14]

The Crown did not make submissions about public works takings by councils in general or for the town centre in particular, other than to note that the Town and Country Planning Act 1953 enabled the council to take land under the Public Works Act, but that this power was not used in the case of the Parata homestead.[15] Otherwise, the Crown submitted that compulsory powers are necessary to provide for public works 'for the greater benefit of society', and the public works regime is a compromise between private property rights and the infrastructural needs of the wider community. As noted in previous chapters, general issues about the public works regime will be addressed later, but we note here the Crown's submission that takings need to be assessed on a case-by-case basis, with each case 'considered on

9. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 94–96
10. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), pp 121–122
11. Crown counsel, closing submissions (paper 3.3.60), p 121
12. Crown counsel, closing submissions (paper 3.3.60), p 122
13. Crown counsel, closing submissions (paper 3.3.60), p 123
14. Crown counsel, closing submissions (paper 3.3.60), pp 123–124
15. Crown counsel, closing submissions (paper 3.3.60), p 121

its facts'. In the Crown's view, the following questions need to be answered in the evidence:

- Was there consultation and a proper process?
- Was compensation payable and, if so, was it paid?
- How was the particular site selected? Were other sites considered?
- What forms of tenure were considered for the public use of the land?
- Were alternatives to outright acquisition considered?
- Were the relevant landowners left with sufficient lands, at the time of the public works takings, for their present and reasonably foreseeable future needs?[16]

On the issue of local government authority, Crown counsel submitted that the Crown has appropriately delegated decisions about communities to those communities, and that the Crown's degree of responsibility for local government is limited to the statutory framework in which it operates.[17] The Crown further submitted that it has 'built safeguards into relevant statutory instruments in order to protect Treaty interests in local decision-making',[18] including the Local Government Act 2002 and the Resource Management Act 1991.[19] The Crown did not, however, make submissions about the earlier statutory framework in the Town and Country Planning Act vis-à-vis the district scheme and the town centre. Rather, the Crown made submissions about the recent situation in respect of the park and ride carpark built on the site of the Parata homestead. On this issue, the Crown argued that there is no evidence as to the NZTA 'role or actions in the construction of the carpark', and therefore no findings can be made about NZTA. The Crown also submitted that it was not responsible for the acts or omissions of the Greater Wellington Regional Council, and that the Crown has created a statutory framework in which such councils 'must operate in a Treaty-consistent manner'.[20]

9.2.2.3 *The claimants' response to the Crown*

In reply submissions, the claimants argued that, even where the area around Whakarongotai Marae was not actually taken under the Public Works Act, there was still an 'implied if not actual use of the public works powers to deprive members of Te Atiawa of their lands'.[21] The claimants also disputed the Crown's position that the rezoning of land did not force the sale of the Parata homestead:

> Counsel submits that a closer reading of the evidence shows that context is important. That the local authority had the untrammelled power to move to rezone land and therefore bring about the loss of that area by the whanau. That the economic

16. Crown counsel, closing submissions (paper 3.3.60), p 55
17. Crown counsel, closing submissions (paper 3.3.60), p 118
18. Crown counsel, closing submissions (paper 3.3.60), p 117
19. Crown counsel, closing submissions (paper 3.3.60), pp 119–120
20. Crown counsel, closing submissions (paper 3.3.60), pp 124–125
21. Claimant counsel (B Gilling), submissions by way of reply, 14 February 2020 (paper 3.3.69), p 12

context meant that they could not maintain and retain their lands but had to move away. That attempts to undertake their own developments were thwarted. And so on. It cannot be said, therefore, that the whanau willingly moved off those lands, even if they did 'agree to sell'.[22]

The claimants also responded that the Crown's emphasis on the post-2002 statutory framework for local government ignored the historical framework that resulted in the alienation of the papakāinga lands around the marae. Further, the claimants disagreed that the current regime is Treaty compliant, partly on the ground that it does not produce Treaty-compliant results, with reference in particular to the park and ride carpark example.[23]

9.2.3 Issues for discussion

In this section of the chapter, we address the following issues:

- To what extent (if at all) did the Town and Country Planning Act 1953 provide for Māori values and interests to be protected, or for Māori to be consulted or involved in decision-making, in respect of district schemes?
- Did the Waikanae section of the district scheme or the revised district scheme provide for Māori values and interests?
- Did rezoning by the district scheme force the sale of the Parata homestead or the site of the Mahara boarding house?
- Was section 47 of the Town and Country Planning Act 1953, enabling land to be taken compulsorily for the purposes of a district scheme, Treaty compliant? What role did it play in the sale of Mahara Tamariki?
- What impacts did inclusion in the town centre have on Whakarongotai Marae?

We turn next to describe the location of the marae and papakāinga on Ngarara West A78 before addressing the issues set out above.

9.2.4 The marae and papakāinga on Ngarara West A78

As discussed in chapter 4, Wi Parata led a migration of many of the people from the village of Tuku Rakau (established in the 1840s) to the proposed site for the railway in the mid-1880s, so that the people could take advantage of the economic development that it was hoped a railway would bring.[24] The great meeting house Pukumahi Tamariki, which had been built for the Kīngitanga under the leadership of Wi Tako, was transported by bullock to its present site at 'Marae Lane in Waikanae, and is the meeting house now known as "Whakarongotai"'.[25] The future prosperity of the tribe, however, was dependent on retaining their land in

22. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), pp 16–17
23. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), pp 13–16
24. Benjamin Rameka Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A, prepared for purposes associated with legal proceedings taken by Mrs Patricia Grace', 8 November 2013 (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), pp [66]–[67])
25. Benjamin Ngaia, 'Report on Cultural and Historical Significance of Ngarara West A25B2A' (Benjamin Ngaia, papers in support of brief of evidence (doc E3(a)), pp [66]–[67])

collective ownership. This was well understood by Wi Parata and other tribal leaders at the time.[26] Soon after the move, the new community was broken up by the extreme form of individualised title that resulted from the rehearing of 1890–91 (see chapter 4). Individual interests were identified, separated, and scattered across the 79 Ngarara West A and 41 Ngarara West C blocks.

Nonetheless, the marae, the church (which was moved from Tuku Rakau in the 1890s), and Wi Parata's homestead next to the marae formed the nucleus of the Waikanae Māori community. It became a site of cultural and historical importance.[27] Wi Parata later gifted the church, named St Luke's in the early twentieth century, to the Wellington Diocese. He also set aside land for a school. An urupā, Ruakohatu, was established adjacent to the church, and many Parata whānau members are buried there, including Wi Parata himself, who died in 1906.[28] The Parata homestead was located immediately south of the marae on what became the Ngarara West A78E8 block. It acted in some ways as an extension of the marae; visitors stayed there and sometimes hui were held in the homestead instead of the meeting house. Natanahira Parata, the second son of Wi Parata, lived there after his father's death. Mahina-a-rangi Baker stated in her cultural impact report for the homestead site:

> Being a large home, several of Natanahira's children's families lived there simultaneously. Kaumātua recalled that the homestead was very active, with many visitors. Visitors from Te Ātiawa, or those that were friends of the Paratas would more often be hosted at the homestead than the whare rūnanga. It was regarded by the people of Te Ātiawa as an important place to stop for those from Taranaki who may be travelling through to Wellington, and also held many important taonga and portraits that belonged to the Parata family. Kaumātua from Whakarongotai also recall that whilst the whare rūnanga was the principal home for Te Ātiawa ki Whakarongotai, it was at different times quite run-down, and that occasionally the homestead next door was used instead for people to hui.[29]

This was still the case in the 1950s when Tutere Parata, grandson of Natanahira, lived in the homestead as a child:

> There was a real sense of community in the area. The Homestead and Marae were the centre of political conversation and were where everyone stopped in, particularly between Taranaki and Wellington. I remember whanau such as my Uncle Koro Bun

26. Tony Walzl, 'The Public and Political Life of Wiremu Te Kakakura Parata, 1871–1906', May 2019 (doc A216), p 93. See also discussion of 'Kemp's Trust': Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 1, pp 405–413.

27. Patricia Grace, brief of evidence, 20 August 2018 (doc E11(a)), p 7

28. Hauangi Kiwha, site visit booklet (doc E15), p [2]; Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land and Local Issues', December 2018 (doc A214), pp 68–69

29. Mahina-a-rangi Baker, 'Cultural Impact Assessment for proposed Park and Ride carpark on Parata Homestead Site', 5 March 2016 (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 145)

> Tamarapa, who was a rangatira from Taranaki and a tall man, and Aunty Mirimiri stopping in on their way through to land meetings in Wellington. This was the case for the other Maori whanau in Waikanae, all of whom had relations from Taranaki. The Jenkins whanau, Tamati, Eruini to name a few.[30]

As well as a cultural hub for the tribe, the homestead was a 'focal point for managing the local food economy'. Ms Baker explained that large cultivations 'extended through the area where Iti Grove is now located'. Eels, toheroa, pipi, flounders, and kererū were taken to the homestead for 'processing in the surrounding sheds, in quantities that could be distributed to support the families connected to the homestead'.[31] The wharekai at Whakarongotai has a carving depicting how the natural abundance of the area supported whānau. As described by Ratapu Solomon, the carving depicts a kete representing the 'food basket that was Waikanae. It shows our Maunga "Kau Kapakapanui" clad with the Ngahere where we snared the manu. Waikanae the awa in the form of a Tuna that sustained us with life. Continuing down to the Moana and her gifts.'[32] Until the 1950s, a cluster of Māori-owned land remained in this area as an identifiable papakāinga, before development and alienation transformed central Waikanae into a predominantly commercial area.[33]

The claimants also highlighted two other buildings at the northern end of the papakāinga: the Mahara boarding house (on Ngarara West A78B9A); and Mahara Tamariki (Ngarara West A78B9B). Natanahira Parata built Mahara Tamariki, a double-fronted, Victorian-style weatherboard villa, and lived there with his children for a time before moving into the Parata homestead in 1906. The Mahara boarding house was built in 1902, near the corner of Hira Street (now Ngaio Road) and the highway, close to a large pōhutukawa considered a key wāhi tapu of the papakāinga. Natanahira ran the boarding house as a private, luxury hotel, counting Admiral John Jellicoe, Lord William Plunket, Lord Herbert Kitchener, and Alexander Turnbull among its guests. The boarding house burnt down in 1937, however, and was not rebuilt.[34] The Parata whānau were struggling with debt, like many other Te Ātiawa/Ngāti Awa whānau (see chapter 5). As a rangatira, Natanahira Parata had important obligations to his people. His daughter, Harata, stated in 1962:

> My father was what I would call a gentleman. He was an important man. He was a follower of the Ratana faith and he travelled a lot. I'd hear again and again, it seemed

30. Tutere Paraone Parata, brief of evidence, 17 January 2019 (doc F2), p 3
31. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 145)
32. Ratapu Nelson Leigh Solomon, brief of evidence, 30 July 2018 (doc E5), p 4
33. Walghan partners, 'Block Research Narratives: Ngatiawa Edition', 2018 (doc A203), pp 28–29
34. Transcript 4.1.20, pp 155, 159, 166; Moira Cooke and Tracey Henare, joint brief of evidence (doc F35), pp 4–5; Moira Cooke and Tracey Henare, written answers to questions, 18 July 2019 (doc F35(e)), p 1; Kenneth Ward, 'Mahara House, Waikanae – An Architectural Gem', *New Zealand Herald*, 18 May 2016 (Moira Cooke and Tracey Henare, papers in support of brief of evidence (doc F35(a)), pp 4–7)

> like he had a princely style of living, and that was how people perceived him. When he went to those hui, you know his koha from his pocket was one hundred pounds, which was like a fortune in those days. My brothers would say, 'We're having bread and butter and our dad was putting down one hundred pound as koha.[35]

We discussed the 'debt trap' and its impact on Māori land holdings in chapter 5. Ngarara West A78 was mortgaged in the early twentieth century through W H Field, who arranged and guaranteed the mortgages for Natanahira Parata. By 1920, there had been some sales of A78 sections (including to Field). According to Dr Rigby, the reason for the high debt loaded on A78 was the Parata dairy farm, which was not successful.[36] When Natanahira died in 1932, his property was worth £15,000 but all the rent from the sections he had leased to settlers was failing to pay the interest on the £8,552 debt to the Native Trustee. The year before, he had tried to protect the marae by applying to the Native Land Court to set aside 1a 2r 13p as a Native Reservation. Judge Gilfedder recommended an order in council to create the reservation but this did not occur, perhaps because Parata died that year. In 1934, Utauta Webber (nee Parata) applied again but was opposed by the Native Trustee, who argued that the application would threaten the trustee's security in the remaining parts of the A78 block. Although Judge Harvey rejected the trustee's argument, the application was not granted. Instead, land had to be sold to reduce the debt. By the late 1940s, the debt to the Māori Trustee still exceeded £7,000, so the court vested 18 acres of A78 in the Māori Trustee to sell as 35 residential lots along Te Moana and Ngarara Roads. The plan was for Hira Parata II, a returned serviceman, to farm the remaining 300 acres. The Minister for Māori Affairs, Eruera Tirikatene, approved the vesting in the hope of reducing the mortgage arrears. The court also granted Tohuroa Parata's application for the marae to become a Māori reservation in 1948, although trustees were not appointed until 1952. By that time, the area set aside for the marae had been reduced to two roods 30.8 perches.[37]

After the Second World War, European settlement intensified at Waikanae. Local historians Chris and Joan Maclean explained that 'the great technological advances made during the war benefited the whole population'. More reliable vehicles, better roads, and increased car ownership resulted in more travel on the Kāpiti coast, which in turn made it easier to have holiday homes at Waikanae and for older people to retire there. The 'influx of new residents during the 1950s accelerated the decline of Waikanae's once distinctive Māori character'.[38] After a flurry

35. Harata Solomon, in Judith Fyfe, *Matriarchs:A Generation of New Zealand Women Talk* (Auckland: Penguin, 1990), pp 90–91; Chris Maclean and Joan Maclean, *Waikanae*, 2nd ed (The Whitcombe Press: Waikanae, 2010), p 99

36. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 302, 338–340, 365–367; Rawhiti Higgott, comp, supporting papers (doc F3(a)), p 112

37. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 372–374, 395–397; Rawhiti Higgott, brief of evidence (doc F3), p 62; Wellington Māori Land Court, minute book 38, p 128 (Higgott, supporting papers (doc F3(a)), p 113)

38. C & J Maclean, *Waikanae*, pp 107–108

of subdivisions at Waikanae Beach (W H Field's 'Waimeha Township') in the 1920s, there were no more 'major subdivisions' until the 1950s. In that decade, many of the larger European landowners began to subdivide and sell residential sections. The Greenaway estate, for example, sold 57 sections near Waikanae Beach in 1951. Post-war growth and population increase put pressure on amenities, such as the local school.[39] By 1950, about 88 per cent of the Ngarara West A block had already been sold to private purchasers through the processes outlined in chapter 5. The remaining 12 per cent was concentrated in two areas: 'southern Waikanae Beach, especially around the estuary and mouth of the Waikanae River'; and 'along Te Moana Road, but especially closer to the railway line'. The 'predominant' block in that area was the remaining parts of Ngarara West A78 (301 acres at that time), in the ownership of the Parata whānau.[40] Very few Māori owners, therefore, retained land to take advantage of the opportunities – or face the risks – associated with the growth of the township. Rate increases, for example, were a significant burden for the remaining Māori owners to bear (see chapter 5).

We turn next to discuss the Horowhenua County Council's planning for the Waikanae township.

9.2.5 The district scheme, zoning, and the homestead sales

9.2.5.1 The statutory framework

The Town and Country Planning Act 1953 'introduced the concept of zoning' as a requirement of local government. Councils had to create planning documents called district schemes, under which land would be zoned rural, industrial, residential, or commercial. Each zone would have permitted, conditional, or prohibited uses as prescribed in the district scheme. In this inquiry district, the Horowhenua, Kairanga, and Oroua County Councils introduced district schemes in the late 1950s and 1960s.[41] A proposed district scheme had to be approved by the Minister of Works in respect of public works needs and takings, and the Minister could prescribe conditions.[42] As part of the process for deciding whether to approve the Kairanga and Oroua schemes, the Ministry of Works asked the Māori Affairs Department for comment on the schemes.[43] We have no information as to whether the department was consulted about the Horowhenua county scheme. In terms of notification, the Act required public notification of the place(s) at which the scheme could be inspected. Objections could be lodged by landowners or occupiers within the period prescribed by the notice (a minimum of three months).[44] The Minister and officials could lodge objections as well.[45] Thus, the

39. C & J Maclean, *Waikanae*, pp 109–110
40. Walghan partners, 'Block Research Narratives' (doc A203), p 29; claimant counsel (Gilling and Brown), memorandum on homesteads (paper 3.2.454), p 3
41. Suzanne Woodley, 'Local Government Issues Report', June 2017 (doc A193), pp 76–77
42. Town and Country Planning Act 1953, s 20(1)
43. Woodley, 'Local Government Issues' (doc A193), pp 79–80
44. Town and Country Planning Act 1953, s 22
45. Town and Country Planning Act 1953, s 24; Crown counsel, closing submissions on Te Kārewarewa Urupā, 16 December 2019 (paper 3.3.59), p 17 n

Minister played an important role under the Act, including in respect of approving public works takings.

The purpose of district schemes was set out in section 18 of the Act:

> Every district scheme shall have for its general purpose the development of the area to which it relates (including, where necessary, the replanning and reconstruction of any area therein that has already been subdivided and built on) in such a way as will most effectively tend to promote and safeguard the health, safety and convenience, and the economic and general welfare of its inhabitants, and the amenities of every part of the area.

Historian Suzanne Woodley noted that the Act did not 'provide for a role for tangata whenua' in any of the decision-making. There was also 'no requirement at the time for local authorities to recognise, when preparing their district plans, "the relationship of the Maori people and their culture and traditions with their ancestral land"', which was not included in the legislation until 1977.[46] Provision in the Act for 'marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses' to be included as part of district schemes was also not added until 1977.[47] One of the problems of the 1953 Act, therefore, was that no provision at all was made for the needs of Māori communities, including papakāinga. Ms Woodley's report on local government focused on this as an issue for rural land, where the subdivision rules took no account of Māori interests.[48] In the present case, it was also an issue in the urban environment, where the Māori land and houses clustered around Whakarongotai Marae were treated simply as an inconvenience to the development of a town centre (see below).

In 1976, the New Zealand Māori Council criticised the 1953 Act to Ministry of Works officials, stating that it took no account of the interests of minorities (which Te Ātiawa/Ngāti Awa were at Waikanae by that time). The Māori Council also criticised the 'high-handedness' of councils' land designations under the Act, and the 'costs of presenting the Maori point of view and of contesting local authority decisions through the planning process to appeal'.[49] The New Zealand Māori Council also made submissions on proposed new legislation in the mid-1970s, which were described by the Tauranga Moana Tribunal:

> The New Zealand Māori Council's submission to the select committee reviewing the Town and Country Planning Act 1953 said that the existing legislation had 'for far too long been a matter of grave concern and serious and continuing strife for the Māori race'. It listed the Act's many negative impacts for Māori: 'very poor communications; lack of real participation; cumbersome machinery; incomprehensible district

46. Woodley, 'Local Government Issues' (doc A193), p 644
47. Town and Country Planning Act 1977, second schedule, cl 3
48. Woodley, 'Local Government Issues' (doc A193), pp 75–82
49. Director, Town and Country Planning, to Commissioner of Works, 29 March 1976 (Woodley, 'Local Government Issues' (doc A193), p 82)

schemes; lack of clear objectives and policies; . . . lack of provision and protection for marae [and] traditional and cultural usages of historic places'.[50]

These were all relevant points for this chapter.

9.2.5.2 *The Waikanae section of the district scheme*

The Town and Country Planning Act 1953 enabled a council to develop the district scheme in stages with the consent of the Minister.[51] The Horowhenua County Council began work on its scheme in 1955 and obtained ministerial consent to develop the scheme in sections. The District Commissioner of the Ministry of Works, the Regional Planning Authority, and various local authorities (including drainage boards, hospital boards, catchment boards and the like) were invited to submit proposals for the scheme. We note that the District Māori Council (operating under the Māori Economic Development Act 1945) was not consulted. In 1955, the district scheme was published in the Gazette and advertised in two Wellington newspapers, the *Dominion* and the *Evening Post*, giving an opportunity to view the scheme and file objections. The council approved the final version of the scheme in 1960, and it became operable on 1 January 1961.[52]

The Waikanae section of the scheme was based on the assumption that future growth should be controlled by zoning. Particular areas would be allocated to prevent 'indiscriminate' mixing of land uses by zoning for 'compatible uses of land and buildings', in 'some cases securing compatibility by imposing special conditions'. The main functions of the Waikanae district were seen as 'primary production, holiday resort and recreation'. The population matched those functions. There were 786 residents in 1956 but the population rose to 1,000 in weekends and 2,000 in holiday weeks. The council anticipated that the development of Waikanae could therefore be accelerated by providing facilities for a resort as well as intensive farming in the rural zone. Areas were zoned commercial, industrial, residential, and rural with a view to providing for these needs over the next 20 years. The permanent population was expected to grow to about 1,900 by 1977, and facilities would be provided for a peak population of 10,000.[53]

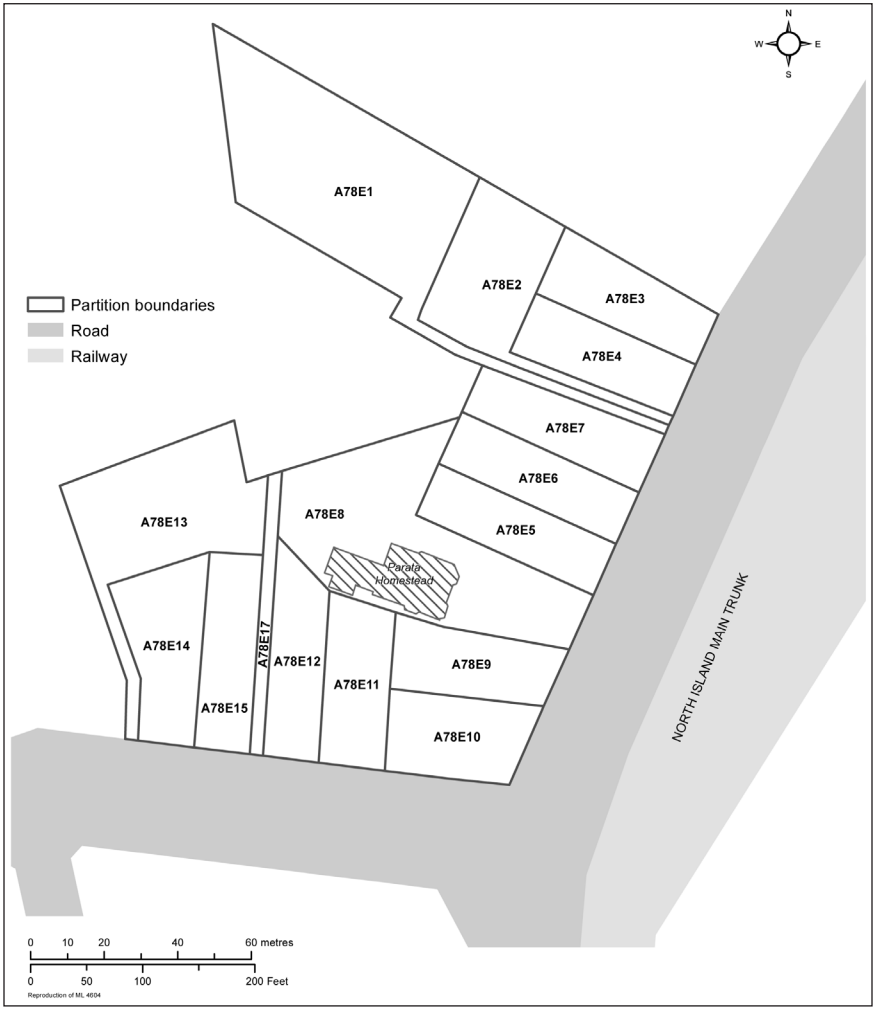
In respect of the new commercial zones, the current aggregate area of shopping consisted of 16 shops in 3.5 acres, with 240 feet of shopping frontage. The intention with the new zoning was to increase this figure to 13.5 acres in two categories: 3.5 acres with 1,320 feet of shopping frontage (category A) and 10 acres with 2,700 feet of frontage (category B). These shopping areas would need new streets and service lanes at the rear to allow loading and unloading of goods so that pedestrians and traffic would not be disrupted. Residential zoning would also increase from 424

50. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 337

51. Town and Country Planning Act 1953, s 20

52. 'County of Horowhenua: District Planning Scheme, Waikanae Section', 1960 (claimant counsel, zoning documents, 5 April 2019 (doc F11(d)), pp 16–18)

53. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), pp 20–21)



Map 15: Ngarara West A78E1–A78E15 showing the Parata homestead, which was marked on the original map as 'Old Single Storey Wooden House'.

acres to 940 acres.[54] The council was fully aware that it was zoning Māori land as commercial. Under the heading 'commercial streets', the scheme referred to '[s]treets fronting proposed commercial area in Parata block', which was Ngarara West A78.[55] The scheme map showed that the eastern edge of the block was zoned

54. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), pp 21–22, 24)

55. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), p 26)

commercial (see map 15). On the other hand, the scheme provided for 'preservation of objects and places of historical interest or natural beauty'.[56] This could conceivably have included the Parata homestead, which was constructed before 1900.[57]

9.2.5.3 *Sale of the Parata homestead*

The Parata homestead (Ngarara West A78E8) and the adjacent blocks on the corner of the State highway and Te Moana Road (A78E9 and A78E10) were among the sections zoned commercial, effective from 1 January 1961. In October 1962, the owners sold these blocks to Waikanae Hotel Ltd.[58] Mahina-a-rangi Baker stated in her cultural impact report for the construction of the park and ride carpark:

> it appears that whilst the sale of blocks A78E8–10 were legitimate, they were necessitated by the Horowhenua County Council (HCC) enforcing a planning scheme on the area, to which the Parata families and Te Ātiawa ki Whakarongotai had no ability to influence. Te Ātiawa ki Whakarongotai have therefore been prevented from preserving the heritage and cultural values of the site in the past.[59]

Tutere Paraone Parata, son of Nohorua Hira Parata, lived in the homestead until the age of 14, when it was sold. He told us that he was the third-youngest of 12 siblings, and that his whānau lived in the homestead along with the whānau of two of his father's brothers. The homestead was in disrepair with only the back quarter liveable so 'the other families had to move on'. Mr Parata explained that the trigger for the sale was his father's death in 1962:

> In 1962 my father died. It was then that we had to move on too.
>
> There were a few reasons for this. I understand that the area was re-zoned by the Horowhenua County Council, it was zoned commercial whereas it had previously been residential. This meant that the land use had to be commercial although it had been identified as a place for our people since before Pakeha even arrived. As far as I am aware, we were never consulted about this change, and if we were it was only lip service and our concerns were clearly not heard.
>
> Keith Davies, who was from Levin, bought the Parata Homestead and the block of land, knocked down the homestead and built Waikanae hotel. I understood that part of the deal was that he would build a house for my mum and us kids, on what is now

56. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), p 24)

57. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 147)

58. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 146); certificate of title for Ngarara West A78E8, WN745/18 (claimant counsel, homestead documents, 30 September 2019 (doc F11(h)), p 19)

59. Mahina-a-rangi Baker, 'Cultural Impact Assessment' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 147)

known as Graham Grove. This was on a block of land that my father already owned. That is where my son is today.

This was my perception of what happened, of our homestead being sold for a Hotel to be built, from the conversations my whanau had during these times. My father was the last of his siblings to sell his share of this block of land and I am certain this was due to poverty and having no means to maintain the Homestead in its aged state of repair. The offer of the Hotel proprietor to build a new house on my father's land would have been appealing at a time when finances were scarce. A loan from the bank would have been out of the question as the Crown did not lend money on Maori land in situations like that.

Selling the homestead after my father passed was the only way Mum could improve our lifestyle. We had land, but we couldn't get a loan back in those days. There was no option to repair and maintain the homestead at this point. The state of the Homestead was dilapidated, and our whanau decided to go to a different home. On paper it seemed like we didn't have a choice.[60]

The claimants argued that the rezoning of the homestead restricted the use of the land and forced the owners to sell.[61] Claimant counsel noted that only part of the homestead block was actually zoned commercial but, because there was no provision in the scheme for a 'solely residential dwelling on commercially zoned land', the only reasonable outcome (regardless of other factors) was the sale of the land to a commercial enterprise. The 'Maori owners of the land and other local whanau had no ability to influence' the scheme, and the Horowhenua County Council 'could only have intended for the change in zoning of the land to have the effect of encouraging the Maori owners to sell and leave their land, in furtherance of its goals of replacing the culturally significant and Maori-occupied block with a new and expanded Waikanae commercial zone'.[62] The claimants did accept that there were other factors leading to sale, namely the 'straitened financial circumstances' of the whānau and the 'difficulties of keeping up the maintenance on the old building', but the rezoning was a reason that compelled the sale; even if the whānau had had the ability to fix the homestead and keep living there, they would not have been able to do so for long because of the zoning.[63] On that point, the claimants argued that the council should not have had the power to destroy their papakāinga, and that the Crown failed to either protect the small amounts of land remaining in Māori ownership by that time or ensure that local government was required to do so.[64]

The Crown submitted that the predominant and conditional uses of land that had been rezoned commercial did not force residential owners to leave their

60. Tutere Parata, brief of evidence (doc F2), pp 9–10
61. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 86
62. Claimant counsel (B Gilling and S Dawe), 'Submissions regarding the zoning of Parata homestead land', 4 April 2019 (paper 3.2.261), pp 2, 5
63. Claimant counsel (Gilling), closing submissions (paper 3.3.50), p 28
64. Claimant counsel (Gilling), closing submissions (paper 3.3.50), p 28; claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 87

homes. The council could have taken the land under the Public Works Act, as it was empowered to do by the Town and Country Planning Act 1953, but it opted not to do so.[65] Rather, in the Crown's view, the sale of the Parata homestead was

> brought about because the whānau were unable to continue to maintain the homestead and much of it had become uninhabitable. As discussed below, following the death of his father (Nohorua Parata), Matua Tutere's mother [Tapuikura Pokere Haweturi] was offered, as part of an agreement to sell the land to Waikanae Hotel Limited, the construction of a new house on other whānau land nearby. This offer was accepted.
>
> While the Wai 1628 claimants submit that the zoning change over the land contributed to the Parata whānau moving out of the homestead, in fact it would appear that whānau may not have been aware of the zoning change at the time of the sale of the property.[66]

Also, according to the Crown, the whānau had a remedy because they would have been able to apply for compensation for the injurious affects of the district scheme. In sum, the Crown submitted that the sale was a private deal brought about by the deterioration of the homestead. The Crown had no knowledge of the sale, nor was it responsible for the conditions which brought about the sale.[67]

On the question of whether the whānau actually knew that the land had been rezoned commercial, the Crown was relying on a statement in the evidence of Mahina-a-rangi Baker that she had told Tutere Parata of this fact (he had not known about it). Ms Baker, however, also noted that Mr Parata would have been too young to have known about the rezoning at the time his mother sold the land:

> This was a sad discovery to share with Uncle Tutere, as our kaumātua weren't aware of this, who at this time of the zoning were young people. They had assumed that they had had to leave due to an inability of whānau to maintain the home. This discovery also cast new light on the development in terms of how the iwi might feel about it, in that it would appear that this was just another example of Crown land and town planning legislative processes facilitating the alienation of our people from their lands. It strengthened a sense that this land should be returned to our people, and reinstated into its original function, to support the capacity of our marae specifically and the manaakitanga of our people.[68]

We agree that Tutere Parata was likely unaware of the zoning change due to his relative youth at the time of the sale.

On the question of whether the rezoning compelled residential owners to sell, the answer is clear that they would have had to do so eventually or risk the

65. Crown counsel, closing submissions (paper 3.3.60), p 121
66. Crown counsel, closing submissions (paper 3.3.60), p 122
67. Crown counsel, closing submissions (paper 3.3.60), pp 121–124
68. Mahina-a-rangi Baker, brief of evidence, 22 January 2019 (doc F11), pp 19–20

compulsory taking of their land. The uses permitted for Commercial B zones were stipulated as 'predominant' and 'conditional': The district scheme set out the predominant uses in the zone:

- Retail and wholesale shops and auction rooms and residential accommodation in conjunction with retail shops as for commercial Zone A zones;
- Administrative buildings of the Central and local Governments, professional and commercial offices, banks, and exchanges;
- Libraries, exhibitions, museums, and art galleries;
- Theatres and halls and places of public and private worship, entertainment, and public and private assembly;
- Licensed and private hotels, residential and non-residential clubs; and,
- Buildings accessory to buildings used for any of the foregoing purposes.

The conditional uses in the zone were:

- Commercial garages and stores for the sale of petroleum by retail and garages for running repairs in cases where the floor space to be used to repair work does not exceed 1,000 square feet and where access from the street in each case is to the approval of the Council;
- Fire stations, electrical substations, transformers, drainage, and pumping stations, bus terminals and shelters, and structures of public utility;
- Any process of manufacture of goods most of which are sold by retail on the premises;
- Buildings accessory to buildings used for any if the foregoing purposes specified in this subclause;
- Use of a rear site for any purpose permitted in this zone.[69]

While the rezoning could not retroactively disallow the existing residential occupation of the land, future development and building on the land after 1 January 1961 had to be in accordance with the zoning designation.[70] Even repairs to existing buildings were severely restricted:

> An existing building which does not conform to any or all of the provisions of the Scheme relating to the zone in which it is situated may be repaired, altered, or modified so long as the repair, alteration, or modification does not increase the extent to which the building fails to conform to the provisions of this Scheme and does not tend to prevent or, in the cases of alterations or modifications, does not tend to delay the effective operation of this Scheme.[71]

69. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), pp 36–37)
70. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), p 21)
71. 'County of Horowhenua: District Planning Scheme, Waikanae Section' (claimant counsel, zoning documents (doc F11(d)), p 44)

In our view, this would have made the necessary repairs to the homestead inconsistent with the commercial zoning, because the repairs would certainly have 'tend[ed]' to prevent or delay the 'effective operation' of the district scheme. This placed the Parata whānau in an impossible situation: they would either have to continue living in a building that was in a state of disrepair and risk their land being taken for the purposes of the scheme, or they would have to sell. As Crown counsel submitted, compensation was potentially available for owners who were affected injuriously by the scheme,[72] but that would not have enabled them to retain this important piece of land in Māori ownership. Section 44(6) of the Town and Country Planning Act, which provided for compensation, was a complex provision with several qualifications and exceptions. One such was that the applicant had to have objected to the scheme at the time prescribed before the scheme was finalised, and the application for compensation had to be made within one year of the scheme becoming operative (which would have been 1 January 1962). These qualifications meant that the whānau was not eligible for compensation.

We accept that the rezoning was not the only reason for the sale: the back quarter of the homestead was the only part still habitable; the whānau could not afford to repair the building; Nohorua Parata had just died; and the purchaser offered to build the whānau a new house. Tutere Parata's evidence established that these were all reasons for the sale.[73]

9.2.5.4 *The Mahara House section*

Mahara House, which burnt down in 1937, was located on Ngarara West A78B9A (2r 5.96p). This section of A78 was on the corner of Hira Road (now Ngaio Road) and the highway, and it was rezoned as commercial on 1 January 1961. The land remained important to the whānau, and it was the site of one of two wāhi tapu pōhutukawa at either end of A78 as markers of the papakāinga. The other is on the corner of Te Moana Road and the highway, near to where the Parata Homestead once stood.[74] After the death of the owner, Tere Rauara Parata,[75] four successors took ownership of the section in July 1961: Te Wenenga Parata; D'Arcy Hikopounamu Parata; Te Aputa Wairau Kauri; and Tahu Te Whaiti Parata. The court's order was backdated to 12 February 1960.[76] This may have been because the new owners had already signed a deed on 12 May 1961, selling Ngarara West A78B9A (2r 5.96p) to a solicitor, Jack Watts, for the sum of £4,775.[77]

It is difficult to say for sure whether the rezoning had any effect on the ability of the owners to retain this land. We have no information as to what the land was

72. Crown counsel, closing submissions (paper 3.3.60), pp 121–122
73. Tutere Parata, brief of evidence (doc F2), pp 9–10
74. Moira Cooke and Tracey Henare, brief of evidence (doc F35), p 11; claimant counsel (Gilling and Brown), memorandum on homesteads (paper 3.2.454), p 7
75. Also known as Tererauara Parata.
76. 'Order vesting interest of deceased in successors', 4 July 1961 (claimant counsel, additional homestead documents, 25 October 2019 (doc F11(i)), p 3)
77. Memorandum of transfer, 12 May 1961 (claimant counsel, additional homestead documents (doc F11(i)), pp 6–8)

being used for at the time it was rezoned. Certainly, the owners would not have been able to build a new house on it or begin to use it for any purpose that was not a predominant or conditional use as defined in the district scheme. The scheme had taken effect before the new generation of owners took over the land, and it deprived them of the ability to develop the land other than for a shop or some other such business. The purchase seems to have been a speculative one, as the purchaser resold the land to the Waikanae service station for £5,545 in 1965.[78] It is possible that the owners could have tried to lease the section to a Waikanae business or businesses but the commercial area was slow to develop. The council itself took over development later in the 1960s, as we discuss below.

9.2.5.5 *The revised district scheme and the development of the town centre*

Under the Town and Country Planning Act 1953, district schemes had to be reviewed every five years.[79] The scheme was duly reviewed in the mid-1960s and a revised district scheme was developed. As part of the revised scheme, the council planned a 'Commercial Area Development' project for Waikanae on the Ngarara West A78 block, including a pedestrian mall.[80] The plan was for the existing commercial area 'beyond the hotel and marae' to become the Waikanae town centre. According to Chris and Joan MacLean, a town centre was required because of Waikanae's 'burgeoning population', and an alternative site was considered but not chosen:

> The alternatives were to locate it either alongside the main highway (where a cluster of shops already existed) or further west, near Ngārara Road. Although some councillors were aware that siting the new centre on the main road could cause traffic problems, this was their final choice, perhaps because people were used to going to the railway station, the school and the post office on the eastern side of the line.[81]

In 1966, the council decided to acquire four acres for the town centre (also referred to as the 'commercial centre'), which would include a pedestrian mall, a library, carparks, a post office, a local government office, and shops.[82] The council had already purchased two Māori-owned sections adjoining the marae reserve in 1965: Ngarara West A78E1 and Ngarara West A78E14.[83] The development of the commercial area as the town centre was undertaken as a partnership between the

78. Claimant counsel (B Gilling and R Brown), second memorandum on homesteads, 25 October 2019 (paper 3.2.479), p 2
79. Town and Country Planning Act 1953, s 30
80. A Eaton Hurley to county clerk, 15 June 1967; 'Waikanae Commercial Centre, plan showing occupied sites, June 1974' (Heather Bassett and Richard Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2713, IMG2724)
81. C & J Maclean, *Waikanae*, p 114
82. C & J Maclean, *Waikanae*, pp 114–115; 'Waikanae Commercial Centre, plan showing occupied sites, June 1974' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2713)
83. Bassett and Kay, 'Public Works Takings' (doc A211), pp 535, 538

county council and the Waikanae County Town Committee, both of which contributed funds. A 'municipal initiative' was necessary because 'no private development company was particularly interested', so the local authorities set out to do the work themselves.[84]

In 1967, the county council sought legal advice on the best way to undertake the 'Commercial Area Development', especially the pedestrian mall. At that point, the revised district scheme was still not operative. A Eaton Hurley of the firm Martin, Evans-Scott, and Hurley advised that the best way to develop the 'Commercial area' was to acquire all the land in the 'Commercial block', redevelop it, and then sell or lease it in conjunction with the mall and 'other development which the Council will be undertaking in accordance with the Reviewed District Scheme'. This was the surest way of recouping the costs of development and 'ensuring an orderly development'. Hurley noted that section 380A of the Counties Act (inserted in 1964) enabled the council to purchase land by agreement for commercial purposes so as to develop it and then sell or lease it. Section 47 of the Town and Country Planning Act gave power to take the land compulsorily but only if a district scheme was operative: 'It will be seen that Section 47 is not available to the Horowhenua County Council at the present time and will not become available until its [revised] District Scheme is operative.'[85]

The council had already identified properties that it wanted for the town centre.[86] A confidential report in November 1970, headed 'Waikanae Commercial Area and Town Centre Re-Development Scheme', showed that one of the properties targeted and acquired for the scheme was A78E2, recorded as 'Baker' (1r 8.98p).[87] As discussed in chapter 5, the Baker whānau block was compulsorily vested in the Māori Trustee in 1965 for sale because of rates arrears. The council then purchased this block from the trustee for the town centre. The Crown has made a concession of Treaty breach in respect of this particular block (see chapter 5 for the details). The other pieces of Māori-owned land were to be acquired under the Public Works Act. We discuss that next.

9.2.5.6 *Use of compulsory powers to acquire land for the town centre*

By 1969, the revised district scheme was operative. This meant that compulsory takings under section 47 of the Town and Country Planning Act were an option. Section 47 stated:

84. County clerk, Horowhenua County Council, to county clerk, Rodney County Council, 10 February 1975 (C & J Maclean, *Waikanae*, p 115)

85. A Eaton Hurley to county clerk, 15 June 1967 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2725-IMG2726)

86. A Eaton Hurley to county clerk, 15 June 1967 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2724)

87. 'Waikanae Commercial Area and Town Centre Re-Development Scheme', confidential report to Horowhenua County Council and Waikanae County Town Committee, 18 November 1970 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2764)

> In addition to any power it may have to take land for any public work which it is authorized to undertake, the Council concerned may, while a district scheme is operative, take, purchase, or otherwise acquire under the Public Works Act 1928 any land in its district if in accordance with the scheme it is necessary or expedient to do so for the proper development or use of the land or for the improvement of areas that are too closely subdivided or are occupied by or appurtenant to any decadent building or for the purpose of terminating any use of any land or building that does not conform to the scheme or for the provision or preservation of amenities.

In June 1969, the Horowhenua County Council issued a notice of intention to take 'seven small parcels of land, three of which were in Māori ownership: Ngarara West A78B9C (2r 5.95p), A78B9D (2r 5.96p), and A78B9B (2r 5.96p)'.[88] The notice stated that the land was being taken for the purpose of leasing or reselling it for commercial purposes, which was made possible by the compulsory power to take land for such 'wide-ranging' purposes that the Act conferred upon councils.[89] The notice stated:

> for the purposes of the operative district scheme for the County of Horowhenua and for the regrouping, improvement and development of the said lands for letting or leasing or resale for commercial purposes; the Council being of the opinion that it is necessary and expedient so to do for the proper development and use of the said lands and for the improvement of areas that are too closely subdivided.[90]

Ngarara West A78B9C was owned by D'Arcy Hikopounamu (D H) Parata. Mr Parata was living in Wellington at the time and was represented by a firm of solicitors in the dealings with the council over the compulsory taking. This land near the marae (as with the other pieces) was part of the papakāinga. The land was a fenced section of pasture used for grazing sheep, and it had a shed and ornamental and shelter trees on it.[91] It should be recalled that, although the council had zoned this land for its town centre, the land was still partly rural.[92]

D H Parata did not file an objection – it is unclear from the information available as to whether notice was served on him. The Ministry of Works' Resident Engineer suggested that the owner may object to the taking.[93] Mr Parata was aware of the council's proposed taking because he reportedly asked the council to confirm the notice of intention to take the land.[94] The Minister approved the

88. Bassett and Kay, 'Public Works Issues' (doc A211), p 535
89. Bassett and Kay, 'Public Works Issues' (doc A211), pp 535–536
90. 'County of Horowhenua: Notice of Intention to Take Land', 11 June 1969, *New Zealand Gazette*, no 35, p 1104 (Bassett and Kay, 'Public Works Issues' (doc A211), p 535)
91. Bassett and Kay, 'Public Works Issues' (doc A211), pp 535–536
92. Ane Ngamate Tamati Mullen Parata (Ani Parata), brief of evidence, 21 September 2018 (doc E20), pp 2–3
93. Bassett and Kay, 'Public Works Issues' (doc A211), p 356
94. A Eaton Hurley to District Commissioner of Works, 3 March 1970 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG0484)

taking because all the formalities had been observed,[95] and there does not seem to have been any discretion reserved for the Minister under this legislation (in contrast to the Soil Conservation and Rivers Control Act, discussed in chapter 8). As discussed in chapter 7, recent legislation had empowered the Māori Trustee to negotiate compensation without reference to the owners, but that provision only applied to land with more than one owner. D H Parata negotiated compensation through his lawyer and refused to accept the council's offer of $8,500. The Land Valuation Court therefore determined the compensation and awarded $9,310.[96]

Te Wenenga (T W) Parata was the owner of Ngarara West A78B9D, a small fenced section of pasture with no buildings on it. This land was also part of the papakāinga but it was no longer Māori land by 1969. As discussed in chapters 5 and 7, the Māori Affairs Amendment Act 1967 empowered the court registrar to make a status declaration changing Māori land that was 'suitable for effective use and occupation' to European (later general) land. There was no requirement to notify the owners or obtain their consent. This unilateral power was restricted, however, to land owned by no more than four people.[97] Ngarara West A78B9D was one of the blocks changed to European land by the registrar.[98] This was the first form of compulsion to which this block was subject; the taking under the Public Works Act was the second. As an owner of European land, however, T W Parata did at least have the notification of intent to take the land served on him. No objection was filed in response. In any case, the council delayed finalising the taking until April 1971 so as to find out what level of compensation the Land Valuation Court would award to D H Parata.[99] We do not have evidence as to the compensation paid to T W Parata, but there is no reason to doubt that compensation was duly paid.

It is possible that D H and T W Parata did not object because of the sheer breadth of power that the council had under section 47 to take land for the purposes of the district scheme. It was highly unlikely that an objection would have succeeded, especially since the council had made this land part of the commercial centre of the town. The third piece of Māori-owned land to be taken for the town centre was Ngarara West A78B9B, which was the site of the homestead Mahara Tamariki. The owner in that case did object but realised that an objection was hopeless, as discussed in the next section.

9.2.5.7 *Mahara Tamariki*

Mahara Tamariki was located on the present site of the Countdown supermarket. Natanahira Parata built Mahara Tamariki about 1900 and lived there with his children before moving into his father's homestead after Wi Parata's death in 1906.

95. District Commissioner to Commissioner of Works, 24 March 1970; Commissioner of Works to Minister of Works, 6 April 1970 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Archives New Zealand folder, IMG0482)
96. Bassett and Kay, 'Public Works Issues' (doc A211), p
97. Māori Affairs Amendment Act 1967, ss 4, 6
98. Walghan partners, 'Block Research Narratives' (doc A203), p 120
99. Bassett and Kay, 'Public Works Issues' (doc A211), p 537

Tohuroa Hira Parata, Natanahira's son by his first marriage, continued to live in Mahara Tamariki. This homestead was eventually inherited by his daughter, Te Aputa ki Wairau Kauri. She was still living there with her whānau in the 1960s.[100] Her grandchildren, Moira Cooke and Tracey Henare, told us:

> The homestead was a beautiful old villa . . . There were four bedrooms, and a parlour. We will never forget the long corridor leading from the front door to the lounge. Along the corridor walls hung the large Parata whanau portraits, that would be taken to the Marae for our whanau tangihanga.[101]

Mahara Tamariki was part of the papakāinga:

> There were lots of lilies on the block and flax all around too. At the back of the property there were sheep, which were killed for hangi. It was almost like a little farm with sheep dogs, chickens and roosters. You drove into the property down a long driveway which would take you to the front door. Pa grew veges, particularly lots of spuds. We remember the banana passionfruit tree clearly. We celebrated Christmas with hangis being put down in the farm paddocks . . .[102]

Mahara Tamariki was situated on Ngarara West A78B9B, a block which had been subject to compulsory Europeanisation under the Māori Affairs Amendment Act 1967.[103] As noted above, owners were not notified or given an opportunity to object prior to the change of status from Māori to European land. Rawhiti Higgott was puzzled as to why such a change had occurred to Te Aputa Kauri's land, commenting: 'I can't see how her land was not Maori land.'[104]

In 1969, Te Aputa Kauri was notified of the council's intention to take the homestead site for the Waikanae commercial centre.[105] Personal notification was at least one benefit of owning European land. A few days after receiving the notice, Mrs Kauri met with the county clerk to express her concern about the proposed taking. The minutes of the meeting show that the clerk explained 'the reasons for the Council resolving to take various parcels of land in the Commercial Area at Waikanae, which includes her own'.[106] The clerk also advised that Mrs Kauri had 40 days to lodge an objection, and that the council would soon make her an offer of $10,000 compensation for the land and house. Mahara Tamariki had been val-

100. Moira Cooke and Tracey Henare, brief of evidence (doc F35), pp 4–5, 7–9; claimant counsel (Gilling and Brown), memorandum on homesteads (paper 3.2.454), pp 5–7; Moira Cooke and Tracey Henare, written answers to questions (doc F35(e)), p 1
101. Moira Cooke and Tracey Henare, brief of evidence (doc F35), p 7
102. Moira Cooke and Tracey Henare, brief of evidence (doc F35), p 8
103. Walghan partners, 'Block Research Narratives' (doc A203), p 120
104. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 63
105. Bassett and Kay, 'Public Works Issues' (doc A211), p 537
106. 'Memorandum of a Meeting between County Clerk and Mrs TAK Kauri, 18 June 1969' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2768)

ued at $2,100,[107] a figure which clearly took no account of its cultural importance and value to the whānau. Te Aputa Kauri responded that she was not in a financial position to fight the taking.[108] This was a common dilemma for Māori affected by council decisions under the Town and Country Planning Act, as pointed out by the New Zealand Māori Council to the Ministry of Works in 1976 (see above). The minutes recorded:

> Mrs Kauri explained that this figure [$10,000] would be barely enough for her to buy a new home, or to buy a section of land and to build on it a house of her choice. She said that she was not in a position to pay legal costs in fighting the Council, and hoped that some mutual arrangement could be made which would spare her this expense.[109]

Mrs Kauri then indicated that 'she would expect to be paid $12,000 and be allowed to continue to occupy her home for a period of up to 3 years for a rental equivalent to the annual amount of the rates'. But before deciding to follow this course (and give up on any hope of retaining the homestead), Te Aputa Kauri indicated that she would 'consult with Mr J K Hunn, an advisor in whom she would have confidence'.[110] Jack Kent Hunn, a former Secretary for Māori Affairs, had retired at Waikanae in the mid-1960s and became involved in local politics.[111]

We have no evidence as to any discussions between Te Aputa Kauri and Hunn. On 30 June 1969, the firm Tripe, Matthews, and Feist wrote to the council to file a formal objection to the taking. Mrs Kauri, they wrote, was 'opposed to the taking of her land'. Despite lodging an objection, and without prejudice to that objection, Mrs Kauri advised the council that she was prepared to transfer the land on the conditions already discussed with the county clerk: a payment of $12,000; and the ability to remain in the homestead for another three years at rent based on the rates ($78 a year at that time). Mrs Kauri added a further condition that the council pay her legal and valuation costs 'up to $250'.[112] The council agreed to pay

107. 'Memorandum of a Meeting between County Clerk and Mrs T A K Kauri, 18 June 1969' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2768)

108. 'Memorandum of a Meeting between County Clerk and Mrs T A K Kauri, 18 June 1969' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2768)

109. 'Memorandum of a Meeting between County Clerk and Mrs T A K Kauri, 18 June 1969' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2768)

110. 'Memorandum of a Meeting between County Clerk and Mrs T A K Kauri, 18 June 1969' (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2768)

111. R M Williams, 'Jack Kent Hunn', *Dictionary of New Zealand Biography*, Ministry for Culture and Heritage, https://teara.govt.nz/en/biographies/5h43/hunn-jack-kent

112. Tripe, Matthews, and Feist to county clerk, 30 June 1969 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2769)

$12,000 and to allow Mrs Kauri to continue to living in the homestead for another three years, although we do not know if the council reimbursed her legal fees.[113]

Public works historian Heather Bassett commented that, although Te Aputa Kauri was 'agreeing to sell, it was an agreement made in the context of the council planning to take her land anyway'.[114] The whānau also considered that Te Aputa Kauri had no choice but to get the best deal she could for the land. Her granddaughters, Moira Cooke and Tracey Henare, told us: 'She went down to the county clerk and objected. But because she knew they were going to take the land anyway, she thought she had no option but to sell it and get money for it.'[115] Rawhiti Higgott also stated: 'Aunty Aputa Kauri had no option but to sell. Pressure was put on her. The Public Works Act was the enforcer if the Crown required it. Aunty opposed the taking of her land.'[116]

In the Cabinet papers discussed in chapter 7, when the Minister for Land Information proposed reforms to the Public Works Act in 2005, the Minister noted that it was necessary to 'clearly separate compulsory taking from truly voluntary sale, thereby removing the shadow of compulsion that is currently associated with most public works acquisitions'. This was because 'the "shadow of compulsion" arises currently, even if the landowner is willing to sell, because the compulsory acquisition provisions are ultimately available if agreement cannot be reached'.[117] In our view, the shadow of compulsion clearly lay over the council's purchase of the block on which Mahara Tamariki stood, since the purchase only occurred in the context of the notice of intention to take the land.

Moira Cooke and Tracey Henare recalled the day their grandmother had to leave the homestead in their evidence. Tracey was nine years old at the time:

> [Tracey] recalls asking Nana, 'why are we leaving our home, they can't do this' and she replied 'Tracey, it is too late'. Again, Tracey replied, 'They can't do this to us'. When our whanau were carrying Nana Aputa from the house because she was overcome with grief, Tracey ran back into the house saying, 'Nan they can't do this, this is your home'. Mum had to go back in and get her. Nan and the whanau were wailing and crying, and Mum had to drag Tracey out of the house. She was still screaming, 'They can't do this to us'. This memory has scarred Tracey, and she will never forget that sound. It was worse than a tangi hotu.[118]

Te Aputa Kauri was 'heartbroken' at the rezoning and loss of the 'land on which her home stood'. According to Suzanne Woodley, the actions of the council 'may well have been what prompted' Te Aputa Kauri to stand for election to the 'newly

113. Bassett and Kay, 'Public Works Issues' (doc A211), pp 537–538
114. Bassett and Kay, 'Public Works Issues' (doc A211), p 537
115. Moira Cooke and Tracey Henare, brief of evidence (doc F35), p 8
116. Rawhiti Higgott, brief of evidence (doc F3), p 63
117. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', undated (February 2005) (Nigel Mouat, papers in support of brief of evidence (doc G7(f)), pp [17], [21])
118. Moira Cooke and Tracey Henare, brief of evidence (doc F35), p 9. 'Tangi hotuhotu' means wailing beyond measure.

constituted Waikanae Borough Council in 1971.'[119] Mrs Kauri was the first Māori woman borough councillor, and also one of only three Māori to be elected to a county council in the inquiry district prior to 1989 when she represented the Waikanae riding on the Horowhenua County Council in 1980–83.[120]

We turn next to consider some of the impacts of the town centre on Whakarongotai Marae.

9.2.5.8 *Whakarongotai Marae: access and privacy issues*

In addition to the personal impacts of the loss of the papakāinga lands around the marae, Mr Higgott stated that there were serious consequences to the Māori community. The remaining Ngarara West A78 sections were alienated through a variety of processes, including rezoning, private purchases, public works takings, and compulsory vesting and sale for non-payment of rates. He told us:

> This had a huge impact on the 'village' and took away our right to live like a 'traditional native village' where the urupa, church and whanau were close by. We may still have the marae but we lost the wider village aspect when the carparks and town centre were created.
>
> The marae was separated from its people, became isolated, and was alone. This was to cause a lot of problems for the marae as time went by.
>
> On the other hand, the Waikanae community, shop owners and the local council benefited. Thank goodness they didn't take the marae land. Some of the descendants became 'landless' and lost that connectiveness to Waikanae.[121]

A sub-committee of the council did consider the possibility of acquiring the marae block for the town centre in 1969. This was one of the proposals presented by the sub-committee in a confidential report to the Waikanae Town Committee (the predecessor of the borough council).[122] This proposal was not accepted by the council, nor did the council attempt to take the land that it wanted using section 47 of the Town and Country Planning Act 1953. Rather, the council negotiated with the marae committee and the marae trustees to try to reach an agreement over the immediate issue concerning the council at that time, which was the provision of service lanes in the town centre (see above for the district scheme's requirement for service lanes in the commercial area). This was a significant improvement to how some of the papakāinga lands had been treated.

The original right-of-way to Whakarongotai Marae, where Frater Lane is today, provided a direct thoroughfare between the marae across the highway (now Main Road) to the church and urupā on the eastern side. As described by Rawhiti

119. Woodley, 'Local Government Issues' (doc A193), p 455
120. Woodley, 'Local Government Issues' (doc A193), pp 22, 32
121. Rawhiti Higgott, brief of evidence (doc F3), pp 64–65
122. Chair of sub-committee to Waikanae County Town Committee, 'Commercial Centre Re-Development Scheme: Report of the General Development Sub-Committee', 11 December 1969 (Bassett and Kay, papers in support of 'Public Works Issues (doc A211(c)), Rawhiti Higgott papers folder, IMG2716)

Higgott, this access was important for the events and ceremonies held at the marae, especially tangihanga:

> I remember as a child attending functions and tangi at the marae. There was a roadway . . . from the state highway that ran to the front entrance of the marae and buses and cars were able to drive in and would park on land on the entrance side of the marae. This entrance was also the traditional pathway to our urupa which was across on the eastern side of the main highway (Ruakohatu urupa). We would walk and carry the coffin of our deceased across the main road.[123]

This marae right-of-way was located on or attached to Ngarara West A78E1, A78E2, A78E4, A78E7, and the marae reservation itself (A78A). Other sections were also able to access the right of way, including A78E3, A78E5, and A78E6.[124]

Claimant Tracey Henare identified another route as 'the original accessway to the papakāinga' on Ngarara West A78.[125] This accessway ran from the back of the marae to the old Waimeha Waikanae Main Highway (now Te Moana Road). Land for that old highway had been set aside in 1907.[126] After the Maori Land Court ordered the partition of Ngarara West A78 in 1955, this accessway became a separate block, A78E17.[127] This strip of land, around 11 feet wide and 210 feet long, is still in Parata whānau ownership and is administered by the Natanahira Trust (legally known as the Ngarara West A78E17 Ahu Whenua Trust).[128]

As noted above, the district scheme required commercial-zoned properties to have service lanes accessing the rear of the property, to discourage loading and parking for businesses on the main state highway.[129] Towards the end of the 1960s the council began planning for service lane access to the rear of the whole strip, rather than leaving the burden of providing vehicle access to individual commercial property owners. In 1969, a council sub-committee presented a confidential report to the Waikanae County Town Committee (referred to above) concerning the redevelopment of the commercial centre, including the planning for carparks and service lanes. It included the following observations about different options for access to the rear of the shops in the town centre:

> First: that the Marae property might become available for incorporation in the Scheme. Second: That failing that, vehicle access between Te Moana and Ngaio Roads

123. Rawhiti Higgott, personal communication, cited in Bassett and Kay, 'Public Works Issues' (doc A211), p 543
124. Wellington Māori Land Court, minute book 39, 27 May 1955, pp 394–396
125. Transcript 4.1.20, p 158
126. 'Notice of the Taking and Laying-off of Roads through Ngarara West A Block', 25 February 1907, *New Zealand Gazette*, no 25, p 946
127. Transcript 4.1.20, p 158; 'Plan of Ngarara West A78E1 to A78E17', ML 4604, June 1956 (claimant counsel, homestead documents (doc F11(h)), p 18)
128. Transcript 4.1.18, p 339
129. Horowhenua County Council, *County of Horowhenua District Planning Scheme, Waikanae Section*, December 1960 (claimant counsel, zoning documents (doc F11(d)), p 24)

through the Marae property might be arranged. Third: That in the last resort a cul-de-sac access from Ngaio Road could be provided.[130]

According to the same report, marae trustees 'did not see any problem in confining the access to their property from the Highway to pedestrian access only'. Mr Higgott denied this, arguing that the marae trustees and beneficial owners at this time were already concerned about the shrinking papakāinga because of the expansion of the town centre.[131] In particular, the council sought the trustees' consent to make the original right-of-way (now Frater Lane) for pedestrians only, which would result in Whakarongotai losing vehicle access to the highway. They also sought the trustees' consent for a pedestrianised service lane to be constructed across the eastern boundary of the marae. This would require demolishing an existing marae toilet block. The trustees were to be compensated with an equivalent area of council-owned land.[132]

From October 1970, the council sought a number of meetings with the marae trustees to discuss the ongoing development of the shopping centre and present them with the proposals to alienate some Māori land for this purpose, including some of the marae reservation itself. After these initial meetings, the trustees approved the new service lane on the eastern boundary. They agreed to the toilets being demolished and rebuilt on marae land. The trustees did not, however, explicitly consent to the loss of vehicle use on the existing accessway to the highway.[133] In return for their agreement, the trustees requested a concrete wall on the northern, eastern, and western boundaries to ensure marae privacy, with a gate on the eastern boundary to preserve access to the marae through the existing right of way. The county clerk complained the wall had not featured in earlier negotiations.[134]

Negotiations over the proposals continued for several years, and the marae trustees' solicitor persisted with the request for the wall.[135] It appears that while these negotiations were underway, the council proceeded with plans for a proposed service lane to provide access to the marae from Te Moana Road (instead of from the highway). In around 1970, the council purchased Ngarara West A78E14, a parcel of land owned by T Parata, for this purpose.[136] The use of Ngarara West A78E14 meant the 'proposed service lane' was further west than originally planned,

130. Chair of sub-committee to Waikanae County Town Committee, 'Commercial Centre Re-Development Scheme: Report of the General Development Sub-Committee', 11 December 1969 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2716))

131. Rawhiti Higgott, personal communication, cited in Bassett and Kay, 'Public Works Issues' (doc A211), pp 539–540

132. County Engineer, Horowhenua County Council, to P J Ellison, Plimmerton, 9 October 1970 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2706-IMG2707)

133. Bassett and Kay, 'Public Works Issues' (doc A211), pp 540–542

134. Bassett and Kay, 'Public Works Issues' (doc A211), p 541

135. Bassett and Kay, 'Public Works Issues' (doc A211), p 542

136. Extract from Horowhenua County Council Minutes, date unknown [c.1970] (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2760)

and did not pass through the marae reservation as originally proposed. The block bordering Ngarara West 78E14, the Ngarara West A78E16 block owned by the Parata whānau, had already been declared a public roadway in 1957, under section 421 of the Māori Affairs Act 1953.[137] Claimant evidence indicated the service lane, Marae Lane, was completed soon after in 1971.[138]

By August 1973, marae trustees said that if the council built the wall, they would reluctantly accept the loss of vehicle access to the highway, so long as it was made a permanent pedestrian accessway.[139] Through their solicitor, the marae trustees expressed their dissatisfaction with the agreement in no uncertain terms:

> We write to advise that the Waikanae Marae Committee met last night at Waikanae to discuss the final proposals put forward by the County.
>
> After lengthy consideration of the previous correspondence and the present position, the Marae Committee instructed us to indicate to you that the Marae has the following requirements:—
>
> 1. The Marae has now re-adopted its original proposal 6 in its letter to the County of 25th February, 1971 and requires the erection of a brick wall or a concrete wall along the East, North and Western boundaries. The proposals of the County will cause substantial pedestrian and vehicular traffic in the area and the wall is required to allow privacy to the Marae.
> 2. The Marae requires an alternative access to the rear of the Marae on either its Western or Northern boundary. The Marae recognises the difficulty in fixing the exact location of the alternative access on the boundary and for this reason will allow the Council some flexibility.
>
> There is one qualification to this requirement. If the writer is able to establish that the present access from Te Moana Road is permanent and unhindered at law the Marae will not require an alternative access. We will be examining this matter but the immediate indications are that the Marae does not have rights over the strip of land which is 78E17 on plan 20/624.
>
> 1. The Marae requires the County to build new toilets within the Marae on a site to be advised and according to plans to be prepared by the County and approved by the Marae.
> 2. If all other requirements are met in full, the Marae will reluctantly accept the loss of its existing vehicular right of way from the state highway. This is, of course, subject to the creation of a permanent pedestrian access way. We should emphasize that contrary to the statement in the letter to you from your client dated 13th November last, the Marae has never agreed to the cancellation of the existing vehicular right of way. This point is insisted on by our clients and appears to be confirmed by the correspondence.

137. 'Declaring Land in a Roadway Laid Out in Block IX, Kaitawa Survey District, Horowhenua County, to be Road', 18 December 1957, *New Zealand Gazette*, no 94, p 2346

138. Ani Parata, brief of evidence (doc E20), p 3

139. McGrath Robinson & Co to Martin Evans-Scott & Hurley, 21 August 1973 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2711-IMG2712)

> We appreciate that the requirements set out in this letter differ from those noted in previous correspondence. The information on our file, however, indicates that no final agreement was reached and that the County gave no indication of its attitude during the period of at least 18 months prior to our receiving your letter of 15th December last. In these circumstances it is hardly surprising that the Committee, having had the opportunity to discuss the matter in fuller detail, has to some extent changed its mind.
>
> However, six of the seven Trustees were present at this meeting, which we are instructed, was by far the most thorough discussion of the issues involved and if the requirements noted above are satisfactory to the County we anticipate little difficulty in proceeding.
>
> However, we must advise that the Trustees are extremely concerned at what they consider to be the interference and unsatisfactory nature of the offer of exchange. This point of view was very strongly expressed throughout the meeting and we advise you of it as we feel the Marae is unlikely to consent to any exchange of land at all other than on the basis of this letter.[140]

The Māori Land Court heard the council's application for land acquisition from the marae and surrounding blocks in November 1974. The original right of way from the highway (now Frater Lane) was cancelled entirely. However, the council also proposed to acquire land from the Waikanae Hotel to make Marae Lane a public road, rather than retaining it as a service lane.[141] This meant there was now public vehicle access across the original right of way to the marae from the highway, and to the new service lane along the eastern boundary (formerly the location of the toilet block).

Counsel for the county advised the Māori Land Court that there was a new proposal, which was recorded in the minutes as follows:

> New development in Waikanae – going on for some years. Negotiations with trustees at the marae. Terms of agreement set forth in application. Arrangements re fencing etc all set out in application. County has been acquiring land for shopping mall. Marae lies across part required for service lane. Marae falls away at back – service lane had to go that way. Equivalent area to be awarded to marae. The area marked 'D' not yet finally acquired by Council. *One modification which is not yet reflected in the plan. Marae has no legal frontage to public road. County also dealing with hotel proprietor who has land next to marae. All the area coloured brown is hotel – marked Waikanae Holdings Ltd. Now arranged that greater width will be taken viz 40' from Waikanae Holdings Ltd – area marked mauve on new plan which will give marae access to a public street. This partly constructed over land already owned by Council. The area marked 'A' viz 28.6 per[ches], is all that is being acquired from marae. The area marked*

140. McGrath Robinson & Co to Martin Evans-Scott & Hurley, 21 August 1973 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2711-IMG2712)

141. Otaki Māori Land Court, minute book 78, 6 November 1974 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2714-IMG2715)

> *'C' viz 25.82 per[ches], is to go to the marae and the area marked 'D' as soon as acquisition completed. Marae at present has right of way to state highway over area marked as 'pedestrian access way'. We wish cancellation of that right of way so it becomes pedestrian access way only. It amounts to an exchange. Advantage to be gained by marae will now include legal frontage to road.*
>
> County engineer says cost of reconstruction of lavatory block $4000. Gates & fences estimated to cost $2000. Agreement executed under seal.
>
> It is anticipated there will be no undue delay in acquiring the area of 2.78 perches.
>
> The areas proposed as 'pedestrian access way' are in fact parts of 78E1 and 78E2 but there is a right of way over same to the marae. These sections already owned by Council. [Emphasis added.][142]

The court minutes show the trustees' lawyer, Mr Pohl, agreed to the proposal, even while acknowledging it had not been specifically considered by his clients:

> Subject to acquisition of the 2.78 perches by the Council my client trustees agree to the proposals. The latest proposal whereby additional land will be acquired from Waikanae Holdings Ltd. and a public street provided giving legal access to the marae has not been considered by trustees but it will be for the benefit of the marae. So far as I know . . . nobody objects to the proposals.[143]

This was despite the trustees' August 1973 letter stating clearly and forcefully that the trustees were extremely reluctant to accept anything other than what had been outlined in their letter.[144] Indeed, Mr Higgott argued the trustees were unlikely to have approved a solution that would result in increased public traffic around the marae.[145] It appeared, he thought, that 'the trustees were backed into a corner by council and their lawyers.'[146] In any case, the Māori Land Court granted all the orders sought by the council.[147]

The service lanes constructed as a result of these negotiations proved to be very disruptive. Vehicle and foot traffic used Marae Lane and the other service lanes as common thoroughfares through the town centre, rather than their original

142. Ōtaki Māori Land Court, minute book 78, 6 November 1974, pp 313–314 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2714)

143. Ōtaki Māori Land Court, minute book 78, 6 November 1974, pp 313–314 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2714)

144. McGrath Robinson & Co to Martin Evans-Scott & Hurley, 21 August 1973 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2711-IMG2712)

145. Rawhiti Higgott, brief of evidence, (doc F3), p 66

146. Rawhiti Higgott, personal communication, cited in Bassett and Kay, 'Public Works Issues' (doc A211), pp 542–543

147. Otaki Māori Land Court, minute book 78, 6 November 1974, pp 314 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2715)

purpose as small, limited accessways for shops and Whakarongotai Marae. This was recognised in 1986, when Marae Lane was gazetted as a public road.[148]

The walls on the northern, eastern, and western boundaries of the marae requested by the trustees were apparently constructed sometime after the Māori Land Court hearing. In addition to the main entrance on the eastern boundary, there were two workers' entrances on the western boundary, requested by the marae and approved by the council in 1980. One gave access to Marae Lane itself, while the other came out at the carpark to the north of the marae.[149] However, presumably because of increased traffic on Marae Lane, a concrete wall was constructed on the western boundary in the 2000s, and the council apparently did not approve the preservation of the Marae Lane entrance due to traffic flow concerns.[150]

With the loss of vehicle access via the original right of way where Frater Lane is today in the 1970s, and another vehicle entrance on Marae Lane in the 2000s, vehicle access to the marae today is limited to a single entrance at the north-western corner of the marae, crowded in by another public carpark. Mr Higgott argued this result, stemming from the council's action to block the western entrance, disadvantages the marae and those who need to use it.[151]

Heather Bassett noted in her report that the marae's issues with access and privacy were 'further compromised and exacerbated' in recent years when the Wellington Regional Council obtained the hotel sections and built a park and ride carpark on the southern side of the marae.[152] We ourselves experienced firsthand the interruption from traffic during the pōwhiri at the third hearing of the Te Ātiawa/Ngāti Awa phase, held at Whakarongotai Marae.

9.2.6 Issues raised about the park and ride carpark

The establishment of the park and ride carpark next to the marae in 2017 occurred within a completely different statutory framework to that of the Town and Country Planning Act 1953. The claimants' allegations were not focused on the legislation but rather on the actions of the Wellington Regional Council and the New Zealand Transport Agency (NZTA).[153] Mahina-a-rangi Baker provided evidence that she was given too little information about the nature of the proposed work to complete the cultural impact assessment report, a position which the archaeologist on the project (Mary O'Keeffe) supported. According to Ms Baker, the requirement that the council consult iwi was undermined because council officials applied undue pressure and used various tactics (including divide-and-rule

148. Bassett and Kay, 'Public Works Issues' (doc A211), p 543; *New Zealand Gazette*, 10 December 1986 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott papers folder, IMG2718)

149. County Engineer to Te Aputa Kauri 'Re: Whakarongotai Marae: Vehicle Entrances for Workers Carpark', 8 January 1980 (Rawhiti Higgott, comp, supporting papers (doc F3(a)), p 128)

150. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 67

151. Rawhiti Higgott, brief of evidence, 18 January 2019 (doc F3), p 67

152. Bassett and Kay, 'Public Works Issues' (doc A211), p 543

153. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 94–96

and the press) to bring about the result they wanted. She provided email evidence in support of her claim. Ms Baker told us that these questionable tactics forced a change of leadership in the marae committee and compromised the ability of the iwi to make a decision about whether or not they supported the establishment of the carpark on the important site of the Parata homestead and very close to the marae.[154]

The Crown did not dispute the evidence of Ms Baker. Rather, the Crown submitted that 'the consultation (or lack thereof) complained of appears to be directed at the GWRC [the regional council] and not at the NZTA (who was responsible for the construction of the carpark)'. The Crown submitted that it is not responsible for the acts or omissions of the regional council. Rather, the Crown has 'established a legislative regime in which local authorities, including the GWRC, must operate in a Treaty-consistent manner'. The Crown has 'built safeguards into relevant statutory instruments in order to protect Treaty interests in local decision-making'. The Crown also submitted that there is insufficient evidence about NZTA's 'role or actions' to make any finding.[155]

We agree that there is insufficient evidence as to NZTA's role in this matter. We are not aware, however, of any legislation that states a regional council 'must operate in a Treaty-consistent manner'. Neither the Local Government Act 2002 nor the Resource Management Act 1991 go that far. Instead, the Tribunal has been critical of section 8 of the RMA, which only requires decision-makers to take account of the Treaty, in multiple reports.[156] The Treaty clause in the Local Government Act 2002 is also focused on taking account of the principles of the Treaty, stating that consultation is the way to do so:

> In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes.[157]

The Crown has thus overstated the position in respect of the legislation. But we did not receive detailed evidence on either this particular example or the workings of the Local Government Act 2002. As a result, we draw no specific conclusions about the cultural impact assessment and the regional council's actions over the carpark.

154. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 17–25; email correspondence and *Dominion Post* article (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), pp 149–156)

155. Crown counsel, closing submissions (paper 3.3.60), pp 124–125

156. See, for example, Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 49–51, 66.

157. Local Government Act 2002, s 4

9.2.7 Treaty findings

The Crown argued that it was not responsible for the decisions of county councils but rather for the statutory framework which governed council decision-making. This is an issue that has been considered in many Tribunal inquiries. In respect of the Town and Country Planning Act 1953, the Tauranga Tribunal stated:

> under the Town and Country Planning Act 1953 there were no specific protections around Māori land or Māori interests, nor any consultation or representation requirements apart from those generally available to the wider public. Local authorities were not required to take into account the traditional and cultural uses of Māori land when rezoning or when planning urban infrastructure. As a result, entire planning documents such as the Tauranga County district scheme for 1969 could be drawn up without making a single mention of Māori or their needs. While we accept that Māori needs and wishes could to some extent be accommodated under general provisions, we can nevertheless see how easy it would be for Māori to feel themselves invisible. Certainly the situation did not reflect the status of Māori as a Treaty partner. Further, we do not consider that the legislation ensured sufficient protection of Māori land and resources – a matter of critical concern in the Tauranga area given the limited amount left to tangata whenua. As the Manukau Tribunal observed, there is a duty on the Crown not to confer authority on an independent body without ensuring that the body's jurisdiction is consistent with the Crown's Treaty promises. We therefore find that, in the period to 1977, the Crown was in breach of the Treaty in respect of its town and country planning legislation.[158]

Similarly, the 1960 Waikanae section of the district scheme and the later revised district scheme took no account of Māori interests, the very small amount of Māori land remaining in Waikanae, the effect that zoning land as commercial would have on Māori land (including the historically important homesteads), or even the existence of the marae and papakāinga on what was zoned to be the town/commercial centre. These flaws in the district scheme and the revised scheme were only possible because of the serious flaws in the Town and Country Planning Act 1953. We agree with the Tauranga Tribunal that the Act was in breach of Treaty principles.

We further find that section 47 of the Act, which allowed Māori land to be taken compulsorily for redevelopment and resale for the purposes of a district scheme, was in breach of the Treaty. This was because, as claimant counsel argued, the Act allowed land to be taken for very wide-ranging purposes simply because a council had promulgated a district scheme; in this case, for the 'purposes of the operative district scheme for the County of Horowhenua and for the regrouping, improvement, and development of the said lands for letting or leasing or resale

158. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, vol 1, pp 403–404

for commercial purposes'.[159] In conjunction with the failure of the Act to require Māori interests to be considered or protected, the failure of the Act to provide for consultation with Māori or Māori representation in the decision-making, and the failure of the Act to require consideration of Māori cultural values in town planning, this wide-ranging power was inconsistent with the principles of partnership and active protection. In the case of Mahara Tamariki, a notice of intention to take the land meant that the purchase was carried out under the shadow of compulsion, and cannot be considered a voluntary sale of the homestead land.

The claimants were prejudicially affected by the rezoning of parts of their papakāinga as commercial, which was an important factor in the alienation of sections adjacent to the marae (including the 1962 sale of the Parata homestead). The claimants were further prejudiced by the decision to put the town centre on top of the papakāinga, which led to further alienations, compulsory takings, and – ultimately – the difficulties posed for Whakarongotai Marae by the establishment of shops and carparks on its doorstep. Among the prejudicial effects, the iwi have been significantly impeded in their ability to undertake the cultural practices associated with tangihanga, in particular the mourning procession of the deceased and whānau from the marae to the burial site.

We accept that there was negotiation with the marae trustees concerning the exchange of land and the service lane in 1969 and the early 1970s, although the discussions were circumscribed by the decisions already taken on zoning for commercial purposes and the establishment of service lanes. In 1975, a parliamentary committee was 'highly critical of the Crown's town and country planning regime, which it said had "not provided protection for marae but . . . frequently permitted development and use on adjacent land which have been detrimental to the function, value, and character of many marae throughout the country"'.[160] This was certainly the case for Whakarongotai Marae. The Tauranga Tribunal quoted this 1975 report, which said:

> the basic reason for this sorry record is the lack of recognition in the Town and Country Planning Act 1953 or its Schedules of the need to preserve the cultural values inherent in marae. Town planning has concentrated on the protection of the physical environment and the Schedules of the Act are full of requirements in this sphere.[161]

In sum, we find that the Town and Country Planning Act 1953 was in breach of the principles of partnership and active protection, and that the claimants were prejudiced thereby.

159. 'County of Horowhenua: Notice of Intention to Take Land', 11 June 1969, *New Zealand Gazette*, no 35, p 1104 (Bassett and Kay, 'Public Works Issues' (doc A211), p 535)

160. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, vol 1, p 336

161. *Report of Committee on Marae Subsidies to Honourable Matiu Rata Minister of Maori Affairs*, September 1974 (Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, vol 1, p 336)

On the issue of the park and ride carpark, we are disturbed that alleged practices like those described by Mahina-a-rangi Baker in her brief of evidence could occur in the second decade of the twenty-first century. Although we are not in a position to make specific findings, we suggest that the Crown should investigate this matter with the regional council. The Crown should also ask the council to review its processes for the provision of cultural impact assessments and for consultation with iwi more generally. We do not think that the Crown, now being aware of these allegations, should wash its hands of the matter.

We turn next to the claims in relation to the Hemi Matenga Memorial Park.

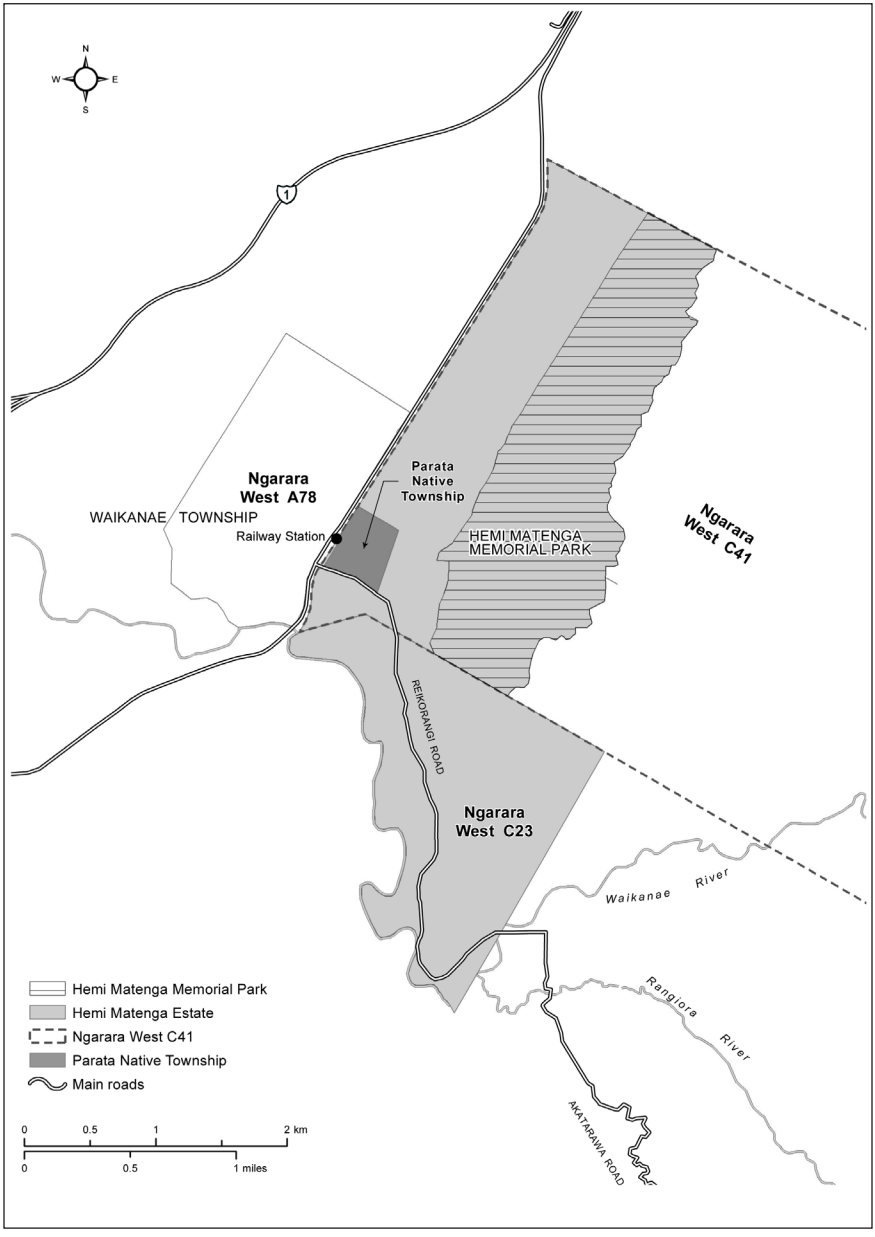
9.3 Hemi Matenga Memorial Park and Adjacent Landlocked Land

9.3.1 Introduction

The Hemi Matenga Memorial Park was once part of the western side of the Ngarara West C41 block, and its establishment as a scenic reserve in 1956 was part of the long legacy of individualised title at Waikanae. The C41 block (8,818 acres) was the largest partition created as a result of the 1890–91 rehearing. As discussed in detail in chapter 4, the large majority of owners wanted to keep Ngarara West undivided but they were defeated by the Ngarara and Waipiro Further Investigation Act 1889. This Act conferred unilateral powers on the Native Land Court to define every individual interest, which resulted in the creation of 79 Ngarara West A blocks and 41 Ngarara West C blocks. After their Supreme Court action to stop this process failed, the majority of owners came up with a voluntary arrangement to locate the interests themselves rather than have the Native Land Court impose the division upon them. This agreement located the scattered interests of each owner on a sketch plan, with the remainder to be vested in their rangatira, Wi Parata. As a result of the final court award, Wi Parata was granted some land in Ngarara West A but took the largest part of his share in the hilly, less economic lands of Ngarara West C in the form of the C41 block. The Crown purchased 5,000 acres of C41 in 1891 (see chapter 4), leaving 3,818 acres with Wi Parata and his brother, Hemi Matenga. As discussed in chapter 6, a small part of C41 was used to establish the Parata native township on land transferred from Parata to his brother.

A large part of the remainder of Ngarara West C41 after the large Crown purchase was forested hills. With the clearance of land for farming in the Reikorangi Valley and other parts of the Ngarara block, these hills eventually became a remnant of the original lowland native bush at Waikanae. On the 'steep slope overlooking Waikanae township' to the east, lot 5 of C41 (805 acres) became the Hemi Matenga Memorial Park, a scenic reserve established by the Crown in 1956. On the eastern side of the ridge-line, the bulk of C41 lots 1–3 (about 1,500 acres) is still Māori land, some of the small remnant remaining today, although it is landlocked (see map 16).[162] The trustees of Hemi Matenga's estate transferred the reserve land

162. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 389; Rawhiti Higgott, brief of evidence (doc F3), pp 12, 16



Map 16: Hemi Matenga Memorial Park, originally part of the Hemi Matenga Estate.

to the Crown, and they had requested that the reserve be called the Hemi Matenga Memorial Park.[163]

Jack Mace, a Crown witness from the Department of Conservation (DOC), described the reserve as follows:

> The Hemi Matenga Memorial Park Scenic Reserve . . . covers approximately 327 hectares on the western edge of the Tararua Ranges. The Hemi Matenga Reserve rises steeply from 80 metres above sea level to its highest point, Te Au, at 521 metres.
>
> In 1962, a small parcel of land (0.4024 ha) was added to the Hemi Matenga Reserve. There has been no reduction in the size of the Hemi Matenga Reserve since its establishment.
>
> The Hemi Matenga Reserve is one of the largest remaining areas of kohekohe forest in the Wellington region, and is one of the largest areas of this forest type in the North Island. Kokekohe was once a dominant species throughout the Kāpiti coastal region, but is now mostly limited to areas protected as reserves.
>
> The Hemi Matenga Reserve hosts threatened or endangered species including native birds such as the karearea (New Zealand falcon), kakariki and kererū. Native skinks and geckos are also present, as well as native invertebrate fauna such as wētā.[164]

The reserve and the adjacent Ngarara West C41 land to the east of the reserve, which is also covered in native bush, is highly important to the Te Ātiawa/Ngāti Awa claimants because it preserves the original forest landscape of their ancestors and it potentially gives an opportunity for them to exercise their kaitiakitanga over its natural resources.[165] But the claimants have concerns about how the Crown obtained ownership of the reserve, which was gifted to the Crown by the trustees of the Hemi Matenga Estate without, they argued, the Crown providing proper recompense. The claimants were also concerned that the Crown had not accorded them a sufficient role in the management and control of the reserve, which they believed should be returned to them or at least made subject to a co-management arrangement. In respect of the adjacent bush-covered Māori land, which was also part of Ngarara West C41, the claimants argued that had no access to enable them to manage the bush or use their land. They looked to DOC to provide access to their landlocked blocks through the reserve and to assist with pest control, asserting that the Crown had so far failed in its duty of active protection.

The Crown denied these claims, arguing that:

- the actions of the Hemi Matenga Estate trustees were not the actions of the Crown;
- DOC consulted the iwi appropriately in respect of the operational management of the reserve;

163. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 66)
164. Jack Mace, brief of evidence (doc G5), pp 6–7
165. Rawhiti Higgott, brief of evidence (doc F3), pp 20–28, 32

- co-management or other possible arrangements could be considered as part of a Treaty settlement; and
- the Crown was not responsible for the difficulties that the C41 landowners faced with access and management of their land, and legal remedies were available under Te Ture Whenua Māori Act 1993 to obtain access.

In this section, we discuss the issues arising with the gifting of the Hemi Matenga Memorial Park to the Crown in 1954–55, DOC's management of the reserve, and the problems faced by the owners of the last remaining pieces of Ngarara West C41, which are among the tiny remnant of the Ngarara block still in Māori ownership. We begin by summarising the parties' arguments in more detail.

9.3.2 The parties' arguments

9.3.2.1 The claimants' case

The claimants submitted that the Crown had been trying to get this piece of bush-covered land for decades prior to 1954, and finally managed to do so by 'requiring it to be transferred' to the Crown 'in order to comply with the Land Subdivision in Counties Act 1946'.[166] In the claimants' view, Wi Parata and Hemi Matenga had both wanted to see the bush preserved but Matenga had insisted on preserving Māori ownership of it, and the Crown's acquisition of the land as a reserve contribution under the 1946 Act was not in keeping with the wishes of the rangatira.[167] Also, the reserve contribution under that Act should only have amounted to 46 acres but the Crown accepted the excess (759 acres) on the basis that it would have taken the land anyway under the Public Works Act. The claimants argued that the Crown did not consult the estate's beneficiaries and, in obtaining so much extra land from them for free and without consultation, owes particular consideration to their interests in the reserve today.[168]

In terms of the reserve's management, the claimants argued that the Crown had failed to give Te Ātiawa/Ngāti Awa a partnership role in the management, and thereby failed to enable them to carry out their kaitiakitanga obligations.[169] Having obtained the land, the Crown 'managed it alone'. The claimants also submitted that the Crown must now provide recompense for how it acquired the land as well as providing for kaitiakitanga to be exercised in the reserve:

> It is submitted that for reparation for wrongs done by the Crown in the rohe, recognition of the fortunate circumstances in which the Crown obtained the land and in order to enable Te Ātiawa to fulfil their kaitiaki responsibilities, the Crown should open discussions with Te Ātiawa in relation to joint management of the Reserve and

166. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 71–73, 74
167. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), pp 71–72, 74
168. Claimant counsel (Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 27; claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 74
169. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 26

that, ultimately, the Crown should undertake to transferring full ownership and control to Te Ātiawa.[170]

On the issue of the landlocked land adjoining the reserve, the claimants argued that the Crown did not ensure that they had adequate access to their land when it acquired the Hemi Matenga Memorial Park. The legal access is a right of way running along the ridge-line boundary between the reserve and their land on the other side of the hill but there is no practical access. In the claimants' view, the Crown has breached the principles of the Treaty by failing to 'ensure that the right of the Māori owners of the land to access and utilise their taonga is protected'.[171] Further, the claimants argued that they have not been able to manage the bush due to access problems and a lack of resources, including the management of pests, yet DOC has not assisted them with conservation of the forest. The claimants also argued that they had to pay rates on this land until very recently, despite their inability to access or use the land. The claimants were prejudiced, they argued, because their forest was deteriorating and they were at the mercy of neighbouring landowners to obtain access. They also lacked the funds to try to obtain a legal remedy through the Māori Land Court, especially since there was 'no guarantee of outcome'.[172]

9.3.2.2 *The Crown's case*

The Crown denied that it required the Hemi Matenga Estate trustees to transfer the land to it as a reserve contribution under the Land Subdivision in Counties Act. According to the Crown, that Act had been in force for eight years at the time, and the decision to transfer the land was made freely by the trustees. Crown counsel noted earlier discussion about using the Public Works Act or Scenery Preservation Act to acquire the land but submitted that the Crown did not in fact use either of these Acts to acquire the land.[173]

The Crown also denied it had any 'responsibility or obligation to pay Hemi Matenga's beneficiaries to receive the native forest area and maintain it as a public reserve'.[174] The Crown submitted that the Hemi Matenga Estate was a private estate, there was no evidence of Māori concern about how the private estate was being administered at the time, and there was no evidence of complaints about the trustees' decision to transfer the land, either at the time or subsequently. Thus, in the Crown's view, the Crown was not 'acting improperly by accepting the gift of land on the basis that it was to be held and maintained as a public reserve'.[175] Rather, the Crown submitted that the goals of the Reserves and Domains Act 1953

170. Claimant counsel (Jones), closing submissions (paper 3.3.49), p 27
171. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 75; claimant counsel (Jones), closing submissions (paper 3.3.49), p 27
172. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 76
173. Crown counsel, closing submissions (paper 3.3.60), pp 167–168
174. Crown counsel, closing submissions (paper 3.3.60), p 164
175. Crown counsel, closing submissions (paper 3.3.60), pp 163–164

to preserve the flora and fauna of scenic reserves did in fact meet the intentions of both Wi Parata and Hemi Matenga to preserve the bush.[176]

On the issue of the reserve's management, the Crown submitted that DOC 'maintains open communication lines with Te Ātiawa/Ngāti Awa ki Kāpiti about operational management within the Reserve'. DOC deals with the charitable trust 'on behalf of the iwi', and consults the trust about pest management and other operational matters.[177] Based on the evidence of Jack Mace, the Crown did not accept that DOC should be proactively considering a co-management arrangement or a transfer of authority under the Reserves Act 1977. Rather, the Crown's view was that ownership and management of reserves like this one or conservation areas should be considered during Treaty settlement negotiations.[178]

On the issue of the landlocked blocks bordering the reserve, the Crown submitted that a number of factors resulted in loss of access, including Winara Parata's sale of C41 lot 4 in 1922. Crown counsel accepted that the remaining C41 land was landlocked but argued that the Crown was not responsible for the owner's lack of access. The Crown was not responsible for whether neighbouring owners have allowed the Māori owners access through their lands but, nonetheless, the Crown argued that there were potential solutions available. Provision of access by vehicle through the Hemi Matenga reserve would depend on a number of factors, including whether the use of vehicles was practical in such steep terrain or consistent with the purposes of the reserve, and it was highly unlikely that DOC would agree to it. The legitimate solution, therefore, was the 'remedial legislation' promoted by the Crown to address access problems: sections 326A to 326D of Te Ture Whenua Māori Act.[179] In the Crown's view, 'any possible Treaty breach finding has been remedied by the implementation of the[se] access provisions contained in Te Ture Whenua Māori Act 1993'.[180] The Crown accepted that exercising the legal remedy could be expensive but argued that legal aid would be available for proceedings in the Māori Land Court, and that DOC may be able to assist negotiations with neighbouring owners.[181]

9.3.2.3 *Claimant replies to the Crown*

In their reply submissions, some claimants argued that Treaty settlement negotiations were not necessarily the right process for arranging co-management or the return of ownership of the reserve. In their view, the correct entity may be Hemi Matenga's beneficiaries (the former owners) rather than an iwi Treaty settlement entity. Also, the claimants argued that there have been opportunities for the Crown to have addressed joint management of the reserve since the 1980s. According to the claimants, DOC was wrong to wait for them to approach it for co-management discussions. Iwi members 'simply do not have the resources', and 'all they do is

176. Crown counsel, closing submissions (paper 3.3.60), pp 164–166
177. Crown counsel, closing submissions (paper 3.3.60), p 167
178. Crown counsel, closing submissions (paper 3.3.60), pp 166–167
179. Crown counsel, closing submissions (paper 3.3.60), pp 47–50
180. Crown counsel, closing submissions (paper 3.3.60), p 47
181. Crown counsel, closing submissions (paper 3.3.60), p 50

under the power of their own steam and at their cost', whereas DOC could have arranged and funded a process to discuss and negotiate co-management at any time since 1987.[182]

9.3.3 Issues for discussion

In this section of the chapter, the issues for discussion are:

- How and why did the Crown obtain the land for the Hemi Matenga Memorial Park?
- To what extent have Māori been (or should Māori be) involved in the management of the Hemi Matenga Memorial Park?
- In respect of the Māori land adjacent to the reserve, to what extent (if any) was the Crown responsible for the lack of access, and is a remedy reasonably available to the owners?

We turn next to consider the Crown's acquisition of the land for the Hemi Matenga Memorial Park.

9.3.4 The Crown's acquisition of land for the Hemi Matenga Memorial Park

9.3.4.1 Wi Parata and Hemi Matenga's aspirations for the bushland

As noted earlier in this chapter, Wi Parata played a prominent role in encouraging the development of Waikanae and the surrounding area, gifting significant tracts of land for public projects and infrastructure. Alongside the agreements with the railway company allowing the construction of the main trunk railway through Te Ātiawa/Ngāti Awa land, this included gifting land for a school and gifting St Luke's Church to the Anglican diocese. According to a 1902 newspaper article, Wi Parata also wanted to gift the bushland overlooking Waikanae as a public reserve:

> Wi Parata, the well-known Waikanae chief, has, through Mr W H Field, MHR, offered to preserve the bush upon and convert into a public domain or reserve, the seaward face of the magnificent forest-clad hill just behind the Wellington-Manawatu railway line between Waikanae and Hadfield. The terms proposed by Wi Parata will probably necessitate a special Act of Parliament to deal with the matter, and a conference has taken place between the chief, the Minister for Lands and Native Affairs and Mr Field, for consideration of the best course to pursue. The offer is a very generous one, and if the gift is completed, and the bush preserved, Wi Parata will have earned the gratitude of the public for all time.[183]

This reported conference between Parata, the Minister, and Field occurred before the first Scenery Preservation Act was passed in 1903 but special Acts to create various reserves or domains were common at the time, including

182. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), pp 26–27
183. 'Local and General', *Evening Post*, 1 September 1902, p 4 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), pp 60–61)

arrangements for the governance and management of each reserve.[184] Wi Parata's objectives required a special Act of Parliament but we have no information as to what special arrangements he required for the reserve before agreeing to gift the land.[185] Once the Scenery Preservation Act was enacted, the Scenery Preservation Commission identified Ngarara lands suitable for acquisition in 1904 (including this piece of land),[186] but nothing came of it prior to Wi Parata's death in 1906. When Field pressed the Government to acquire the land, the Minister of Lands responded in 1906 that Wi Parata had intended to donate the land as a scenic reserve, and therefore the Government had 'taken no steps in the matter', which now rested with Wi Parata's successors.[187] The Wellington Chief Surveyor also said that he was personally informed by Wi Parata of his intention to donate the land for a scenic reserve.[188]

Field's continued agitation for the Crown to acquire the land was resented by the new owner, Hemi Matenga, who inherited this part of Ngarara West C41 from his brother. Matenga wrote to the *Evening Post* in October 1906:

> I see by your issue of the 8th inst. that Mr Field, MHR., is urging the Government to acquire the bush-clad hill near Waikanae. I think it would have been a better course for Mr Field to have taken, if he had first enquired who was likely to succeed to that part of my late brother's land, and to have first interviewed the new owner. Wi Parata was always anxious to preserve the forest, and when granting any leases of the flat land he made stringent provisions for the preservation of the forest on the slopes. I have myself always urged upon him the advisability of saving the forest on that land, and now that I have succeeded to it under the provisions of his will, I intend to preserve the forest with the same care. I, however, resent the course adopted by Mr Field in publicly urging the Government to acquire the land without first speaking to me about it.[189]

Hemi Matenga considered that the bush should be preserved but in Māori ownership, and he took no steps to gift the land to the Crown prior to his death in 1912.

The area concerned was lot 5 of Ngarara West C41 which became a part of the Hemi Matenga Estate from 1912 onwards. The surviving portions of C41 that were owned by Wi Parata were on the other side of the hill and thus could not be seen from Waikanae. That area was divided into lots 1–4, which belonged to various

184. See, for example, the Reserves and other Lands Sale, Disposal, and Enabling and Public Bodies Empowering Act 1901.

185. Bassett and Kay, 'Public Works Issues' (doc A211), p 330

186. Bassett and Kay, 'Public Works Issues' (doc A211), p 330; map attached to Under-Secretary for Lands to Minister of Lands, 2 November 1906 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5804)

187. Under-secretary for Lands to Minister of Lands, 2 November 1906 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5803)

188. Bassett and Kay, 'Public Works Issues' (doc A211), p 331

189. 'Reserves at Waikanae', *Evening Post*, 15 October 1906, p 3 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 62)

members of the Parata whānau after Wi Parata's death in 1906. Lot 4 (452 acres) was sold by Winara Parata in 1922. As discussed in chapter 5, many Waikanae alienations were driven by debt and the difficulties Māori had in obtaining finance. Judge Gilfedder confirmed the sale, even though the price was 'ridiculously low' and Winara Parata was rendered landless as a result, possibly to assist him in getting finance for a house and business. As also discussed in chapter 5, the Crown's protection mechanisms were not very effective in preventing landlessness.[190]

Some local settlers remained concerned that, given the apparent ease with which Māori land could be acquired and then developed, the bush would be destroyed. This concern was expressed to the Crown from time to time, as we discuss in the next section.

9.3.4.2 *Crown interest in the bushland prior to 1954*

In the first half of the twentieth century, the Crown expressed interest in the bushland at regular intervals (in 1902, 1906, 1912, 1929, and 1936). This was often prompted by concerns expressed by local Pākehā. Scenery preservation was the key factor rather than preservation of the native forest per se, so the Crown was only interested in the part of Ngarara West C41 that could be seen from Waikanae township and the railway. In 1912, officials suggested that the death of Hemi Matenga opened up the way to acquire the land. The Inspector of Scenic Reserves advised the Under-Secretary for Lands: 'Now that Mr Matenga is dead and his estate in the hands of trustees, it seems an opportune time to again negotiate for the acquisition of the bush on the steep hillside opposite Waikanae Village.'[191] There is no evidence as to why this initiative was not followed up. An approach from the Nelson Bush and Bird Preservation Society in 1929 was also not followed up; the Lands and Survey Department wanted more detail about the particulars of the land, which it appears the society did not provide.[192]

In 1936, the Crown finally moved to acquire the land compulsorily for scenery preservation purposes. W H Field had again raised concerns about the vulnerability of the bush to destruction, this time with his local member of Parliament, having frequently raised the issue during his own time in the House. The member for Ōtaki, L G Lowry, made inquiries and discovered that the surviving estate trustee had not made any attempt to sell the timber-cutting rights, and there was 'pressure brought to bear by some of the Maori beneficiaries' on the trustee to 'deal with the bush'. What exactly that meant – to log or to make arrangements to preserve – was not clear. This bush was regarded as 'the only piece of virgin bush of any extent adjacent to the railway between Wellington and New Plymouth', and its destruction would be 'inexcusable'. In terms of compensation, however, Lowry

190. Rigby and Walker, Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 389–390

191. Inspector of Scenic Reserves, Lands and Survey Department, to Under-Secretary for Lands, 26 July 1912 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5800)

192. Bassett and Kay, 'Public Works Issues' (doc A211), p 332

was advised that the land had no value for farming and would therefore be cheap to acquire.[193]

The Commissioner of Crown Lands and the Under-Secretary for Lands went to inspect the land, after which the commissioner recommended acquiring it for scenic purposes so long as 'money can be obtained for the purpose.'[194] The under-secretary referred the Minister in Charge of Scenery Preservation to the Native Department, recommending that the department ask 'the owner' (the one trustee) if he was prepared to sell and at what price. It would only be possible to decide whether the scenery preservation funds could 'bear the cost' once a definite price had been named.[195] The Native Department did approach the sole trustee, Thomas Neale, in mid-1937. Neale was at first willing to consider the merits of a sale but later advised that, if the Crown were to take the land by compulsion, he would not file an objection.[196] On 15 November 1937, the Commissioner of Crown Lands recommended to the head of the Lands and Survey Department that the bushland be taken under the Public Works Act, partly because the trustee would not contest compensation at the Government valuation, which was £1,050.[197]

In February 1938, the Scenery Preservation Board (a board of Government officials) recommended the taking of Ngarara West C41 lot 5 under the Public Works Act. This recommendation would ordinarily have been followed by the taking of the land concerned but not in this case.[198] No explicit reason was given for this in the documentary evidence. The answer is almost certainly because the bushland became caught up in controversy about the Hemi Matenga Estate lands in 1938, and then was accorded protection by the Crown through other legislation in 1941. As discussed in chapter 6, the beneficiaries were distressed by the loss of land as a result of the trustees' sales, and petitioned the Crown in 1938 to convert the estate into a perpetual trust in which no more land could be sold. The Crown agreed and introduced legislation to create the trust in the Native Purposes Act 1941. As a result of this Act, the remaining estate lands were made inalienable.[199] This presumably gave enough protection to lot 5 of Ngarara West C41 to remove the need to take it. Although section 12(6)(d) of the Act empowered the trustees to sell and dispose of any timber on the estate lands, the trustee (Neale) was aware of and

193. A H Burgess to L G Lowry, 4 June 1936 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5797)

194. Commissioner of Crown Lands to Under-Secretary for Lands, 28 September 1936 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5794)

195. Under-Secretary for Lands to Minister in Charge of Scenery Preservation, 7 May 1937 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5793)

196. Bassett and Kay, 'Public Works Issues' (doc A211), p 333

197. Commissioner of Crown Lands to Under-Secretary for Lands, 15 November 1937 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5788)

198. Bassett and Kay, 'Public Works Issues' (doc A211), p 333

199. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 203–207

supported the Crown's wish to preserve the bush on that land.[200] Also, taking this land after the Crown had agreed to preserve the estate in perpetuity would have been a difficult prospect.

In closing submissions, Crown counsel dismissed the Crown's pre-1954 interest in acquiring the bushland as irrelevant:

> The closing submissions for the Wai 1628 claimants as well as Bassett & Kay (in their *Public Works Issues Report*) discuss at length legislation which could have been utilised by the Crown to obtain control of what became the Hemi Matenga Memorial Park from 1903. That legislation (the Scenery Preservation Act 1903) was never used in relation to the Hemi Matenga Reserve land block. The Crown submits the discussion by both Bassett & Kay and counsel for Wai 1628 about the Scenery Preservation Act 1903 is irrelevant to this inquiry. The Crown did *not* acquire this land under that legislation, or any other, despite, as Dr Gilling describes it, 'the numerous attempts and lobbying by various interest groups for the land to be reserved'.[201]

It is correct that the Crown did not ultimately acquire the land under the Public Works Act for scenery preservation, but we do not agree that the events discussed above are irrelevant. In our view, those events are crucial to understanding the Crown's decisions in 1954 when the estate trustees offered the Crown 805 acres instead of the amount of land required by the statutory scheme for subdivisions (46 acres). We turn to discuss this 'gift' next.

9.3.4.3 *The Hemi Matenga Estate trustees offer the land to the Crown*

In 1948, a petition of beneficiaries of the Hemi Matenga estate was presented to Parliament, seeking to overturn the 1941 legislation. This is discussed in some detail in chapter 6. Essentially, the petitioners wanted to restore the original terms of Matenga's will, which would result in the sale of all the estate's lands after the death of the last child of Wi Parata named in the will. This was duly granted in the Māori Purposes Act 1948, opening the way for the sale of the remaining estate land (including the bushland overlooking Waikanae).[202] It is unclear why these petitioners wanted to undo the results of the previous petition, but claimant Hauangi Kiwha explained that there were strong disagreements among the whānau about allowing the estate to be sold off as Hemi Matenga had intended in his will. The whānau had already been effectively alienated from the land for such a long time by then, and financial pressures worked against land retention in a number of ways. Ms Kiwha stated:

200. T Neale to Under-Secretary, Native Department, 12 June 1937 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5791)

201. Crown counsel, closing submissions (paper 3.3.60), pp 167–168

202. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 207

> I do not know the exact reasons why people wanted to sell but people faced financial pressures. They may have owned the land but not been able to live near it or had the resources to develop it, so if they faced financial difficulties they may have felt that selling was an option.[203]

The Māori Land Court appointed new trustees in 1950 after the retirement of the trustee at that time, Ernest Ryder. The beneficiaries of the estate wanted a beneficiary, Tukumaru Webber, appointed sole trustee but the court insisted on others, with the result that three trustees were appointed: Tukumaru Webber, W B Travers, and Alfred Blackburn.[204] Hauangi Kiwha also observed that her father, Tata Parata, lobbied Webber: 'I can remember my father stating to his cousin Tukumaru Webber who was a trustee of Hemi Matenga's will, "*We need to hold on to some of our land, we won't be able to buy that land and live on our own land*". (Emphasis in original.)[205] Dr Barry Rigby and Kesaia Walker commented that 'such conversations must have put Tukumaru Webber in a difficult position' because he was only one of three trustees, and 'the terms of the will and the duty to carry them out seems to have left the trustees little room to make other choices'.[206]

The new legislation of 1948 once again made the bushland section vulnerable to sale and destruction of the forest. Utauta Webber, the last surviving child of Wi Parata, died in 1953.[207] From that point on, all the remaining Waikanae lands in the estate had to be sold and the proceeds paid out to the beneficiaries, but the terms of the will allowed the trustees to delay the distribution, stating: '*I expressly declare* that my Trustees may postpone the sale and conversion of any part or parts of my residuary real and personal estate for so long as they shall see fit' (emphasis in original).[208]

In 1954, the trustees planned to sell about 450 acres in the strip of Ngarara West C41 adjacent to the main trunk railway line and the Parata native township. This land would be converted into residential subdivisions. The Land Subdivision in Counties Act required the trustees to submit scheme plans for the approval of the Minister and to set aside a proportion of the land as reserves for public purposes.[209] In September 1954, Tukumaru Webber and Alfred Blackburn met with the county engineer, the Chief Surveyor, and the Assistant Surveyor-General to discuss the scheme reserves. Webber and Blackburn asked these local and central government officials: '[I]f the Estate set aside the area of bush on the western side

203. Hauangi Kiwha, brief of evidence, 30 July 2018 (doc E7), p 8
204. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 210–211
205. Hauangi Kiwha, brief of evidence (doc E7), pp 7–8
206. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 211
207. Jim Webber, 'Hona and Utauta Webber: Disintegration of a Kapiti Island Family', 2012 (doc A140), p [12]
208. Last will and testament of Hemi Matenga, witnessed on 22 November 1911 (Tohuroa Parata, papers in support of brief of evidence (doc F2(a)), p [13])
209. Bassett and Kay, 'Public Works Issues' (doc A211), pp 333–334; Fletcher & Moore to Surveyor-General, 20 September 1954 (Rawhiti Higgott, comp, supporting papers (doc F3(a)), p 63)

of the hills as a Scenic Reserve, would the Crown forego any reserve requirements on the present and any future subdivisions of the Estate's land at Waikanae[?]'[210] The Chief Surveyor reported: 'It was agreed by all parties present that it was most desirable to preserve the bush slopes as a Reserve'. Officials agreed (with some provisos) that the Crown would survey the scenic reserve.[211]

The issue of access to the reserve was discussed at the meeting. The Chief Surveyor recommended that the trustees' offer of the reserve be accepted by the Minister on condition that the trustees provide 'suitable access to the reserve by means of rights-of-way where required at not more than two places', consisting of strips of land at least 66 feet wide from the reserve to 'a formed legal road'.[212] The Chief Surveyor also recommended that the Lands and Survey Department agree to survey the boundaries of the reserve, and that the Minister sign a deed of transfer in which the Crown would acknowledge that 'the above Reserve and the rights-of-way thereto will be the appropriate reserve areas under the Land Subdivision in Counties Act which may be required on any subdivisions of the Estate's land at Waikanae'.[213] The Chief Surveyor added that the 'area is well worth preserving as a Scenic Reserve', noting that it contained about 720 acres of 'mainly steep hills in native bush'.[214] It is not clear why this figure was lower than the 805 acres which the Scenery Preservation Board approved for acquisition in 1938.

Thus, the proposed reserve was intended as the scheme contribution not only for this particular subdivision but for all future subdivisions of the estate's remaining lands at Waikanae. The Crown accepted it on this basis and a deed of agreement was signed in November 1954, although the transfer was not registered until 15 May 1956.[215] Although the deed referred to 720 acres (as did the trustees and officials at the 1954 meeting), the gazette notice which formally established the reserve had the figure of 805 acres.[216] As discussed above, this was the amount of land originally slated for taking as a scenic reserve in 1938. Heather Bassett could not discover the reason for the discrepancy in her research:

210. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 65)

211. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 65)

212. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), pp 65–66)

213. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 66)

214. Chief Surveyor to Surveyor-General, 12 November 1954 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 65)

215. 'Deed of transfer, 25 November 1954; 'Head Office committee: definition of purpose of reserve and naming of scenic reserve', minute, 5 November 1956 (Bassett and Kay, papers in support 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5781, DSCF5784)

216. Bassett and Kay, 'Public Works Issues' (doc A211), pp 334–335

> We have seen no explanation for the increase in size between the 'approximately 720 acres' listed in the deed of transfer and the 805 acres gazetted, though it may be accounted for by a survey finding that the area was larger than earlier thought.[217]

As Rawhiti Higgott told the Tribunal, the Crown acknowledged that it got a 'very good deal'.[218] Mr Higgott was referring to an analysis of the required contribution for reserves in a subdivisional scheme vis-à-vis the size of the Hemi Matenga Memorial Park, which was carried out by the Assistant Commissioner of Crown Lands in 1958. The assistant commissioner noted that the Hemi Matenga Estate lands at Waikanae amounted to 1958 acres, of which 805 acres was set aside as a scenic reserve. The remaining 1,153 acres was not all suitable for subdivision. The assistant commissioner deducted 30 per cent as a result, and calculated that 'the total number of lots for housing purposes will be 2470'. With that number of lots, the minimum provision for reserves under the Land Subdivision in Counties Act would have amounted to 'a total reserve contribution of 46 acres 1 rood 10 perches'.[219] Thus, the Crown accepted 805 acres in lieu of the required contribution of 46 acres.

According to the assistant commissioner, however, the comparison of land values in terms of prices favoured the Hemi Matenga estate, not the Crown. The 46 acres, it was argued, would have represented '135 saleable lots', which were selling for £450. The development costs of £250 for each lot would have to be deducted, leaving a profit of £200 per lot. If this land was subdivided and sold, there would be a profit of £27,000. By giving up the less valuable lands of the scenic reserve, therefore, the estate was considered to have, 'in one sense, made a very good bargain with the Crown'. The assistant commissioner argued that the Crown would have had to pay £35 per acre to purchase the scenic reserve at a value of £27,000. He noted: 'It may be that it is worth this but obviously if the Crown was purchasing it, I don't think the Crown would accept this figure.'[220] It should be noted, however, that the value of the last remaining pieces of forested land and of the Ngarara block itself had a greater value than the financial, as Rawhiti Higgott described:

> Rongoa, wananga, carving, ngahere forest lore, hunting, maintaining of the whenua to name a few. We could have been actively doing these things for years. What a difference this would have been for us growing up in those times and the benefits it could have created for us in today's world. The knowledge that we could have learnt from our elders and then passed on to our children. What are we leaving our tamariki today?[221]

217. Bassett and Kay, 'Public Works Issues' (doc A211), p 335
218. Rawhiti Higgott, brief of evidence (doc F3), p 29
219. Assistant Commissioner of Crown Lands to D N R Webb, Head Office, 26 February 1958 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 69)
220. Assistant Commissioner of Crown Lands to D N R Webb, Head Office, 26 February 1958 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 69)
221. Rawhiti Higgott, brief of evidence (doc F3), p 81

Returning to the assistant commissioner's analysis of the 'gift' in 1958, he accepted that 'the Crown has also made a very good bargain because it has secured a very acceptable bush area as a scenic reserve and really at no cost to itself'. If the Crown had insisted on or accepted the requisite 46 acres instead, a 'scenic reserve of note' would have been lost, and 'if any attempt had been made to cut the bush from the slopes much adverse criticism would have followed'. The assistant commissioner emphasised this point: 'Again, had an area of 46 odd acres been set aside there seems to be no doubt in my mind that pressure would have been on the Crown to acquire the bush area.'[222] Thus, the Crown would likely have been forced to buy the land for the scenic reserve because the kinds of pressures we discussed in the previous section had only intensified; the Crown wanted the land for the scenic reserve and had done so since the 1930s, and this was why it accepted 805 acres from the trustees in satisfaction of a legal requirement for no more than 46 acres.[223]

The claimants were highly aggrieved at what the assistant commissioner called the Crown's 'very good bargain'. Tutere Parata told us:

> The Hemi Matenga Reserve, which is on the hills within Ngarara West C41, was gifted to the Crown by the trustees of Hemi Matenga's will in 1954. I am not aware of the Crown making any payments or consideration to the beneficiaries of Hemi Matenga's will.
>
> I do not that think the trustees gave effect to the true wishes of Hemi Matenga. Further, the Crown did nothing to ensure that the interests of Hemi Matenga's beneficiaries were protected, and rather took land from Maori who had an interest and right to it.[224]

Crown counsel did not accept that this grievance was justified:

> The Crown denies it bore a responsibility or obligation to pay Hemi Matenga's beneficiaries to receive the native forest area and maintain it as a public reserve. The proposal that the forest area be proclaimed a public reserve was put by the Trustees of Hemi Matenga's Estate. In their letter to the Surveyor General of 20 September 1954 . . . the Trustees stated that they felt that the area of Native bush along the western slopes of the hill 'which has been preserved over the years . . . should be preserved as a Public reserve and suggest that it be set aside with a suitable access for that purpose'. The Crown is not aware of any evidence of complaints being made challenging the decision of the Trustees, either at that time or in the years following.

222. Assistant Commissioner of Crown Lands to D N R Webb, Head Office, 26 February 1958 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 69)
223. Bassett and Kay, 'Public Works Issues' (doc A211), p 335
224. Tutere Parata, brief of evidence (doc F2), p 7

> In the absence of any evidence of concern about the administration of the private estate at the time, Crown says that it was not acting improperly by accepting the gift of land on the basis that it was to be held and maintained as a public reserve.[225]

The analysis made by the Assistant Commissioner of Crown Lands, discussed above, was a comparison of the benefits to the Crown and the Hemi Matenga estate (and therefore its beneficiaries) if the Crown had accepted a 46-acre reserves contribution or an 805-acre scenic reserve in lieu of the reserves contribution. The assistant commissioner accepted that the Crown had made a 'very good bargain' in acquiring land at no cost to itself which, had it accepted the 46 acres instead, it would have had to buy anyway. The assistant commissioner argued that the scenic reserve land was likely worth the price of the land that the Crown would have received, but that the Crown would not have paid that much for the reserve even if it was worth that much. This was an important admission, especially since the Crown also acquired 85 acres over and above the 720 acres that the trustees had agreed to donate. The context of this analysis was a phone call received by head office from 'Mr Tirikatene' – presumably Eruera Tirikatene – which led the assistant commissioner to carry out this assessment and conclude: '*It would seem on the face of it that there is hardly a case to be made in the gift direction*' (emphasis added).[226] It appears, therefore, that concerns had been raised with Lands and Survey about whether the Crown had received a free gift from the estate, but we have no further details on that point.

In our view, the Crown was obliged to consider and protect the interests of the Te Ātiawa/Ngāti Awa beneficiaries of the Hemi Matenga Estate, just as the Crown was obliged to consider and protect the interests of Māori in any land transaction conducted between the Crown and Māori. This was so regardless of whether the Māori group concerned was represented in the transaction by trustees, and especially so in this case given the Crown's awareness of concerns about the past actions of the Hemi Matenga Estate trustees. We agree with the Crown's submission that the Crown was not responsible for the actions of the trustees, but the Crown was responsible for its own decision to accept the 'very good bargain' with no recompense at all to the beneficiaries of the estate, especially for the extra 85 acres acquired by the Crown. The context of that decision was the Crown's 'long desired' wish to acquire the land for a scenic reserve,[227] and the acknowledgement made by officials at the time that the Crown would have had to acquire (and pay for) the land if an ordinary reserve contribution had been made.

The question of whether the Crown's decision breached the principles of the Treaty is discussed below.

225. Crown counsel, closing submissions (paper 3.3.60), p 164

226. Assistant Commissioner of Crown Lands to D N R Webb, Head Office, 26 February 1958 (Rawhiti Higgott, papers in support of brief of evidence, app EE (doc F3(a)), p 69)

227. Bassett and Kay, 'Public Works Issues' (doc A211), p 333

9.3.4.4 *Rezoning of land as rural*

The Assistant Commissioner of Crown Lands' assessment of the reserves contribution (46 acres) was based on the prospect that all the suitable remaining land at Waikanae would be subdivided for residential purposes under the Land Subdivision in Counties Act 1946. This assumption proved to be incorrect. In 1958, the year that the commissioner made his assessment, the trustees lodged an objection to the county council's proposed district scheme (discussed above). This scheme would rezone 110 acres of Māori land in Ngarara West C41 for rural use. The estate trustees had already sold 228 allotments for housing and had plans for a further 350 allotments in the rezoned area. The trustees objected on the grounds that this was prime residential land and unsuitable for intensive farming or market gardening (and it 'could not be classed as being entirely suitable for dairy farming').[228] The trustees pointed out that the rezoning would undermine their agreement with the Crown to transfer the bushland in lieu of their reserves contribution:

> When the Trustees transferred the Bush Reserve of *720 acres* to the Crown as their contribution under Sec 12 of the Subdivision of Land in Counties Act, it was a condition as far as the Trustees were concerned that it should cover any future subdivisions for residential purposes which might be made. If we are to be denied the right to carry out further work of this nature, it would appear the agreement will not be fully implemented. [Emphasis added.][229]

The Horowhenua County Council rejected the trustees' objection but granted an objection from the Waikanae town committee, resulting in a further area of 16 acres of the estate's C41 land being zoned rural. The trustees appealed to the Town and Country Planning Board in 1959 without success. As a result, in 1960 the trustees began the process of subdividing what were called 'farmlets' (allotments larger than 10 acres).[230] The Māori Land Court confirmed 18 transfers of '10 plus acre lots' between 1961 and 1964. Dr Rigby commented that the 'keen demand for semi-rural lots in Part C41 left only about 100 acres out of the originally surveyed 450 acres unsold'.[231] Out of this 'left-over land', the last piece of the estate's C41 land was sold in a single 84-acre block to a syndicate in 1972.[232] The Land Subdivision in

228. Alfred Blackburn and Tukumaru Webber, statement of appeal to Town and Country Planning Board, undated (1959); Alfred Blackburn and Tukumaru Webber to county clerk, 18 June 1958 (Crown counsel, papers filed in response to questions from the Tribunal (doc F49), pp [3]–[5])

229. Alfred Blackburn and Tukumaru Webber to county clerk, 18 June 1958 (Crown counsel, papers filed in response to questions from the Tribunal (doc F49), p [5])

230. Alfred Blackburn and Tukumaru Webber, statement of appeal to Town and Country Planning Board, undated (1959) (Crown counsel, papers filed in response to questions from the Tribunal (doc F49), p [3]); Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), p 390

231. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 390, 391

232. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 391–394

Counties Act 1946 did not apply to any of the farmlets or the 84-acre block; it only required the provision of a subdivision scheme and reserves contribution for the division of land into allotments of less than 10 acres.[233]

Thus, the Assistant Commissioner of Crown Lands' assessment of 46 acres as the reserves contribution for the Hemi Matenga Estate was greatly exaggerated. The agreement with the Crown was not revisited after November 1954, even though – as the trustees said in their objection to the county council's district scheme – the agreement was not fully implemented as far as the estate was concerned.

9.3.5 Management of the Hemi Matenga Memorial Park

We have no evidence about the management of the Hemi Matenga Memorial Park prior to the Conservation Act 1987. Jack Mace, the Crown's DOC witness, stated that his newly established department took over the management of the reserve in 1987 from 'predecessor government agencies such as the Department of Lands and Survey'.[234]

The Reserves Act 1977 provides for reserves to be managed by the Minister or by an administering body such as a board, a voluntary organisation, or trustees. The Minister can appoint any 'fit' persons to be the members of a reserve board. Trustees appointed to manage land under other Acts, including Māori trust boards, can also be entrusted with the control and management of a reserve.[235] Generally, an administering body would be 'a registered entity – ie an incorporated society or trust'.[236] Under section 10 of the 1977 Act, the Minister also has a general power to 'delegate his or her powers and functions under the Act to any individual, committee, body, local authority, or organisation, or to any officer or officers of the Department'. Jack Mace explained that there are other mechanisms such as leases, licences, and management agreements that DOC could use which would serve the same purpose as transferring control to a board or other entity.[237] The previous legislation, the Reserves and Domains Act 1953, also provided for reserves to be managed by boards or trustees.[238] These provisions have been available, therefore, ever since the establishment of the Hemi Matenga Memorial Park in 1956 but have not been used for the inclusion of tangata whenua in the control and management of this reserve.

In this inquiry district, the only instances where DOC has 'actively pursued' appointments to manage reserves have been to non-iwi bodies, although Mr Mace pointed to cases where Treaty settlement legislation had established entities as administering bodies under the Reserves Act. The historic and scientific reserves on Matiu/Somes Island, for example, are now managed by the Harbour Islands

233. Land Subdivision in Counties Act 1946, ss 3(1), 12
234. Jack Mace, brief of evidence (doc G5), p 7
235. Reserves Act 1977, ss 29–37
236. Jack Mace, answers to questions in writing, 30 September 2019 (doc G5(j)), p [1]
237. Jack Mace, answers to questions in writing (doc G5(j)), p [1]
238. Reserves and Domains Act 1953, ss 6, 19

Kaitiaki Board.[239] But Māori bodies have been appointed to manage and control reserves outside of Treaty settlements. Mr Mace gave the examples of:

- a local reserve in Havelock managed by the Te Rūnanga o Ngāti Kuia Charitable Trust;
- a nature reserve on the Hen and Chicken Islands managed by the Ngātiwai Trust Board (through a 'control and management agreement' with DOC); and
- the Rangiriri Pa and Te Wheoro's Redoubt Historic Reserves administered by the Waikato Raupatu Lands Trust through both a vesting and a memorandum of understanding.[240]

The claimants in our inquiry wanted either a joint management arrangement or the return of ownership of the reserve so that they can carry out their role as kaitiaki.[241] Rawhiti Higgott stated in his evidence:

> I would like to see kaitiakitanga carried out by us in a more recognized way by the Crown. Let us walk the footsteps left by our tupuna so we can leave footprints in the whenua for those generations yet to follow.
>
> In order to truly walk in the footsteps of our tupuna, we would like to see the ownership of the reserve land returned to us. Not only would this allow us to exercise kaitiakitanga over this land, it would also allow us to exercise our rangatiratanga. We would be able to gain access to our Ngarara West blocks without having to seek permission from private land owners or DOC.
>
> I hope we can develop a better relationship between the Crown, and that whanau are given the responsibility and resources to play a more active role as kaitiaki of the whenua.[242]

According to Jack Mace, DOC has consulted the Te Atiawa ki Whakarongotai Charitable Trust in recent years in respect of the operational management of the reserve. DOC has an annual budget of $55,000 for the management of the Hemi Matenga Memorial Park. Its management of the reserve has focused on pest control (plant and animal) and maintenance of the 'tracks and structures' that facilitate public access. Claimant counsel questioned Mr Mace as to whether $55,000 a year was enough to control pests. He responded that this sum was sufficient to 'maintain a reasonably healthy natural ecosystem', and that the Hemi Matenga Memorial Park was 'one of the better-protected reserves in our Lower North Island Region'. Rats were the only pests in 'moderate to high numbers', whereas pigs, goats, and possums were low or very low in number. Weeds were mostly a problem where the reserve adjoined residential properties. Mustelids and feral cats were not targeted by DOC but were 'expected to be in low numbers'.[243]

239. Transcript 4.1.21, pp 371–372
240. Jack Mace, answers to questions in writing (doc G5(j)), pp [1]–[2]
241. Rawhiti Higgott, brief of evidence (doc F3), p 32; claimant counsel (Jones), closing submissions (paper 3.3.49), pp 26–27
242. Rawhiti Higgott, brief of evidence (doc F3), p 32
243. Jack Mace, answers to questions of clarification, 29 July 2019 (doc G5(c)), p 3

Mr Mace suggested that DOC began consulting the charitable trust about pest control and management of the reserve in about 1995. Typically, the consultation has been by letter and provision of fact sheets supplemented by the occasional visit.[244] In 2018, perhaps prompted by the Tribunal's hearings in this phase of the inquiry, DOC checked with the charitable trust that this form of consultation about the reserve was acceptable:

> In August 2018, to ensure that DOC was still following the wishes of iwi in regard to consultation, DOC Biodiversity Ranger Dave Allen contacted the Te Atiawa ki Whakarongotai Charitable Trust, seeking to reaffirm their preferred method of consultation (letter/fact sheet or visit) for a proposed possum and rodent control operation. Subsequently, a letter and fact sheet were emailed to the Trust in August 2018 to provide operational details and to offer the opportunity for feedback on the effects of the proposed methodology. No feedback regarding the planned 2018/19 operation has been received to date.
>
> In 2018, DOC also spoke to Kristie Parata, administrator for the Trust, face to face and over the phone, regarding karaka control in the Hemi Matenga Reserve. DOC suggested controlling young plants but leaving mature trees. Ms Parata advised she (by which we presumed she meant the Trust) was happy for the latter to remain, but would pass the notice on to the wider iwi. No further responses were received on that issue.[245]

Mahina-a-rangi Baker, who was Pou Takawaenga Taiao for the trust at the time of our hearings, told us that some aspects of DOC's work required 'input' from the trust, such as the issuing of wildlife permits. Although consultation was a statutory requirement, no resources were provided for it, which has limited the kind of relationship that the iwi can have with DOC or with their taonga that are administered by DOC.[246] On the issue of these limitations, Crown counsel submitted that DOC did not have a policy for resourcing iwi in statutory processes and practice has varied between regions. Nationally, DOC had sometimes provided assistance, both financial and non-financial, to assist Māori participation. The Crown also submitted:

> DOC is currently developing a policy to provide a more consistent and transparent approach to resourcing of iwi in future statutory planning processes.
>
> DOC has been looking to better resource its work with iwi, to reflect the growing work of implementing Treaty settlements; to reflect the fact that iwi often have limited resources to respond to DOC requests of them; and to generally build broader 'Treaty partnerships'.[247]

244. Jack Mace, brief of evidence (doc G5), p 8
245. Jack Mace, brief of evidence (doc G5), pp 8–9
246. Mahina-a-rangi Baker, brief of evidence (doc F11), pp 31–32
247. Crown counsel, closing submissions (paper 3.3.60), pp 172–173

Some claimants, especially those who have interests in lots 1–4 of Ngarara West C41 on the other side of the ridgeline, considered that they had no opportunities to exercise kaitiakitanga in the scenic reserve and no involvement in its management.[248] Rawhiti Higgott, who has spent time visiting and inspecting the adjoining land, told us that the pests move from the more controlled environment of the reserve onto their land, which they cannot manage for lack of access, and results in damage to their native forest.[249] Although DOC informs the charitable trust of specific operational matters, such as pest control programmes, and seeks a response, the claimants want to carry out their kaitiakitanga responsibilities and exercise tino rangatiratanga within the reserve. In our view, given the circumstances in which the Crown acquired this land from the Hemi Matenga Estate, DOC should also consult with the Wi Parata Waipunahau Trust, which represents some of the beneficiaries and, more particularly, those who own the adjoining lots 1–3 and part lot 4.

Jack Mace stated in his brief of evidence that 'if iwi were interested in doing so, we would be happy to explore other options for engagement'.[250] For DOC to consider some kind of co-management arrangement or a transfer of powers to a management board or trust, tangata whenua would need to approach DOC and initiate a process, but DOC usually waits for Treaty settlement processes to consider such arrangements in respect of iwi.[251] Otherwise, appointments of bodies to manage reserves usually happen where DOC has received a proposal or where 'an interested party has been working with DOC over a period'. Nonetheless, DOC is 'proactive' with iwi 'in the sense that it meets regularly with tangata whenua' and is 'open to considering such opportunities' for power sharing. Mr Mace accepted that transferring control of a reserve such as the Hemi Matenga Memorial Park would be 'one way in which DOC and tangata whenua can achieve a healthy Treaty partnership and meet the Crown's obligations under section 4 of the Conservation Act'.[252]

Section 4 of the Conservation Act 1987 states: 'This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.' It is important, therefore, that partnership arrangements for the management of reserves administered by DOC are a high priority for the department. At the time of the hearings, however, DOC was in the midst of re-evaluating its approach to the Treaty in light of the Supreme Court's decision in *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation*[253] and the whole-of-government response to the Waitangi Tribunal's Wai 262 report, which commenced with an announcement by Minister Nanaia Mahuta in August 2019.[254] The Minister of Conservation has

248. Hauangi Kiwha, brief of evidence, 21 September 2018 (doc E19), p 3; Rawhiti Higgott, brief of evidence (doc F3), p 32
249. Rawhiti Higgott, brief of evidence (doc F3), p 21
250. Jack Mace, brief of evidence (doc G5), p 9
251. Transcript 4.1.21, pp 371–372
252. Jack Mace, answers to questions in writing (doc G5(j)), p [2]
253. *Ngāi Tai ki Tamaki Tribal Trust v Minister of Conservation* [2018] NZSC 122
254. Crown counsel, closing submissions (paper 3.3.60), pp 173–179

instructed DOC to 'consider ways it can improve delivery of its section 4 responsibilities across all levels of its work'.[255] These developments will be considered later in the inquiry when they have further progressed.

Here, we note the Crown's submission that 'DOC has limitations on its powers to delegate under the Conservation and Reserves Acts, but has experience in a range of co-management arrangements'.[256] The Crown also submitted that settlement negotiations would give the appropriate opportunity to discuss ownership and management arrangements for the Hemi Matenga Memorial Park.[257] In response, the claimants pointed to the many decades in which action could have already been taken by the Crown, although they welcomed the prospect of addressing this issue in negotiations.[258] The claimants also expressed some doubts as to whether a Treaty settlement entity or some other body, such as the descendants of the beneficiaries, would be more appropriate for such discussions, but no definite submissions were made on the point.[259] We appreciate that the claimants welcomed the opportunity to negotiate on the matter. But, as the Minister for Māori Affairs said in 2010, claimants should not have to expend their 'valuable negotiations capital' in obtaining through Treaty settlements what should already be available to them under the law (in this case, the Reserves Act 1977 and the Conservation Act 1987).[260]

According to Jack Mace, the process for appointing an administering body such as a board or trust to manage a reserve under the Act involves a public process followed by a decision of the Minister or a DOC official with delegated authority. The process includes 'assessing management requirements and other issues specific to the reserve, the transferee's association with the reserve, their skill and experience, management terms and conditions, consultation with other interested parties (reserve user groups, conservation board, etc), public notification and reviewing submissions/objections (if any)'.[261] It is on the basis of this process that, the Crown submitted, there are limits on DOC's ability to transfer power under the Reserves Act 1977.[262] This appears to be DOC's own process. DOC's section 4 Treaty obligations were not mentioned in respect of the process to appoint a board but would presumably be critical in the present case of the Hemi Matenga Memorial Park.

In respect of the statutory requirements, we note that section 29 of the Reserves Act 1977 simply empowers the Minister to appoint a voluntary organisation to

255. Crown counsel, closing submissions (paper 3.3.60), p 177
256. Crown counsel, closing submissions (paper 3.3.60), p 172
257. Crown counsel, closing submissions (paper 3.3.60), p 166
258. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), pp 26–27
259. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 26; claimant counsel (Gilling, Dawe, and Brown) (paper 3.3.51), pp 73–74, 128–129
260. Minister of Māori Affairs, press release, 21 October 2010 (Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 273–274)
261. Jack Mace, answers to questions in writing (doc G5(j)), p [1]
262. Crown counsel, closing submissions (paper 3.3.60), p 172

control and manage a reserve for the better carrying out of the purposes of the reserve:

> For the better carrying out of the purposes of any reserve vested in the Crown, the Minister may, by notice in the *Gazette*, appoint a voluntary organisation to control and manage the reserve for the purpose of its classification and in accordance with the appropriate provisions of this Act, and subject to such additional conditions and restrictions as may be specified in the notice. A notice under this section shall take effect according to its tenor, and may at any time be in like manner amended or revoked.

Similarly, section 30(1) empowers the Minister to appoint a board to control and manage a reserve simply for the better carrying out of the reserve's purpose:

> For the better carrying out of the purposes of any reserve vested in the Crown, the Minister may, by notice in the *Gazette*, appoint such persons as he or she thinks fit to be a reserves board, trust, trust board, or other special board to control and manage the reserve for the purpose of its classification and in accordance with the appropriate provisions of this Act, and subject to such additional conditions or restrictions as may be specified in the notice. Every such notice shall take effect according to its tenor. Any person so appointed may be appointed by virtue of any office.

Section 30(2) enables the Minister to delegate the power to appoint a board.

We turn next to make our findings on issues in respect of the reserve.

9.3.6 Treaty findings in respect of the Hemi Matenga Memorial Park

Our analysis of the Crown's decision to accept the Hemi Matenga Estate trustees' offer of 720 acres for a scenic reserve is set out in section 9.3.4. The principles of the Treaty of Waitangi required that the Crown actively protect the interests of Māori in transactions between the Crown and Māori. The interpretation of the Treaty has always been informed by Lord Normanby's instructions to Governor Hobson in 1839, which included the points that Crown dealings with Māori must be conducted on the 'principles of sincerity, justice, and good faith', and that the Crown should not enter into contracts with Māori that might be injurious to them. The principle of protection was to govern Crown land transactions with Māori, and – to secure that end – an official protector would be appointed.[263] The protectorate was disestablished as early as 1846 but the principle of protection remained and, as the Court of Appeal has found, it is not merely passive but active protection to the

263. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker & Friend, 1991), pp 193–196; Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 1, pp 37–38

fullest extent possible in the circumstances.[264] Also, the Privy Council found that the obligation of the Crown is constant but

> the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant.[265]

In our view, the Crown acted reasonably in accepting the accommodation that the estate trustees wanted in respect of reserves contributions for subdivisions. It might have been possible for the Crown to call a meeting of assembled owners to discuss the proposal and ensure that it was supported by the beneficiaries of the estate, but this would have been unorthodox and open to legal challenge from the trustees. It was entirely within the discretion of the Crown, however, as to whether it would accept without payment an additional 759 acres (on top of the 46 acres theoretically required by the Land Subdivision in Counties Act). The evidence shows clearly that the Crown would have had to have acquired the bushland if the trustees had arranged the usual reserves contribution instead. The Crown had intended to take this land under the Public Works Act in 1938 when the petition from the beneficiaries and the law change in 1941 made it unnecessary to do so. The Crown had also been interested in acquiring the land much earlier.

The evidence also shows that the Crown got an even better bargain than expected, since the Crown obtained 805 acres instead of the 720 acres offered by the trustees. Also, the reserves contribution for the Hemi Matenga Estate turned out to be substantially less than 46 acres. The Crown did not reconsider the agreement when either of those facts came to light. We also note that the economy was buoyant in the 1950s, and the Crown could not have justified its failure to pay for the land on the grounds of a recession (see above).

We find that it was not consistent with the principle of active protection for the Crown to have made what it considered a 'very good bargain' at the expense of the beneficiaries of the Hemi Matenga Estate, who had no say whatsoever in the offer of this land at no cost to the Crown.

The issue of prejudice is complicated. The assistant Commissioner of Crown Lands argued that the estate (and therefore the beneficiaries) got a good bargain in financial terms because it kept valuable land for subdivision that would otherwise have been required for reserves contributions. In reality, the Crown acquired much more land at no cost than it should have done. In addition, Māori lost control of the bushland and the ability to act as kaitiaki of this precious remnant of the lowland forests. They had remained kaitiaki while the land was an undivided part

264. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, p 4

265. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC), 517 (Waitangi Tribunal, *Stage 2 Report on National Freshwater and Geothermal Resources Claims*, p 19)

of the estate but once it was separated out and transferred to the Crown, their ability to act as kaitiaki was lost. Thus, the claimants have been prejudicially affected in spiritual and cultural terms as well as financially.

The Crown could have compensated to some extent by placing control and management of the reserve under a board with Māori members, as it did for the Lake Horowhenua domain board (see the *Horowhenua* volume of this report). In 1953, two Rotorua scenic reserve boards had Māori representatives, but this was 'two out of only four in the whole country' at the time.[266] As the Central North Island Tribunal found, the Crown had 'mechanisms available to it that it did not use'.[267] The Crown could have convened a meeting with the beneficiaries or with local Māori more broadly at the time of the 'gift' to discuss how the scenic reserve would be managed and whether a board should be established, especially in light of the extremely generous reserves donation.

At the time of our hearing of DOC evidence in 2019, the Crown had still not used the legislation available to it to include Māori representatives in the governance and management of the Hemi Matenga Memorial Park. This is disappointing and does not live up to the spirit of the agreement signed with Māori rangatira in February 1840. We accept that DOC has consulted from time to time on operational matters such as pest control since 1995, and has consulted on the conservation management strategy (which is outside the scope of this chapter). But this does not equate to the exercise of tino rangatiratanga and kaitiakitanga that Rawhiti Higgott spoke of in respect of the reserve.[268] We also accept that, prior to these hearings, DOC was not aware of some claimant dissatisfaction about the reserve's management or the wish for co-management of the reserve and/or the return of ownership.

The prejudice of the Crown's Treaty breaches has been mitigated to some extent by the Crown's preservation of the bush in the reserve. This was what Wi Parata ultimately intended when he offered to gift it to the nation under special arrangements requiring a special Act of Parliament. Hemi Matenga also wanted to preserve the bush but he wanted it preserved under Māori ownership and control. This was not, however, provided for in the terms of his will. That is not a matter to do with the Crown but, in our view, the Crown has carried out the wishes of these rangatira in part by preserving this important remnant of the lowland forest. Mahina-a-rangi Baker stated that Māori relationships to taonga are a 'very good measure of the systemic effects of changes to the environment'.[269] In this case, the forest has been preserved in what Jack Mace described as 'a reasonably healthy natural ecosystem'.[270] What is missing is the ability for the claimants to exercise tino rangatiratanga and kaitiakitanga over this taonga, which is a breach of the Treaty guarantee of rangatiratanga and the principle of partnership. As the

266. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, p 843
267. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 843
268. Rawhiti Higgott, brief of evidence (doc F3), p 32
269. Transcript 4.1.18, p 381
270. Jack Mace, answers to questions of clarification (doc G5(c)), p 3

Te Rohe Pōtae Tribunal stated, the DOC Conservation General Policy encourages 'partnerships to encourage conservation and to recognise mana'.[271] This indicates that section 4 of the Conservation Act 1987 and DOC's policies require DOC to provide some mechanism enabling the claimants to exercise tino rangatiratanga over the reserve in partnership with DOC.

Overall, we find that the Crown has breached the principles of the Treaty of Waitangi in its acquisition of the reserve land without payment and without providing for Māori involvement in the governance and management of the reserve to the extent allowed by the law in force at the time (and since). The beneficiaries of Hemi Matenga's will have been prejudiced by these breaches.

More generally, the individualisation of title has impacted on Te Ātiawa/Ngāti Awa in a myriad of ways, including the vesting of so much of the tribal estate in an individual and the empowerment of an individual to dispose of taonga such as the bushland of Ngarara West C41 lot 5. The rest of the tribe had no say in any of these matters, which was antithetical to Māori customary law and the Treaty guarantee of tino rangatiratanga in article 2. The loss of this taonga is, we believe, of wider importance than just to the estate beneficiaries.

The Crown submitted that Treaty settlement negotiations are the appropriate forum for discussing ownership and management of reserves, including the Hemi Matenga Memorial Park, once Te Ātiawa/Ngāti Awa have mandated an entity to negotiate on their behalf.[272] In our view, this would be the most practical outcome because the mandated entity will be resourced to negotiate and communicate with the affected people during the negotiations. For the removal of prejudice to the relevant beneficiaries of Hemi Matenga's will, we recommend that the Wi Parata Waipunahau Trust, which is the landowner of Ngarara West C41 lots 1–3, be consulted in any such negotiations about the ownership and/or management of the Hemi Matenga Memorial Park. Further, we consider that the principle of partnership requires a co-governance arrangement to be the object of these negotiations, enabling the exercise of tino rangatiratanga and the fulfilment of kaitiakitanga obligations in respect of the reserve. This may take the form of appointing a voluntary organisation or board under sections 29–30 of the Reserves Act 1977, but we do not wish to be prescriptive on this point. Also, the principles of active protection and redress require the Crown to consider restoring legal ownership so that the exercise of mana whenua may be provided for in respect of this important taonga. This would enable the conservation of the taonga while giving effect to the article 2 guarantees of the Treaty.

We turn next to discuss issues in respect of the Māori land that adjoins the Hemi Matenga Memorial Park.

271. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pt 4, p 380
272. Crown counsel, closing submissions (paper 3.3.60), p 166

9.3.7 Landlocked Māori land adjoining the Hemi Matenga Memorial Park

9.3.7.1 Landlessness and its consequences

Ngarara West C41 lots 1–3 adjoin the Hemi Matenga Memorial Park (lot 5). This land is 'very steep and hilly', with native bush and some 'small areas of pasture'. Two streams flow through this land to the Waikanae River.[273]

As noted above, most of C41 lot 4 was sold by Winara Parata in 1922. The remaining 85 acres of lot 4 were converted into European title without informing the owners, let alone allowing them to decide if they wanted their land to cease being Māori land. This was done under the Māori Affairs Amendment Act 1967, which enabled the compulsory conversion of Māori land to European land. We discussed compulsory Europeanisation in chapter 7. The provisions of the 1967 Act required the Māori Land Court registrar to investigate the situation of all land which had 1–4 owners. The investigation was not required to go beyond the court records, except in the case of ensuring that the block had been properly surveyed. If the registrar was satisfied that the land was suitable for 'effective use and occupation', the registrar was empowered to change its status from Māori to European land. There was no requirement to inform the owners until after the status declaration was registered, and then only if the owners could in fact be located.[274] This was one of the more draconian measures in the 1967 Act and it attracted a lot of Māori criticism at the time. In 1970, the deputy registrar of the Aotea Māori Land Court converted the 85-acre part lot 4 to European land (later general land). It is still general land today. Dr Rigby commented that the current owners 'may not know how their land came to be Europeanised more than 48 years ago'.[275]

The land in Ngarara West C41 lots 1–3, amounting to about 1,500 acres, is part of the small, surviving area of the original Ngarara block in Māori ownership. Dr Rigby commented that almost all of the remaining Māori land in Ngarara West C (2,433 acres) is 'landlocked, marginal land' that is of little or no economic use to its owners.[276] This is certainly the case for lots 1–3, which are landlocked.[277] Issues in respect of this land arose during the hearings and were not the subject of statements of claim or technical evidence. As Crown counsel submitted, we do not have sufficient evidence to determine exactly how and when these particular blocks became landlocked,[278] although it was likely 1916 or 1922.

According to the Walghan block research narratives, the land was subdivided into lots 1–5 in 1916,[279] which was subsequent to the death of Wi Parata (who left the land that became lot 5 to Hemi Matenga) and the death of Hemi Matenga in 1912. The legal requirements for access at the time were set out in sections 48–54

273. Rawhiti Higgott, brief of evidence (doc F3), p 12
274. Māori Affairs Amendment Act 1967, ss 3, 4, 6, 7, 11
275. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 394–395
276. Rigby and Walker, 'Te Ātiawa/Ngāti Awa ki Kapiti: Twentieth Century Land' (doc A214), pp 399, 406
277. Rawhiti Higgott, brief of evidence (doc F3), p 16
278. Crown counsel, closing submissions (paper 3.3.60), pp 46–49
279. Walghan partners, 'Block Research Narratives' (doc A203), p 85

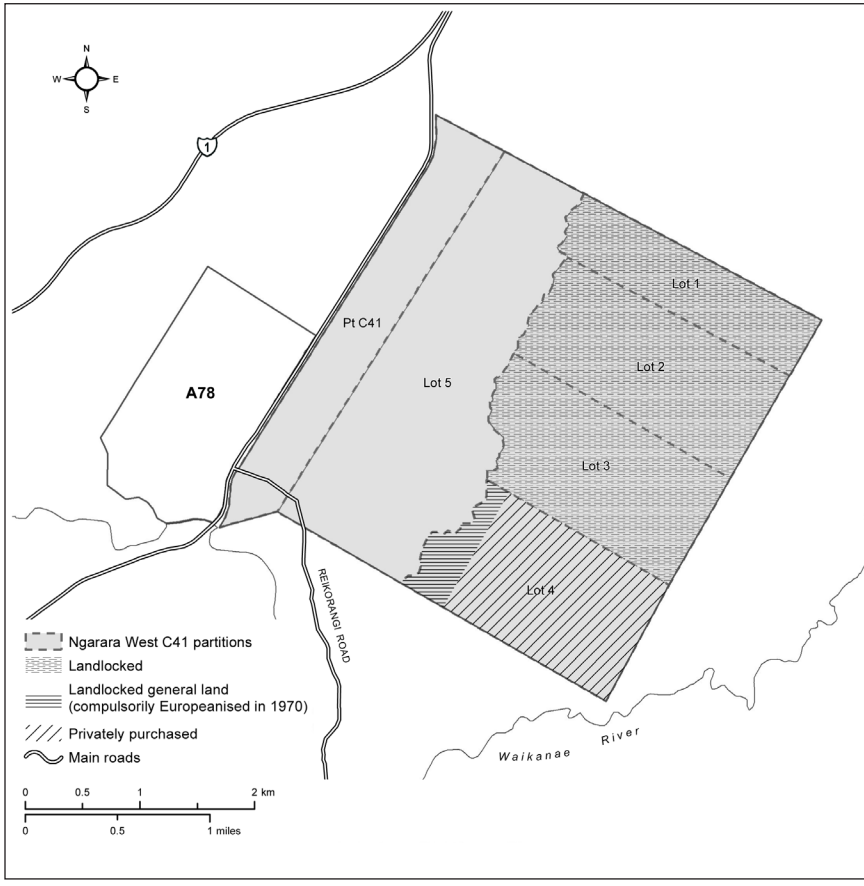
of the Native Land Amendment Act 1913. Section 48 gave the Native Land Court discretion to 'lay out upon the land partitioned such road-lines (if any) as the Court thinks necessary or expedient for the use of the several parcels and for giving access or better access thereto'. Instead of laying out road lines, the court had discretion to, if it 'thinks fit', create 'private rights of way over any parcels of the land partitioned'.

Section 49 of the 1913 Act empowered Māori landowners whose land had already been partitioned and who lacked 'reasonably practicable access to any public road' to apply for a road-line or private right of way. The court had discretion to make such order as it saw fit. No such road or right of way could be imposed across land that had passed out of Māori ownership in the interim. Under section 50, the court could lay off such roads or rights of way over adjoining Māori land as it thought 'necessary or expedient' to 'give access or better access to any Native freehold land', although the owners could object and the consent of any lessee was required. Compensation was payable in some cases. Section 52 stated that, for the purposes of sections 48–50, the court 'may' lay off a road or right of way across any land, whether Māori or European, so long as the owners had given consent in writing and stipulated what compensation (if any) they wanted for it. Land could also be exchanged so as to obtain access. Finally, section 54 required the court, when deciding partition applications, to consider 'as far as practicable' road access, aspect, fencing boundaries, and 'generally shall have regard to the configuration of the country, the best system of roading, and facilities for settlement'. The court also had to have regard, 'as far as practicable, to the interests of the Native owners'.

Thus, the legislation in force at the time gave a large discretion to the court as to whether to provide access in a partition decision. The court was not *required* to ensure that there was a form of access in agreeing to partitions. The court could not be certain how settlement and main roading would develop in some districts, especially for some of the more remote, marginal lands, so strong provisions for granting access after partitioning were essential. There was some provision in the 1913 Act for getting a road line or right of way after the land had been partitioned but that was relatively restricted, involved paying compensation, and, again, gave a large discretion to the court. The partitioning of the Ngarara West C41 residue into lots 1–5 was carried out in circumstances where the terrain was steep and hilly. For lots 1–4, the court provided a private right of way two chains wide instead of a road line. This right of way ran along the ridgeline separating lot 5 on the western side from lots 1–4 on the eastern side (see map 17). Rawhiti Higgott described this right of way as 'impractical and impossible to walk as it is very steep'. Lots 1–3 and part lot 4 are now surrounded by two scenic reserves (the Hemi Matenga Memorial Park and the Kaitawa scenic reserve) and private land.[280] We have no evidence about the role (if any) of the private land to the north-west in making these blocks landlocked.[281]

280. Rawhiti Higgott, brief of evidence (doc F3), pp 16–18, 20; plan of Ngarara C41 subdivisions (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 13)

281. Crown counsel, closing submissions (paper 3.3.60), p 47



Map 17: Landlocked land adjoining Hemi Matenga Memorial Park (lot 5).

While the legal access is along the ridgeline, the more practical access has been through the flatter land of lot 4, which has been in private ownership since 1922. The court either (a) decided not to provide access when the majority of lot 4 was partitioned for sale because there was already legal access to all four lots from the other side or (b) did not consider the issue of access. It was likely this decision of the court or Māori Land Board in 1922 that made the remaining Māori land in lots 1–4 landlocked. The creation of the Hemi Matenga Memorial Park in 1956 did not involve any partitioning. The scenic reserve was established on land that had already been partitioned out back in 1916, so there was no occasion for the court to consider how the change in ownership of lot 5 might affect access to lots 1–4. Certainly, the establishment of a scenic reserve made it unlikely that a road would be constructed to the top of the ridgeline for access to lots 1–4.

In 1984, lots 1–3 were vested in the Wi Parata Waipunahau Trust under section 438 of the Māori Affairs Act 1953.[282] The remaining piece of lot 4 was not included, presumably because it is general land. The trust's access to lots 1–3 and part lot 4 is either by walking to the top of the Hemi Matenga Memorial Park to reach the legal ridgeline right of way or by permission of neighbouring landowners. Mr Higgott explained that he used to be able to access the land by permission of an owner, which was the Anglican Pension Board, but that access has since been denied by new owners.[283] Even if access is permitted by farmers to cross their land, it is still necessary to 'cross the Mangaone Stream and then tramp for about an hour before you reach our block'.[284] Tutere Parata told us that the land is 'unusable' and 'you really would need a helicopter to get there'. Mr Parata added:

> The whanau have discussed various proposals to use this land, such as a wilderness retreat, forestry or gondola. All fell through because [of] lack of access, and lack of resourcing. Therefore, this block does not have reasonable access and is landlocked. The Court system that created it was faulty and inadequate and should never have tied up our land in ways that meant we could not access or use it.[285]

Rawhiti Higgott described a long battle to get access to the block and also to obtain assistance from DOC to help control pests and preserve the bush. The trust has also faced demands for rates even though the blocks were landlocked and unproductive.[286] We discussed the rating regime in chapter 5, where we also discussed the Crown's pre-2002 failure to introduce effective measures for exempting unproductive Māori land from rates. In the case of Ngarara West C41 lots 1–3, the Kāpiti Coast District Council's rates are currently written off but this is a recent development, presumably due to the council's establishment of a rates remission policy for Māori land in 2016.[287] Rates arrears were still accumulating against the land as late as 2005.[288] In addition to problems with rates, the owners could not afford the pest control measures being carried out by DOC on the Hemi Matenga and Kaitawa scenic reserves. Mr Higgott explained:

> DOC for many years have carried out eradication projects on these two reserves. I have always asked if they can look at our block also, but the answer has always been that there is no money in the budget.

282. 'Order declaring trusts', 16 May 1984 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), pp 54–59)
283. Rawhiti Higgott, brief of evidence (doc F3), p 22
284. Rawhiti Higgott, brief of evidence (doc F3), p 44
285. Tutere Parata, brief of evidence (doc F2), pp 13–14
286. Rawhiti Higgott, brief of evidence (doc F3), pp 18–28
287. Rawhiti Higgott, brief of evidence (doc F3), p 20; Woodley, 'Local Government Issues' (doc A193), pp 697–699
288. Kāpiti Coast District Council to Rawhiti Higgott, 24 November 2005 (Rawhiti Higgott, papers in support of brief of evidence (doc F3(a)), p 20)

> The damage to our native forest/birdlife by doing nothing has been bad. Trees of major importance are dying off such as Rata, Totara, Rimu, Kahikatea to name a few. Our forest is dying because of a lack of funding. The pests move to our block from the two reserves. Pigs and goats are also damaging our forest. It is of concern but there is nothing we can do about it unless the Crown help us. We should not be penalized for preserving our bush in its natural state.[289]

As noted above, DOC needs an annual budget of $55,000 for maintaining the Hemi Matenga Memorial Park and controlling pests, a budget which the owners of lots 1–4 simply do not have. DOC was sympathetic to the owners' difficulties but also lacked the budget to assist, as Mr Mace stated in his evidence:

> DOC is sympathetic to the desire to preserve natural values and undertake pest control on land adjoining public reserves. In the present circumstances, in addition to the direct benefit to conservation values on the privately owned land, it would also support the natural values of the adjoining Kaitawa and Hemi Matenga Reserves. DOC has been approached by iwi in the past to undertake joint pest control work on the private land, but have not been in a position to fund this work. We have, however, prepared and provided them with technical advice for pest control within these areas and encouraged them to approach Ngā Whenua Rāhui for funding. If funding were available, we would be very happy to assist with pest control.[290]

Rawhiti Higgott explained the prejudicial effects of being unable to use or care for this ancestral land:

> There are some good things that we could do, walking tracks, tourism, rongoa, wananga, carving, but mainly looking after the whenua and being able to exercise our kaitiakitanga.
>
> We are unable to do any of this without reasonable access.
>
> . . . . .
>
> Whanau are unable to exercise kaitiakitanga as we have lost the ancestral relationship with the whenua. As whanau we are unable to provide for our social, economic, health and cultural wellbeing. It is proof of our link to our ancestors of the past, it is our identity, it is proof of our tribal and kin group ties.
>
> Being separated from our whenua threatens our physical existence, but also our identity and possibly eventually our extinction. I am not only referring to the Ngarara West land block [Ngarara West C41 lots 1–4], but to land that we have previously lost to the Crown.
>
> The Crown should be acknowledging our communal and tribal past by enabling hapu development and projects where that is practicable.
>
> Ownership is a piece of paper and is one thing, kaitiaki is something else. It has spiritual strength, something that is vital in all aspects of life. When you are walking

289. Rawhiti Higgott, brief of evidence (doc F3), pp 20–21
290. Jack Mace, brief of evidence (doc G5), p 12

the land and, in the bush, you can feel it. You can feel it when you drink from the streams.

The Ngarara block interests are our inheritance from the past. We should be able to enjoy the fruits of land in our lifetimes and then pass those fruits on to succeeding generations.[291]

9.3.7.2 *Remedies for landlocked land*

Jack Mace stated that it is not possible for DOC to provide access by vehicle through the Hemi Matenga Memorial Park or the Kaitawa scenic reserve without 'potentially high impacts' on the 'natural and scenic values of the Reserves'. The physical constraints of putting in a vehicle track on such 'steep and heavily afforested terrain' would make it difficult and expensive, but would also require a zig-zag road with a high impact on the reserves' values. It was highly unlikely, therefore, that DOC could agree to it consistently with the purpose of the reserves. From DOC's perspective, it would be much more reasonable for the owners to seek access through neighbouring farmland.[292]

The Crown submitted that it has

> provided legitimate solutions to address the problem of landlocked land across the motu by promoting the enactment of remedial legislation including sections 326A–326D of Te Ture Whenua Māori Act 1993 (under which owners of landlocked land may apply to the Māori Land Court for an order granting them 'reasonable access' to their land).[293]

The Crown accepted that the access provisions in Te Ture Whenua Māori Act do not guarantee a positive outcome because the rights of neighbouring landowners also have to be taken into account. This 'ought not detract', the Crown argued, 'from the fact that the Crown has, responsibly, enacted legislation to provide a remedy to the issue of access to landlocked land'.[294] We did not receive evidence about this remedy or the extent to which it has been successfully taken up since the Crown amended Te Ture Whenua Māori Act in 2002 to strengthen the Māori Land Court's powers in respect of landlocked land. The Tribunal, in the report *He Kura Whenua ka Rokohanga*, concluded that lack of access remained a barrier to the utilisation of Māori land as at 2013, and the Te Ture Whenua Māori Amendment Act 2002 had 'failed to rectify the problem'.[295]

The Te Ture Whenua Māori Amendment Act 2002 inserted sections 326A–326D into the 1993 Act. Landlocked land was defined as a piece of Māori freehold land that has 'no reasonable access to it'. The definition also included general land that

291. Rawhiti Higgott, brief of evidence (doc F3), pp 25–26
292. Jack Mace, brief of evidence (doc G5), pp 15–16; Crown counsel, closing submissions (paper 3.3.60), pp 47–48
293. Crown counsel, closing submissions (paper 3.3.60), p 48
294. Crown counsel, closing submissions (paper 3.3.60), pp 48–49
295. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Lower Hutt: Legislation Direct, 2016), p 109

had been converted from Māori land under the provisions of the 1967 Act (discussed above). Thus, the Act would apply to C41 lots 1–3 (Māori land) and C41 part lot 4 (general land converted under the 1967 Act). Reasonable access was defined in the Act as 'physical access of the nature and quality that may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land'.[296]

Under the 2002 amendments, the Māori owners of landlocked land could apply for an order that would either vest land in them for access or grant them an easement over land (whether adjoining or not). In deciding whether or not to grant the order, the court was required to consider 'the nature and quality of the access (if any)' that existed when the applicants acquired the land, the circumstances in which it became landlocked, and the conduct of the applicants and other parties (neighbouring owners), including any attempts to negotiate access before the application was lodged. The court was also required to assess the hardship caused to the applicant if no access was granted vis-à-vis the hardship caused to others (neighbouring owners) if access across their land was granted.[297] Crown counsel emphasised the point that no land from a public reserve could be vested for access purposes although an easement was still possible.[298] Any appeal of the court's order would be heard by the High Court by way of a full rehearing of the case.[299]

At the time of the hearings, the Crown had introduced an Amendment Bill in 2019, which Crown counsel advised would strengthen the landlocked land provisions.[300] This Bill was enacted as the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020. This Act added further matters for the court to consider when deciding whether to grant access. These were:

- the relationship that the applicant has with the landlocked land and with any water, site, place of cultural or traditional significance, or other taonga associated with the land; and
- the culture and traditions of the applicant with respect to the landlocked land[.][301]

This will likely have increased the weight given to the interests of the Māori applicants but it is too soon to know how it will affect outcomes in practice. The 2020 Act also changed the definition of reasonable access to include access for services

296. Te Ture Whenua Māori Amendment Act 2002, s 51 (inserting sections 326A–326D)
297. Te Ture Whenua Māori Act 1993, s 326B (inserted by section 51 of Te Ture Whenua Māori Amendment Act 2002)
298. Crown counsel, closing submissions (paper 3.3.60), p 49
299. Te Ture Whenua Māori Act 1993, s 326D(3)–(4) (inserted by section 51 of Te Ture Whenua Māori Amendment Act 2002)
300. Crown counsel, closing submissions (paper 3.3.60), pp 50–51
301. Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, s 70(3)

as well as people, and it repealed the requirement that appeals be heard by the High Court instead of the Māori Appellate Court.[302]

The 2020 amendments, however, did not alter the likely costs faced by the Māori applicants if the court made an order vesting land or granting an easement. The court had powers under section 326C(1) to require the applicants to pay compensation to any person affected by the order and also impose conditions as to fencing and upkeep of the affected area. Under section 326C(2), it was mandatory for the court to impose the 'reasonable cost' of 'carrying out any work necessary' to provide access on the Māori applicants.[303] There are also costs associated with exhausting all other options for possible access, including geotechnical and engineering reports and valuations. Thus, the costs of litigation in the Māori Land Court and possibly the Māori Appellate Court would be amplified by having to compensate neighbouring owners and pay for the costs of the work to create the access. It is not surprising, therefore, that the claimants were hesitant to 'fund and mount a legal process though the Māori Land Court'. According to the claimants, the Crown should be 'taking action and assisting the claimants in obtaining access to their land'.[304]

Jack Mace offered DOC assistance in negotiating with neighbouring owners to try to obtain an agreement prior to applying to the court,[305] which would make the process easier and less expensive. Crown counsel stressed that 'this should not be interpreted by claimants or the Tribunal as an offer for the Crown to fund or lead any court application'.[306] On the issue of costs, the Crown submitted that the Māori applicants would have access to legal aid under section 7(1)(e) of the Legal Services Act 2011, and that prior negotiations assisted by DOC may also reduce the costs of an application.[307] The Crown did not address the costs of forming the access or compensating neighbouring owners in closing submissions. We note, too, that there is restricted legal aid available for litigation in the Māori Appellate Court under the Legal Services Act 2011 and the Te Ture Whenua Māori Act 1993.

The claimants did not accept that Te Ture Whenua Māori Act provided a sufficient remedy for the Māori owners of Ngarara West C41 lots 1–3 and part lot 4. In their view, the amended access provisions of 2002 only gave a 'theoretical and legal remedy'. Litigation can be lengthy and expensive without any certainty of outcome. Further, the legal aspect of the remedy – a court process – is only one part of the 'huge cost' of obtaining reasonable access. Hence, 'the claimants seek Crown assistance in resolving this problem.'[308]

302. Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, ss 70(2), 71(2)
303. Te Ture Whenua Māori Act 1993, s 326C
304. Claimant counsel (Gilling, Dawe, and Brown), closing submissions (paper 3.3.51), p 76
305. Jack Mace, brief of evidence (doc G5), p 16
306. Crown counsel, closing submissions (paper 3.3.60), p 50
307. Crown counsel, closing submissions (paper 3.3.60), p 50
308. Claimant counsel (Gilling), submissions by way of reply (paper 3.3.69), p 9

9.3.8 Treaty findings in respect of the landlocked land

As we have mentioned several times in this report, the Crown conceded that the individualisation of title facilitated the fragmentation, alienation, and partitioning of Māori land. The Crown also conceded that its acts and omissions have left Te Ātiawa/Ngāti Awa virtually landless. In closing submissions, however, the Crown did not consider the impact of the process of fragmentation, partitioning, and alienation on the few remaining pieces of land left in Māori ownership. In our view, the flawed title system established by the Crown in the nineteenth century was responsible for these remnants of Māori land, such as Ngarara West C41 lots 1–4, becoming landlocked and unusable, surrounded by Crown and general land. This was very common in other districts, as the Tribunal has found most recently in the Taihape district.[309]

The Native Land Amendment Act 1913, which was in force at the time Ngarara West C41 lots 1–5 were partitioned, gave the court discretion to provide or not provide for access as it saw fit. The statute stated that, when land was being partitioned, the court 'may' lay out such road lines ('if any') as the court thought 'necessary or expedient'. Alternatively, the court 'may, if it thinks fit', create private rights of way. In making partition orders, the court was to have regard 'as far as practicable' to road access and the interests of the owners (among other things). We did not have the benefit of technical research on access issues but the form of access provided by the court in 1916 was clearly neither practical nor reasonable. We accept that the Native Land Court was not the Crown, and its decisions were not those of the Crown. In our view, however, the Crown was responsible for the legislation that enabled:

- individualisation of title;
- the impact of individualisation of title on the authority of tribal structures to make collective, strategic decisions about what land to partition, sell, or retain; and
- the subsequent uncontrolled partitioning, fragmentation, and alienation which left the Māori landowners of Ngarara West C41 without access to this steep, hilly remnant.

We thus find that the Crown's native land laws contributed to the landlocked state of Ngarara West C41 lots 1–3 and part lot 4, in breach of Treaty principles. The prejudice has been the division of the Māori owners from their ancestral land, in effect a virtual alienation of their land, with the consequential lack of opportunities to care for the land, protect the bush from pests, or make any use of the land whatsoever.

The Wairarapa ki Tararua Tribunal found that successive Crown acts and omissions had led to the 'chaotic situation' of much Māori land today, and that 'the time has come for a significant project to be undertaken to assist tangata whenua in this district to rationalise their remaining landholdings in an effort to make them viable'. The Tribunal added: 'The Crown should now, we believe, make available

309. See Waitangi Tribunal, memorandum concerning landlocked Māori land in the Taihape inquiry district, 14 August 2018 (Wai 2180 ROI, paper 2.6.65).

the funding to allow the claimants to find a way out of the bind they are in.'[310] The Wairarapa ki Tararua Tribunal then recommended that, among other things, the Crown should engage with the claimants about establishing a fund to pay for surveyors and the other expertise necessary for a successful application to the court in respect of landlocked land.[311]

We are aware that the Taihape Tribunal will shortly be releasing a report on landlocked land issues, based on the evidence and submissions in that inquiry. The Crown and claimants will have worked through the issues in greater detail than we have been able to do to date, as about three-quarters of the Māori land in that district is landlocked. We will consider what recommendations we might make in respect of Ngarara West C41 lots 1–3 and part lot 4 after that report has been released.

On the issue of pest control in the reserve, our view is that DOC should fund and carry out pest control on this land as well as the surrounding Hemi Matenga Memorial Park and Kaitawa scenic reserve. This would surely benefit the reserves as well as the Māori land. It could be discussed as part of co-management arrangements for the Hemi Matenga Memorial Park (see our findings and recommendations above).

310. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 637
311. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, pp 637–638

CHAPTER 10

SUMMARY OF FINDINGS AND RECOMMENDATIONS

10.1 Introduction

In this chapter, we summarise the findings made in chapters 3–9 and make such recommendations as we can at this stage of the inquiry. This summary is not a substitute for reading the full discussion and the articulation of findings in those chapters.

10.2 The Crown Pre-Emption Era, 1840–65

10.2.1 Introduction

The Crown pre-emption era (1840–65) is discussed in chapter 3 of this report. For Te Ātiawa/Ngāti Awa ki Kāpiti claims, there were two main issues in the Crown pre-emption era:

- the pressure from the Crown to sell the entirety of their tribal estate while retaining minimal reserves; and
- the responses of Māori (both nationally and locally) to Crown purchasing, the demands of European settlers for land, and settler self-government institutions.

Te Ātiawa/Ngāti Awa had a good relationship with the Crown in the 1840s, despite challenges such as the Hutt War in 1846 and the return of the majority of the Waikanae population to Taranaki in 1848 (Te Heke Mā Ruru), which Governor Grey had opposed. The claimants emphasised the promises of partnership, protection, and care that Grey made to the rangatira of Te Ātiawa/Ngāti Awa and Ngāti Toa in 1846 (see section 3.5). Grey wrote to them:

> The Queen has directed me to do all in my power to ensure your safety and happiness. Maoris and Europeans shall be equally protected and live under equal laws, both of them are alike subjects of the Queen and entitled to her favor and care. The Maoris shall be protected in all their properties and possessions and no one shall be allowed to take anything from them or to injure them. Nor will I allow Maoris to injure one another – an end must be put to deeds of violence and blood. You will always find me ready to aid you as far as lies in my power; if therefore you are any time in doubt and difficulty do not hesitate to write to me. You shall receive a kind and friendly answer. I think that it would be well for you to send some of your members to Wellington to see

me. I can there say many things which are too long for a letter, and after having met one another, we shall be more intimately acquainted.[1]

In addition to these promises, the Crown developed official standards for the purchase of Māori land, which had been anticipated in the Treaty by the agreement of the Māori rangatira to Crown pre-emption (article 2). These standards are derived from the instructions of various Secretaries of State for the Colonies (including Lord Normanby) and the instructions or statements of Governors and colonial officials (see sections 3.6.7.1 and 3.6.7.3). The standards included (but were not limited to):

- purchases would be conducted on the principles of sincerity, justice, and good faith;
- purchases must constitute fair and equal contracts – Grey assured Te Ātiawa/Ngāti Awa in 1851 that 'he did not wish to buy except from *willing sellers, with a perfect title*' (emphasis added);[2]
- purchasers must take care that Māori vendors did not enter into sale agreements that injured their interests; and
- reserves must be sufficient for present and future needs, which – at times – included a recognition that sufficient land should be reserved for customary resource uses as well as for cultivation and for leasing to obtain revenue.

In the 1850s and early 1860s, however, neither Grey's promises to Te Ātiawa/Ngāti Awa nor the official purchase standards were reflected in the Crown's attempts to purchase land on the Kāpiti coast and Taranaki, the Crown's resort to arms over the Waitara purchase, and Crown acts and omissions in respect of the Kīngitanga. Te Ātiawa/Ngāti Awa supported the Kīngitanga in the 1860s as their response to the pressures of Crown purchasing and the growth of settler institutions (including the settler Parliament); the people built the house Pukumahi Tamariki for a Kīngitanga rūnanga to manage their affairs, and they adhered to the fundamental principles of the Kīngitanga (see sections 3.7 and 10.2.3).

10.2.2 The Crown's purchase of the Whareroa and Wainui blocks

As discussed in section 3.6, the Crown tried to purchase the entire tribal estate of Te Ātiawa/Ngāti Awa ki Kāpiti in the 1850s. Although this attempt failed, the Crown did succeed in purchasing the Wainui and Whareroa blocks (about 65,000 acres). In respect of those two purchases, the Crown breached Treaty principles in its purchasing conduct, its making of the most minimal of reserves, and its later acquisition of the Whareroa Pā reserve under the Public Works Act 1928. In particular, the Crown breached the principles of partnership and active protection, and its own official nineteenth-century standards for purchasing and making reserves, by:

1. Grey to the 'chiefs of Ngatitoa, Ngatiawa & Ngatimutunga', no date (c January 1846) (Tony Walzl, papers in support of 'Ngatiawa: Land and Political Engagement Issues' (doc A194(a)), p 739)
2. *New Zealander*, 12 April 1851 (Walzl, 'Ngatiawa' (doc A194), pp 242–243)

- failing to investigate customary title in the Whareroa and Wainui blocks prior to purchasing;
- failing to engage with or seek the consent of the resident Whareroa community (mostly Ngāti Maru and some Ngāti Mutunga and Puketapu) or Puketapu at the northern end of the Whareroa block;
- imposing the purchases on Ngāti Maru, Ngāti Mutunga, and Puketapu – while some Ngāti Maru at Whareroa Pā did support the purchase because they wished to return to Taranaki, others at Whareroa Pā were opposed and their consent was neither sought by the Crown nor given; and
- failing to make sufficient reserves for the present and future needs of the Whareroa inhabitants, including failing to reserve urupā and other wāhi tapu.

Ngāti Maru, Ngāti Mutunga, and Puketapu were prejudiced by these Crown Treaty breaches. Those who opposed the Whareroa and Wainui purchases (when they found out about them) lost their land without their consent and without any payment. They were also prejudiced by reserves that were too few and too small for either development or subsistence. Further, the reserves for the Whareroa community were not made inalienable and therefore became vulnerable to individualisation of title and piecemeal sales. Ultimately, the remaining members of the Whareroa community had to abandon their pā and return to Taranaki, unable to survive on their dwindling cultivation reserve. Settlers, on the other hand, had enough land to use profitably and could therefore purchase the small reserve sections to enhance their farms. The 50-acre Puketapu reserve was Crown-granted to a single individual, the rangatira Tamati Whakapakeke, leaving the other Puketapu residents of Whareroa landless except for their houses in Whareroa Pā.

Whareroa Pā had to be abandoned but the land (18 acres) was not sold. The Crown breached the principles of partnership and active protection by not attempting to find the successors to the owners of Whareroa Pā and seek their consent when it wanted this site for Queen Elizabeth II Park. Instead, the land was taken under the Public Works Act 1928 for 'better utilisation', which was an extremely broad and undefined purpose, especially for a compulsory taking. This acquisition of the pā prejudiced the owners by severing any last remaining links to the land.

10.2.3 The Crown's pressure on Te Ātiawa/Ngāti Awa to give up the Kīngitanga

After the Waitara purchase and the outbreak of war in Taranaki in 1860, Te Ātiawa/Ngāti Awa asked Wi Tako to come to Waikanae to lead them through the crisis (see section 3.7). The Waikanae people were committed to supporting the Kīngitanga, its institutions, and its governing principles, which Wi Tako explained in 1862:

> ko te tuatahi rawa ano o aku whakaaro ko te whakapono; hei oranga tena mo te wairua. 2 kia mau ki te whenua; hei waiu tena mo a tatou tamariki. 3 kia kaha te mahi i nga ritenga mo te kingi, hei matua te na mootatou tinana. 4 ki a pai te whakahaere

i nga ritenga; o te kingi kaua e kawea ketia. 5 kati te pupuri i nga whakaaro a te kingi tukua kia haere, ma te perehi e kawa ki nga wahi katoa kaua ma te reta.[3]

1 My thoughts are faith which sustains the spirit. 2 holding to the land as breastmilk for our children. 3 establishing the customs/rules of the king for their sustenance. 4 carrying out those customs/rules and not straying from them. 5 not keeping back the king's ideas, but letting them be broadcast.[4]

The Waikanae people maintained their position until mid-1864, despite pressure from the Crown. By then, the Kīngitanga had been defeated in Waikato and the Crown was explicitly threatening to confiscate Waikanae lands. As found in previous Tribunal reports, the Crown's Treaty obligations required the Governor to protect and provide for tino rangatiratanga. This included an obligation to negotiate and reach an accommodation with the Kīngitanga, and to empower, not suppress, Māori autonomy. Options included establishing autonomous native districts under the New Zealand Constitution Act, an option actively proposed by the Colonial Office but not pursued by Governors Gore Browne or Grey.[5] No attempts were made to reach an accommodation with Kīngitanga leaders at Waikanae or to recognise and empower their Kīngitanga rūnanga. Instead, Waikanae leaders were pressured and then threatened with confiscation if they did not give up the Kīngitanga, which eventually they did in response to these threats. The Crown breached principles of partnership and Māori autonomy when it compelled the Waikanae people to give up their political institutions instead of protecting and providing for their exercise of tino rangatiratanga.

The Crown's refusal to reach an accommodation with the Kīngitanga at Waikanae in 1860–64, and its suppression of the Kīngitanga there in 1864, had lasting prejudicial consequences for Te Ātiawa/Ngāti Awa ki Kāpiti. Without the protection of the King, of a native district under the New Zealand Constitution Act, or of a rūnanga empowered by legislation, they were subjected to the full force of the Native Lands Act 1865 and the individualisation of title. This gradually eroded their remaining autonomy and their land base.

10.3 The Native Land Court Era at Waikanae, 1870–1900

10.3.1 Introduction

The nineteenth-century Native Land Court era at Waikanae (1870–1900) is discussed in chapter 4. The form of court used to determine customary title at Waikanae was established by the Native Lands Act 1865. It involved a formal court structure with a Pākehā judge sitting alongside one or more Māori assessors. In

3. *Hokioi o Niu Tireni, e rere atu na*, 8 December 1862, p 3
4. The Tribunal has provided this translation.
5. See, for example, Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington, GP Publications, 1996), p 19; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2018), pts 1–2, pp 379–381, 444–446.

section 4.4.2, we discussed some of the alternative forms of title adjudication proposed at the time, including the Native Councils Bill 1872, which would have given Māori more control over the process of deciding their land entitlements. We also considered the reasons why Te Ātiawa/Ngāti Awa leaders felt they had to apply to the court for a title investigation in 1872 – essentially the filing of a claim to part of their tribal estate (the Kukutauaki block) by chiefs of Ngāti Toa, and Crown persuasion to put the whole of their remaining lands through the court (see section 4.4.3). The Te Ātiawa/Ngāti Awa claim to the Ngarara block (and the Muaupoko block that was cut out of it for Otaraua) was uncontested by any other tribal group; as a result, the people exercised control over which names were put into the list of owners required by the native land laws. The process and outcomes of freezing customary title in this finite list of owners, and the lack of collective community control once title had been individualised, resulted in highly significant grievances that were presented to Parliament in the nineteenth century and not resolved by any appropriate redress, hence the claims about these issues to the Tribunal today. These grievances are discussed in full in chapter 4.

10.3.2 Findings about the Crown's native land laws

The Crown's native land laws have been the subject of multiple Tribunal inquiries, and have been found in breach of the principles of the Treaty in many Tribunal reports.[6] In respect of the Te Ātiawa/Ngāti Awa claims, the Crown's native land laws breached the principles of partnership and active protection, and the tino rangatiratanga guarantee in article 2 of the Treaty, in the following ways:

- The Native Lands Act 1865 provided for land to be granted to a maximum of 10 owners (the 10-owner rule), regardless of the number of right-holders in a block, which resulted in the exclusion of all right-holders in the Kukutauaki 1 and Muaupoko blocks other than those named in the certificates of title, to their detriment.
- The Native Lands Act 1867 provided for the individualisation of title, which froze the fluid and mobile customary tenure of Te Ātiawa/Ngāti Awa ki Kāpiti in a finite list of individual owners for the Ngarara block, made up of those who happened to be resident at that point in time, and who customarily would have kept the fires lit for those living in Taranaki and elsewhere who had the right to return and take up land under customary law. That right to return would have continued and been regulated by rangatira if the native land laws had not cut across the tikanga of Te Ātiawa/Ngāti Awa ki Kāpiti in this way. The 1867 Act also lacked sufficient safeguards against errors in the compilation of lists of owners, in this case for the Ngarara

6. See, for example, Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 2, ch 8; Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, chs 15–16; Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 2, chs 9, 11; Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 1, ch 11; Waitangi Tribunal, *Te Mana Whatu Ahuru*, ch 10.

block, which resulted in some who had no or little right being included from aroha, and the exclusion of others who were either overlooked or omitted as a result of internal quarrels. This particular problem had been identified by Justice Richmond at the time, and a preliminary inquiry by a native council (under the failed Bill of 1872) or by district officers or some other mechanism was essential as a necessary corrective for those who were overlooked or deliberately left out due to internal tensions (such as the rangatira Pakewa and her whānau). We agree with the Turanga Tribunal on this point.[7]

- The Native Land Act 1873 abolished the trustee-like powers of the owners on the front of the Ngarara certificate of title (conferred under section 17 of the 1867 Act) but provided no corporate management structure as an alternative. This Act's individualisation of title and destruction of chiefly authority was strongly condemned by Wi Parata in 1893, when he made a presentation about the Kotahitanga petition to a select committee. The petitioners stated that the legislation had seen iwi and hapū lands vested in individuals 'for the convenience of Pakeha purchasers and lessees', since 'this practice of empowering a single person to do whatever he pleases with tribal lands has been a complete innovation to us, because lands never belonged to one person but to the whole tribe or family [hapū]'. The petitioners complained that the powers vested in individuals by Parliament had 'debarred' them from dealing collectively with their own lands; 'we are like sheep without a shepherd, being driven hither and thither'. The 'laws of Parliament have made us appear an ignorant and inferior people; and the Native Land Court has ignored the existence of the rights of chiefs; and the Natives generally have been dispersed, and those who had homes have been deprived of them'.[8]
- The Native Land Court Act 1886 empowered any individual to apply for partition regardless of the wishes of the community. This led to the 1887 partition of Ngarara West against the wishes of the majority of owners who wanted to retain their land intact and undivided.

Of these Acts, the Native Lands Act 1865 and the amending 1867 Act were highly damaging to Te Ātiawa/Ngāti Awa ki Kāpiti because they converted the 'ahi kā', the residents who were keeping the fires lit, into the sole legal owners of the Ngarara block. All other members of the iwi who had rights in the block were thereby disenfranchised. Also, the 1886 Act allowed any individual on the list to apply for a partition, which ultimately resulted in applications for a rehearing (which were denied), petitions to Parliament, the Ngarara commission, and the special remedy of a rehearing under the Ngarara and Waipiro Further Investigation Act 1889 (discussed next).

7. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 449, 451
8. 'Petition of the Members of the Federated Māori Assembly of New Zealand', May 1893 (Walzl, papers in support of 'Ngatiawa' (doc A194(e), p 2)

10.3.3 Remedial legislation: the Ngarara and Waipiro Further Investigation Act

The Ngarara and Waipiro Further Investigation Act 1889 was particularly flawed due to the narrowness of the remedy that it provided, the element of compulsion accorded to the Native Land Court, and the complete undermining of all tribal authority over Ngarara West. The Act was in breach of the principles of partnership and active protection, and the article 2 guarantee of tino rangatiratanga, because it:

- Restricted the rehearing to the partition applications of 1887 rather than the original 1873 list of owners, despite the clear evidence given to the 1888 select committee and Ngarara commission about the way in which the native land laws had frozen custom at a single point in time and thereby excluded absent right-holders from the title, and despite the recommendations of the Native Department Under-Secretary that the 1873 title should be reheard to allow their inclusion.
- Empowered the court to identify all individual interests on the block plan regardless of the wishes of the owners and even against the wishes of the owners, resulting in:
    - litigation in the Supreme Court to try to stop the Native Land Court from exercising this compulsory power, which failed because the Act clearly empowered the court to do so despite the opposition of the majority of owners;
    - the compulsory division of all individual interests in Ngarara West into Ngarara West A2-A79 and Ngarara West C1-C41, with detailed descriptions of the boundaries and acreages of each section, although this was to be done prior to survey (followed soon after by the survey of these blocks to complete the subdivisions);
    - the fullest form of individualised title for Ngarara West;
    - scattered interests across non-contiguous sections for many Ngarara owners in an attempt to accurately reflect customary rights in the new form of title; and
    - rapid alienations outside of community controls.
- Deprived owners of a right to apply for a rehearing because the compulsory division of all individual interests by the court was technically done by a rehearing court instead of by a court of first instance.

The Ngarara and Waipiro Further Investigation Act 1889 also breached the principle of mutual benefit because the settlers were the main beneficiaries of the individual titles conferred under this Act and of the economic development of the Waikanae district that followed. This outcome was the result of the extreme form of individualised title provided for in the Act, which Parliament at the time was aware would result in rapid, uncontrolled alienation of Māori land to settlers.

The remedial Act was not entirely flawed. Those who had applied for a partition in 1887 did obtain a remedy in the sense that their individual partitions were significantly increased. Also, we note that the Crown did not insist on charging the costs of the Ngarara commission against the land, which the commission had recommended in 1888. On the other hand, the Crown did not act to relieve the

owners of any of the costs despite much of the litigation occurring as a result of a mistaken decision by a court.

10.3.4 Section 13 of the Native Land Courts Act Amendment Act not a remedy

As noted, the Ngarara and Waipiro Further Investigation Act 1889 was intended to provide a remedy for those Ngarara West owners who had applied for partition in 1887. The Ngarara commission had not recommended any form of remedy or investigation for those who claimed that they had been omitted from the title back in 1873. Some of those affected tried to get back into the Ngarara West title by using section 13 of the Native Land Court Acts Amendment Act 1889, which enabled the chief judge to correct errors. This provision was not, however, intended to cover the situation of those excluded from the title in 1873, which, according to Chief Judge Seth-Smith, required a rehearing on the merits. This is where the failure to order a rehearing of the 1873 title in the wake of the Ngarara commission was so prejudicial to all right-holders who were not resident at the time or merely absent when the court sat in 1873.

10.3.5 Legislative provision for voluntary arrangements

In respect of the voluntary arrangement provisions in the Native Land Court Act 1886 and the Native Land Laws Amendment Act 1890, we accept that those provisions gave Māori owners a degree of control over the title process in the 1890–91 rehearing. Also, the Crown had introduced amendments in 1890 to help guard against fraud in voluntary arrangements.

In the case of the Ngarara West subdivisions, the key problem was that the voluntary arrangement in 1891 only covered some owners (albeit the majority) and was completed before the court had made its awards to other owners. As a result, this particular voluntary arrangement was faulty and the court departed from it in its final allocations. That was not the Crown's fault, although the Crown failed to provide a remedy when petitioned about the outcome or to inquire fully into the circumstances of the voluntary arrangement in response to the petitions filed after the 1891 division of Ngarara West.

10.3.6 Crown acts and omissions

In addition to Treaty breaches in the native land laws as set out above, the acts or omissions of the Crown breached the principles of partnership and active protection in the following ways:

- The Crown failed to pursue the Native Councils Bill 1872 past its first introduction to Parliament, or any similar Bill, and thereby failed both to provide the appropriate safeguards that were missing from the native land laws and to provide Māori with a proper role in the determination of their own land entitlements.
- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became of aware of them, but the Crown was responsible to some extent for compromising the outcome of the Ngarara commission by:

- appointing relatively inexperienced commissioners;
- failing to appoint any Māori commissioners and thereby depriving the commission of any expert Māori knowledge; and
- limiting the commission's inquiry to court decisions in respect of Ngarara West (thereby excluding the original Ngarara decision in 1873).

- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became of aware of them, but the Crown never provided a proper inquiry into the situation of those who alleged that they had been wrongly omitted from the Ngarara list of owners in 1873, and never provided them with an adequate remedy.
- Crown counsel agreed in our inquiry that the Crown had an obligation to remedy grievances when it became aware of them, but the Crown refused to consider any further remedies when petitions were lodged with Parliament after the enactment of the Ngarara and Waipiro Further Investigation Act 1889.
- The Crown did nothing to ameliorate the impact of full individualisation of title on Ngarara West in the 1890s.
- The Crown purchased land in the Muaupoko block in 1875 and in Ngarara West C in the 1890s without sufficient regard to the best interests of the Māori owners, including the payment of prices in the 1890s that were lower than its own purchase official's valuation.

10.3.7 The relevance and limitations of the Crown's concessions

In terms of the community's inability to prevent partition in 1887, the sale of land in the Muaupoko block in the 1880s, and the rapid alienation of the Ngarara West block to the Crown and private purchasers in the 1890s, the Crown's concessions are relevant and appreciated. The Crown accepted two Treaty breaches in its concessions:

- individualisation of title contributed to the undermining of the traditional tribal structures of Te Āti Awa/Ngāti Awa ki Kāpiti, and the Crown's failure to protect those structures was a breach of the Treaty; and
- the Crown's failure to ensure the retention of 'sufficient land for their present and future needs' was a breach of Treaty principles.[9]

In addition, the Crown conceded that individualisation of title made 'the lands of Te Āti Awa/Ngāti Awa ki Kāpiti more susceptible to fragmentation, alienation and partition', but it did not concede that this was a Treaty breach other than to the extent that these things undermined traditional tribal structures. The Crown also conceded that the cumulative effect of its acts and omissions was to render Te Āti Awa/Ngāti Awa virtually landless but, again, it did not concede that this was a Treaty breach. Rather, Crown counsel conceded that only one act of omission was in breach; the Crown's failure to ensure that Te Āti Awa/Ngāti Awa retained

9. Crown counsel, closing submissions, 18 December 2019 (paper 3.3.60), p 29

sufficient land. This tends to undermine the value of the Crown's concessions in this inquiry to a significant extent.

10.3.8 Kotahitanga (the Māori parliament) appeals for systemic remedies

In respect of the Kotahitanga appeals to the Crown for systemic remedies in the 1890s, the Crown refused at that time to accept that the Treaty had been breached by the Native Land Act 1873 and other native land laws, as claimed in the 1893 petition. The Crown refused to provide any remedies until 1898, when negotiations began for a partial remedy that was introduced in 1900 (the Māori Lands Administration Act 1900). In particular, the Crown refused to abolish the native land laws, refused to prohibit all sales of Māori land, and refused to empower a Māori assembly to appoint committees to administer Māori land. The denial of remedies from 1893 to 1900 meant that the surviving land base of Te Ātiawa/Ngāti Awa ki Kāpiti was much reduced by the time the Māori Lands Administration Act was passed in 1900.

10.3.9 Prejudice

Te Āti Awa/Ngāti Awa ki Kāpiti suffered considerable prejudice as a result of the above breaches, which we have categorised as: the impacts on those left out of the titles in 1873; the impacts of individualisation on the ability of Māori communities to retain their land; and the bitter divisions that arose or were exacerbated by the litigation of 1887–91 and its outcomes, which are still felt today.

First, there were prejudicial impacts on those who were left out of the 1873 titles. The Native Lands Act 1867 converted customary rights in the Ngarara block into a finite list of individuals who were resident at the time. While those who compiled the list understood that they were acting according to tikanga, they did not anticipate the effect that this would have on all those who were not resident at the time and who thereby lost all their rights in the land. The 1867 Act also lacked sufficient safeguards to prevent errors in lists of owners. These key flaws had a highly prejudicial impact on those who were omitted from the 1873 list of owners for the Ngarara block. The prejudicial effect was compounded by the Crown's failure to investigate their grievances properly or provide an adequate remedy.

The title to Kukutauaki 1 and Muaupoko was individualised under the Native Lands Act 1865, and the 10-owner rule disenfranchised a significant number of right-holders. Evidence to the Ngarara commission and in the 1890 rehearing showed that there were people who were left out of both blocks, especially the Muaupoko block which was supposed to have been the hapū block for Otaraua, although there is some evidence that Eruini Te Tupe struck a deal with those excluded that they would have a larger share of the Ngarara block. Those omitted were never provided with a remedy, despite indications of this issue in the Ngarara commission which ought to have resulted in further inquiry.

Secondly, individualisation of title often led to rapid, uncontrolled alienation of land. For Ngarara West A and C, this resulted from the form of title conferred under the special remedial Act of 1889, which gave the court compulsory power to divide all individual interests without any provision for collective management

and decision-making. Ngarara West, which the majority of owners had fought to keep undivided since 1873, was divided into 120 subdivisions (excluding Ngarara West B). In addition, some owners' interests became fragmented across several non-contiguous sections, a significant number of which were too small for individual farms. These prejudicial effects of individualised title in general, and of the special Act of 1889 in particular, made the land easier to sell than retain and contributed to rapid land loss. The ease with which absentees could sell their individual interests also contributed to land loss in the 1890s. As with sales by individuals in general, absentee sales were a prejudicial consequence of removing control from chiefs and the community.

We also attributed land loss in the 1890s to the disproportionate costs of obtaining title. These included the protracted litigation in the Ngarara commission in 1888 and in the Native Land Court in 1890–91. Subdivision of all individual interests, with all its associated costs, was forced on many owners regardless of their opposition to it (even if the surveys were delayed for a time). Individualisation of title also exposed each owner to the dangers of the 'debt trap', in which lessees and prospective purchasers were the only source of credit, and individual sections could be acquired as a result of accumulated debt.

Individualisation of title and the disempowerment of the tribe could have been ameliorated in the 1890s had the Crown agreed to support the Federated Māori Assembly Bill in 1893 or the Native Rights Bill in 1894. The Crown's refusal to entertain Kotahitanga's proposals, including those communicated to the Crown by the Waikanae representative, Wi Parata, had prejudicial effects on the ability of Te Ātiawa/Ngāti Awa ki Kāpiti to control their lands and restrain sales in the 1890s.

Also, individualisation of title had prejudicial effects in the almost complete alienation of the Muaupoko block in the 1880s.

Thirdly, the protracted litigation of 1887–1891 resulted in bitter conflict and divisions within Te Ātiawa/Ngāti Awa that were still evident in our hearings. The conversion of customary tenure into a finite list of individuals, and the requirement to identify the extent of each individual's entitlement – to assign acreages and boundaries to each individual – inevitably resulted in conflict, especially since the final decisions lay with the court and not the community. The nature and extent of the conflict was particularly bitter at Waikanae and it has had long-term effects. It partly arose from the removal of some hapū from Tuku Rakau to the coast to take advantage of the railway, and partly because of the outcomes of the litigation. Benjamin Ngaia explained: 'It is an issue where we have described ourselves as Te Ātiawa-ki-Uta and Te Ātiawa-ki-Tai, or more loosely Te Ātiawa-ki-Uta being the top crowd or the townies and Te Ātiawa-ki-Tai being the beach crowd or the poor Māoris, but that is a reflection of that historical impact that occurred during that time.'[10]

10. Transcript 4.1.16, p [523]

10.4 Twentieth-Century Land Claim Issues

10.4.1 Introduction

10.4.1.1 *Land alienation*

Twentieth-century land issues are addressed in chapter 5, although those issues are in many ways a continuation of the matters discussed in chapter 4. Following the sales of the 1890s, Te Ātiawa/Ngāti Awa entered the twentieth century with half of Ngarara West already alienated to the Crown and private purchasers. In chapter 5, we concentrated in particular on the first three decades of the twentieth century, partly because private purchasing made most owners landless or virtually so by the end of that period. Dr Rigby concluded: 'By 1925, Waikanae Maori had lost approximately 80 percent of their land, and the Matenga and Parata trustees [the trustees of the wills of Hemi Matenga and Natanahira Parata] controlled much of what remained in Maori ownership.'[11]

The Crown conceded that it failed to ensure the retention of 'sufficient land for [the] present and future needs' of Te Ātiawa/Ngāti Awa, in breach of Treaty principles.[12] But the Crown also submitted that it was not responsible for the actions of private land purchasers, and that it was not aware of any dissatisfaction with the purchases of W H Field. Further, Crown counsel argued that the Crown was not responsible for its protection mechanism failing to actually prevent landlessness (the mechanism referred to here was the statutory criteria for board/court confirmation of purchases under section 220 of the Native Land Act 1909). Rather, the Crown argued that any failure in the statutory protections was due to Native Land Court judges, not the Crown or the statutory framework under which the judges operated (see section 5.2.2).[13] The claimants strongly disagreed with the Crown's position, and these issues became a major focus of the discussion in chapter 5 in respect of how and why so much of the remaining Te Ātiawa/Ngāti Awa land was sold to private purchasers in the first three decades of the twentieth century.

10.4.1.2 *Rating issues: exemptions and compulsory vesting for sale*

Twentieth-century rating issues were a matter of major concern to the claimants in this phase of the inquiry. Our discussion of those issues focused primarily on the Crown's role in two aspects of the rating regime: an exemption from rating for Māori land that produced no revenue (for which legislative provision had been made); and the compulsory vesting of Māori land in the Māori Trustee for sale to recover rates arrears. The Crown had a statutory role to protect Māori interests in both of those matters (discussed below).

The Crown made a concession of Treaty breach about the particular circumstances in which Ngarara West A78E2 was compulsorily vested for sale (see section 5.8). Historian Suzanne Woodley identified systemic problems with the council's notification of rates demands to the owners of Māori land, and Crown counsel

11. Barry Rigby and Kesaia Walker, 'Te Ātiawa/Ngāti Awa ki Kāpiti, Twentieth Century Land and Local Issues Report', December 2018 (doc A214), p 372
12. Crown counsel, closing submissions (paper 3.3.60), p 29
13. Crown counsel, closing submissions (paper 3.3.60), pp 38–40

conceded that 'the Crown, knowing that the owner of Ngarara West A78E2 had neither received rates demands or been notified of the vesting of his land in the Māori Trustee for the purposes of sale, could have intervened to halt the vesting.'[14] Its failure to halt the compulsory vesting, the Crown conceded, was a breach of the principle of active protection.[15]

10.4.2 The significant reduction of legislative protections for Māori land, 1900–13

The Māori Lands Administration Act was one of the outcomes of the negotiations between the Crown and Kotahitanga in the later 1890s. This Act, while not perfect, had represented an agreement that:

- no more Māori land should be purchased;
- Māori should be represented by elected members on the Māori Land Councils, which would administer their lands and also exercise some of the powers of the Native Land Court;
- European settlement should continue through leasing alone; and
- inalienable reserves, including papakāinga reserves and reserves for customary resource use, should be established for individuals and/or hapū before any more land could be leased.

As discussed in section 5.4, the Crown had reneged from its negotiated agreement with the Kotahitanga parliament as early as 1905, and the whole system had been dismantled and replaced by 1909. Full, unrestricted Crown and private purchasing resumed, except that (a) purchases and leases had to be confirmed by the Māori Land Board, and (b) the Native Land Act 1909 required the retention of a minimum amount of land for each individual owner. This was to be assessed at the time of confirming a sale or lease rather than proactively, and was designed to prevent total landlessness rather than ensure a sufficiency of land for customary purposes and for use in the colonial economy. From 1913, landlessness was no longer even a minimum protective standard if the Māori Land Board considered that the land could not support an individual or that the individual had the skills for paid employment.

In addition, Māori representation in the Māori Land Councils, which gave them some control over the administration and protection of their lands, was whittled away to one non-elected Māori member in 1905 and then no Māori members at all on the new Māori Land Boards in 1913.

Due to the highly significant reduction of statutory protections for Māori land between 1900 and 1913, we disagree with the Crown's submission that:

- the Native Land Act 1909 and its successors gave adequate protection to Māori in the retention of their ancestral land; and
- any failures in protection were the responsibility of the independent Māori Land Court judges who implemented the law, not the legislation (see section 5.4 for the detailed analysis and comparison of policies and legislation).

14. Crown counsel, closing submissions (paper 3.3.60), p130
15. Crown counsel, closing submissions (paper 3.3.60), pp129–130

Thus, for the crucial period covered in chapter 5 (1905–1930), the Crown's legislative protections in respect of Māori land were inadequate. Also, Māori in general, and Te Ātiawa/Ngāti Awa in particular, were excluded from decision-making in the body that administered and implemented the protections in respect of their ancestral lands. For these reasons, the legislation was inconsistent with the Treaty principles of active protection and partnership.

The prejudice to Te Ātiawa/Ngāti Awa was the loss of land that followed the abandonment of the agreement with Kotahitanga, the weakening of legislative protections, and the loss of tino rangatiratanga over their lands with the loss of representation on the body that administered (and implemented the statutory protections for) their lands.

10.4.3 Crown failure to ameliorate the private purchasing system

There were two key factors involved in the Crown's failure to ameliorate the private purchasing system so that it was not seriously damaging to Māori in general, and to Te Ātiawa/Ngāti Awa ki Kāpiti in particular.

10.4.3.1 *Māori Land Board confirmation of purchases*

The first factor was the Crown's protection mechanism, which took the form of a requirement that sales and leases be confirmed by the Native Land Court (the Native Land Court Act 1894) and then by the Māori Land Board (the Native Land Act 1909). From 1913, the board and court were interchangeable, because the board consisted of the judge and registrar, and the judge could confirm alienations sitting as the board or the court. In performing its confirmation role, the legislation gave the board the status of a court of record. The board was supposed to assess and confirm or veto each alienation according to a set of statutory criteria, which included, among others, adequacy of price, retention of some land (as discussed above), and that the purchase was not contrary to equity or good faith or the interests of the vendors.

In section 5.7.2, we concluded that, for the lands of Te Ātiawa/Ngāti Awa in the first three decades of the twentieth century, the Crown's protection mechanism failed. Whether this was due to staffing, as Dr Rigby argued, or to other factors is not clear. The court staff did not play an investigative role in terms of vetting alienations. The board or court was largely reliant on the registry information about land owned by individuals and the material put before it at hearing by the prospective purchaser. The rate of land loss for Te Ātiawa/Ngāti Awa by the end of the 1920s showed that the system was, at the very least, incapable of providing a meaningful check on land alienations vis-à-vis land retention. We find that the Crown failed to provide an effective protection mechanism for Te Ātiawa/Ngāti Awa lands in breach of the Treaty principle of active protection.

10.4.3.2 *The need for systemic reform of the private land purchasing system*

The second of the key factors mentioned above was the Crown's failure to reform the private land purchasing system. As noted, the Crown's intervention in the system was confined to the board's series of checks at the end to ascertain whether a

purchase met the statutory requirements. But the Crown could have intervened to ameliorate the system itself. As discussed in section 5.6, some of the fundamental characteristics of the private purchasing system were as follows:

- individualisation of title had removed tribal or collective controls on alienation;
- the fragmentation of land and the scattering of interests across multiple sections made it harder for owners to either access finance for development or to use their land, including for farming;
- leases were too easily converted into purchases (with rent treated as advances on a purchase);
- in order to obtain development finance, some individual owners became caught in a debt trap whereby they had to 'trade land for debt', as Dr Rigby explained in his report;
- Pākehā purchasers were the main source of credit for Māori owners, and the purchasers charged Māori higher interest rates than the institutions from which they borrowed;
- Pākehā purchasers could more easily refinance their debts with reputable institutions, whereas the purpose of purchasers advancing money to Māori owners was to obtain their land;
- individual owners were strapped for cash and debts tended to mount up for immediate needs rather than investment in land development.

Key issues in this system were the individualisation and fragmentation of Māori land title and a virtual settler monopoly on access to cheap finance. The Treaty principle of equity required the Crown to reform the private purchase system and provide a more level playing field as between Māori and settlers. This would have enabled the Crown to protect Māori interests while still allowing for a reasonable degree and pace of settlement. The solution adopted by the Crown after negotiation with Kotahitanga in 1898–1900 was to stop all purchasing (in theory) and progress settlement by widescale leasing. This solution having been abandoned in 1905–09, the Stout–Ngata commission recommended new reforms in 1907.

According to the commission, the most urgent priority was for the Crown to provide cheap development finance to Māori, as it already did to settlers through the 'advances to settlers' scheme. The commission also recommended no more direct dealings between Māori and settlers; sales and leases should take place by auction. This was not a new recommendation. Sales by auction only had been proposed frequently in the nineteenth century, to remove the predatory aspects of direct dealing (where settlers had distinct advantages over Māori) and to ensure the highest market prices for Māori. Further, the commission recommended consolidation schemes to create viable farms out of owners' scattered interests, and the creation of papakāinga reserves for individuals, families, and tribes.

These recommendations, if acted upon in time, could have helped level the playing field between Māori and settlers at Waikanae by removing the dependence of the former on the latter for finance, by stopping the use of rents to turn purchases into leases, by tackling at least one of the more intractable title problems, and ultimately by enabling owners to develop their lands and free themselves from

debts incurred for consumption needs. Some Te Ātiawa/Ngāti Awa owners were already caught in the debt trap by then, however, and it would have taken time for the reforms to be embedded and to make a significant difference.

In any case, the Crown chose not to act on these recommendations of the commission, and it did not otherwise reform the private purchase system. As a result, in respect of Te Ātiawa/Ngāti Awa and their remaining lands in the first three decades of the twentieth century, the Crown's failure to reform the private purchase system and enable a more level playing field between settlers and Māori was in breach of the principles of equity and active protection.

10.4.3.3 *Prejudice*

The prejudice arising from the Crown's weak protections and its failure to reform the system of private purchasing was land loss that was rapid, uncontrolled, and devastating. Te Ātiawa/Ngāti Awa ki Kāpiti were already close to landlessness by 1930. They retained too little land to benefit from Ngata's development schemes in the 1930s. Some individuals and whānau retained pieces of land, especially the Parata whānau and the Hemi Matenga Estate, but those lands dwindled further as the twentieth century progressed.

The Crown accepted that landlessness was a serious consequence of its acts and omissions:

> The Crown concedes that the cumulative effect of its acts and omissions left Te Ātiawa/Ngāti Awa ki Kāpiti virtually landless, and had a devastating impact on their economic, social and cultural well-being and development. The Crown's failure to ensure that Te Ātiawa/Ngāti Awa ki Kāpiti retained sufficient land for their present and future needs was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles.[16]

Some of the Crown acts and omissions which led to Te Ātiawa/Ngāti Awa landlessness in the twentieth century are set out above (and discussed fully in chapter 5).

10.4.4 Rating exemptions and compulsory vesting

10.4.4.1 *Failure to exempt non-revenue producing Māori land*

Section 104 of the Rating Act 1925 gave the Governor-General power to 'exempt any Native land liable to rates from all or any specified part of such rates' by order in council, and any such order in council apply to (a) any 'specified land on account of the indigent circumstances of the occupiers or for any other special reason', or (b) to 'any specified class of lands'. Natanahira Parata and Tohuroa Parata represented Waikanae at a hui in 1928, which, in response to this Act, called for the exemption of certain classes of Māori land from rating, including all unoccupied (and therefore non-revenue producing) Māori land. This was followed in 1933 by the Crown's appointment of a Native Rates Committee, which recommended that

16. Crown counsel, closing submissions (paper 3.3.60), pp 23–24

the Native Department, the Valuation Department, and councils should ensure much wider use of section 104. The Native Land Amendment and Native Land Claims Adjustment Act 1926 amended section 104 to enable this recommendation to be carried out, but the Crown failed to investigate whether any Māori land or class of Māori land at Waikanae should be exempted from rates.

As a result, rates remained a factor in the sale of multiply-owned Māori land, which was often poor-quality, undeveloped, and plagued by access or title problems. It is not possible to quantify the extent to which rating influenced sales of such land in the twentieth century but it was definitely an important causal factor. The Crown's failure to actively protect Māori land at Waikanae through rates exemptions also made non-revenue producing Māori land vulnerable to compulsory vesting and sale. In particular, the Crown failed to consider exemptions when the Horowhenua County Council applied for vesting orders for the Ngarara West A3C blocks, the A32C blocks, and A78E2.

This series of Crown omissions was a breach of the Treaty principle of active protection.

10.4.4.2 *The Ministerial veto and compulsory vesting of Māori land for sale*

Section 109 of the Rating Act 1925 required the Minister to approve all court orders compulsorily vesting Māori land in the Māori Trustee for sale to recover rates arrears. This Ministerial veto was not used to protect Māori land in the instances examined in chapter 5: the Ngarara West A3C blocks, the Ngarara West A32C blocks, and Ngarara West A78E2. This was the case even though:

- neither the council nor the Māori Affairs Department properly identified and contacted all owners prior to the department's recommendation to approve the vesting; and
- there were circumstances in each case which justified the exercise of the Ministerial veto (see section 5.8 for the details).

The Crown failed to actively protect these small, surviving remnants of Māori land at Waikanae. Nor did the Crown provide any positive assistance to the owners to retain their land, even when appeals for assistance were made to the Minister. Instead, section 109 of the Rating Act 1925 was used to forcibly deprive Māori of their ancestral land without adequate justification. This was in breach of the plain meaning of article 2 of the Treaty, which guaranteed the right of Māori to retain their land for so long as they wished to do so. The Māori Affairs Department was aware that section 109 of the Rating Act 1925 was a draconian provision designed to 'get the rates paid without any concern for the welfare, wishes or interests of the former proprietors of these lands'.[17] The department was also aware that Māori considered these forced sales to be 'something very like confiscation',[18] which

17. Office solicitor to deputy secretary, Māori Affairs, 3 February 1967 (Suzanne Woodley, papers in support of 'Local Government Issues' (doc A193(c)(vii)), pp 62–63)

18. District officer, Palmerston North, to head office, Māori Affairs Department, 4 April 1968 (Woodley, 'Local Government Issues' (doc A193), p 555)

The Detail of the Crown's Concession about Ngarara West A78E2

Ngarara West A78E82 belonged to the Baker whānau before it was compulsorily vested in the Māori Trustee and sold for non-payment of rates. The following concession in respect of this block is a direct quotation from the Crown's closing submissions:

The Crown accepts that the Department of Māori Affairs was made aware, when the Horowhenua County Council made enquiries about the identity of the owner of Ngarara West A78E2 before vesting the block, that the block's owner had not been contacted regarding the vesting of their land in the Māori Trustee under section 109 of the Rating Act 1925.

The Crown considers that either the Crown or the county council would have been able, as part of their extensive enquiries, to make contact with Mrs Haua Baker in order to ascertain who the owner of the block was and, it being her son, his contact details. There is no evidence that either did so.

The attempts made by the county council to locate the owner through the Department of Māori Affairs meant that officials should have been aware, when the block was vested, that ratings demands had not been sent to the owner of Ngarara West A78E2.

The name of the owner of Ngarara West A78E2 was on the particulars of title to land, which was held by the Department of Māori Affairs. The Crown considers it should have supplied the particulars of title to land to the Horowhenua County Council. If that had been done, the block's owner would have been notified of the vesting of his land in the Māori Trustee for the purposes of sale, and could have, as events proved he wished to, sought to prevent the sale.

The vesting order itself was subject to approval by the Minister for Māori Affairs, which he gave on 4 May 1965. The Crown considers that, at this point in time, the Crown, knowing that the owner of Ngarara West A78E2 had neither received rates demands nor been notified of the vesting of his land in the Māori Trustee for the purposes of sale, could have intervened to halt the vesting.

The Crown accepts that the failure of the Crown to take this step to halt the vesting constituted a breach of the principle of active protection.

claimant André Baker also referred to as 'muru raupatu.'[19] Further, the department was very aware that the legacy of the Crown's native title system was responsible for many of the problems which resulted in non-payment of rates. But the Crown took no action to ameliorate the owners' position or to remove this confiscatory provision from the rating legislation until 1988.

19. André Baker, summary of brief of evidence, 8 February 2019 (doc F6(a)), p 4

Te Ātiawa/Ngāti Awa whānau were prejudiced by the confiscation of some of the last remaining pieces of their tūrangawaewae at Waikanae for non-payment of rates.

10.5 Specific Claim Issues: Parata Native Township

10.5.1 Introduction

As discussed in chapter 4, Te Ātiawa/Ngāti Awa faced rapid land alienation in the 1890s; at the same time, they supported the Kotahitanga goals of an end to purchasing, alienation through leasing only, and a Māori parliament to manage Māori lands and affairs. While the Māori Lands Administration Act 1900 did not deliver all of what they wanted, and Te Ātiawa/Ngāti Awa were reluctant to put their land under the new and untried land councils, there was hope that they would be able to save their remaining lands and benefit from the development of the Waikanae district. By the end of the 1890s, Wi Parata wanted to establish a privately-owned town to benefit from settlement. A service town would also benefit the remaining Te Ātiawa/Ngāti Awa landowners, so long as they could retain their land in the early decades of the twentieth century. After settler representations to the Government, however, Premier Seddon negotiated with Wi Parata to establish an official 'native township' under the recent Native Townships Act 1895 (see section 6.4.1 for an analysis of this legislation). The Parata native township was established on 17 August 1899 on 49 acres of Ngarara West C41. This area now forms part of modern-day Waikanae. Te Ātiawa/Ngāti Awa claims about the establishment of the township, its administration, and the alienation of township lands are discussed fully in chapter 6.

10.5.2 Key features of the 1895 native townships regime

The Native Townships Act 1895 was designed to promote European settlement in the interior of the North Island. It contained some protective elements:

- up to 20 per cent of the township could be reserved as 'native allotments';
- Māori had to be consulted about the establishment of a township on their lands (but their consent was not required); and
- the townships were intended to be a permanent endowment (all the allotments were inalienable other than by lease so as to provide a permanent income to the beneficial owners).

On the other hand, townships could be established whether Māori agreed or not, and the beneficial owners were given no role in the administration of their own township. The Crown later passed legal ownership and the trust administration of the townships to Māori land boards without consultation with the owners, any provision for Māori decision-making in the town's administration, or properly ensuring the protection of Māori interests.

10.5.3 The establishment of the Parata native township under the 1895 Act

There were some unusual features in the creation of the Parata native township in 1899 (see section 6.4).

First, as a result of the total individualisation and division of interests in 1891, the direct benefit of the township's income and reserves would only go to one person, their whānau, and later, their descendants. A number of claimant whānau would be owners today if the Crown had not allowed the sale of township lands. As found in chapter 4, the total individualisation of interests, which was forced on most owners in 1891, was in breach of Treaty principles in chapter 4. As noted, the evidence suggests that Wi Parata intended the township to service a hinterland of Māori and settler farmers, and to ensure that his people benefited from the railway and the (by then) inevitable settlement of their district. The success of these aims, however, depended on Māori retaining sufficient land.

Secondly, the Parata native township was established at a location where a great deal of land had been sold to the Crown and settlers, and leasing was also widespread. This was not the intent of the Act.

Thirdly, Wi Parata did agree to the establishment of a native township instead of his own township scheme. He also succeeded in having his planned layout for the township adopted with few amendments. There is no indication in the sources that Wi Parata's agreement was coerced. Rather, he negotiated terms with Premier Seddon. Parata's intention to transfer land to his brother, Hemi Matenga, proved to be a complicating factor, but the transfer was not completed and registered until the year after the establishment of the township. The Crown, therefore, was entitled to deal with Wi Parata.

Some aspects of the establishment of the Parata native township were, however, in breach of Treaty principles. The Crown breached the principles of partnership and active protection when it failed to work with Wi Parata to ensure that the full quantum of native allotments (20 per cent of the township) was reserved. Also, the Crown took two additional allotments as public reserves without the agreement of the owner. Finally, and most importantly, Wi Parata, Hemi Matenga, and all future beneficial owners were excluded from any role in the administration of the township once it was established, as per the statutory scheme. This was a clear breach of the tino rangatiratanga guaranteed and protected by article 2 of the Treaty. Had the township been administered in partnership with Māori, it could have developed very differently.

10.5.4 The Parata township and the enactment of the Native Townships Act 1910

The fatal blow to Wi Parata's intentions for his whānau and his people came after his death. In 1910, a new Native Townships Act stripped the statutory scheme of the elements which had been of most benefit to Māori. The Act provided for settlers to purchase the freehold of their leased allotments or to obtain 99-year, perpetually renewable leases. No provision was made in the Act for sections to be revested in the owners rather than sold or let on perpetual leases. The disadvantages of the scheme continued – the beneficial owner (Hemi Matenga) and later the beneficiaries of his will had little or no say in how the township was administered – but the advantages were gradually removed as Parata native township sections were sold off. This very significant change was introduced to the legislation without consultation with Hemi Matenga, the owner in 1910, or with Wi Parata's

whānau, or with Te Ātiawa/Ngāti Awa. Such a dramatic change to the scheme ought not to have been introduced without consultation or the consent of each township's beneficial owner(s). Wi Parata intended the township lands to be an endowment for his whānau and a permanent benefit to his people, and he agreed to the establishment of Parata native township on that basis.

This legislative change, as it applied to this particular native township, was introduced without consultation or consent and was contrary to the original agreement in 1899. It was also in breach of the principles of partnership and active protection.

We accept that Hemi Matenga was willing at the time to consider selling some sections but many of his successors were not. Tohuroa Parata and others wanted to retain ownership of the township lands.

10.5.5 Was the Crown a good trustee?

Under the Native Townships Act 1910, the trustee role was transferred from the Crown to Māori Land Boards. This was done without consultation or consent. The question arises: what measures did the Crown take to ensure that the trusteeship would be properly exercised from then on? The provisions of the 1910 Act enabled the board as trustees to sell all sections or let them on perpetual leases. In both enabling sales and transferring the trust from the Crown to the boards, however, the Crown did reserve for itself an important protective power. The consent of the Governor, as well as of both the board and the beneficial owners, would be required for every sale of a township section.

Crown counsel disclaimed any responsibility for sales after the trust was transferred to the boards, submitting that '[t]he Crown was neither involved in nor responsible for decisions to freehold the Parata Native Township lands'.[20] We do not agree because the Governor-in-Council (later Governor-General) had to consent to sales (which the Native Minister explained as a protection when introducing the 1910 Act). Also, the Crown had Treaty obligations to the beneficial owners, regardless of whether it was still the trustee at law, including obligations of active protection. Nonetheless, the Crown routinely consented to all sales of Parata native township lands, and the Hemi Matenga Estate's lawyers argued that the role of the Governor-in-Council was confined to ensuring that the legalities of consent had been observed. This was not the intent as described by Sir James Carroll in 1910, nor was it stated in the legislation.

The Crown, therefore, did not exercise a protective role in rubberstamping township sales, nor did it seek the wishes of the will's beneficiaries before giving its consent. The Crown was aware from a letter of complaint by Tohuroa Parata in 1923 that the estate trustees were not consulting the beneficiaries before agreeing to sales. Although not required by legislation, consultation was a minimum requirement the Crown was obliged to meet given Treaty guarantees. Failing to exercise its protective role properly was a breach of the principle of active protection, and the Crown's failure to consult before rubberstamping sales was a breach of the principle of partnership.

20. Crown counsel, closing submissions (paper 3.3.60), p 133

10.5.6 Hemi Matenga's will and petitions for Crown intervention

From 1912 onwards, Hemi Matenga's will authorised his estate trustees to maximise income and then liquidate all assets after the death of the last of Wi Parata's children named in the will. The Native Townships Act 1910 required the consent of beneficial owners to sales and perpetual leases, which was to be given either directly or (for more than 10 owners) by way of a meeting of assembled owners. But the beneficial ownership of the Parata township was held in the first instance by the trustees of the Hemi Matenga Estate, who routinely agreed to sales, as discussed in section 6.5. A substantial number of the whānau, led by Tohuroa Parata, petitioned the Crown in 1938 to intervene, resulting in legislation to establish a new trust and to stop the sales of the beneficiaries' ancestral lands. This was in keeping with the Crown's responsibilities as a Treaty partner.

In 1948, in response to a petition from Utauta Webber and others, the Crown agreed to introduce legislation to cancel the 'perpetual trust' established in 1941 and to restore the full terms of Hemi Matenga's will. Crown counsel submitted that '[t]he fact that the Crown acted to implement the petitioners' wishes clearly demonstrates the Crown acted in good faith and at the request of the beneficiaries themselves who sought the restrictions on alienation removed'.[21] It is not clear from the evidence whether all the beneficiaries agreed to this amendment but some of those who had petitioned for a perpetual trust in 1938 had since died.

The 1948 legislation, which was enacted at the wish of the beneficiaries, was not in breach of Treaty principles. By this time, the beneficial owners had had no control over or direct role in the township lands for almost half a century. The option of revesting the land in its owners or trustees of their own choosing was not considered by the Crown in 1948. The dominance of perpetual leases over the remaining township sections by that time must have been a factor in the petitioners' appeal to the Crown, since it was unlikely that they or their descendants would ever be able to occupy any of the sections.

10.5.7 The fate of the reserves

10.5.7.1 *The native allotments*

The native allotments, which were supposed to be a permanent endowment for the beneficial owners, were not exempted from the 1910 provisions enabling sale of all township allotments. These were sold with the consent of the Hemi Matenga Estate trustees. The only exception was the Ruakohatu urupā, which became a Māori reservation in the 1950s. The sale of these reserves, which should have been available for the permanent use of the beneficial owners, was in breach of the principle of active protection.

10.5.7.2 *The public reserves*

In respect of the public reserves, one section was set aside for a school but the Wellington Education Board obtained ownership of three other sections from the Crown, which were not supposed to have been public reserves. The township

21. Crown counsel, closing submissions (paper 3.3.60), p 133

allotments were still inalienable at the time so special legislation was passed in 1908 to grant these sections to the board, with compensation payable to the beneficial owners. The original school section was also conveyed to the Wellington Education Board at its request but, as this had been a public reserve in the original scheme, no compensation was due. The section was not actually needed for a school and the Education Board divided and sold it to a number of settlers with no compensation for the owners.

The Crown breached the principles of partnership and active protection when it decided to transfer these sections to the board, including one which was not needed for education purposes, without the consent of the beneficial owner or the Parata whānau. Three of the sections were leasable and had not been set aside for public purposes in the Parata township scheme. The fourth section was set aside for a school but instead simply sold for profit. According to the Education Board, Hemi Matenga had agreed to the transfer of two sections, but this claim was not investigated or confirmed by the Crown.

The two agreed public reserves, sections 8 and 9, were transferred by the Crown to the Horowhenua County Council in 1950. Following the original township scheme, these public reserves had been vested in the Crown but not on trust for the beneficial owner. We do not believe that there was any Treaty breach here as these sections were intended for public use and the township was close to being wound up in any case.

10.5.8 Prejudice

The Parata native township was not of great benefit to the wider body of Te Ātiawa/Ngāti Awa landowners because of the rapid alienation of their remaining lands after 1905 and the lack of Crown assistance with development capital (see chapter 5). A service town for a farming community was therefore of limited benefit to them, contrary to the expectations of Wi Parata.

In terms of direct financial benefit from reserves, this was limited to one owner initially due to the individualisation of title in 1891 (see chapter 4). Rents were sometimes not paid or were delayed, and Hemi Matenga had great problems actually convincing the Crown and then the board to pay him the rents. The beneficiaries of his will did obtain financial benefit from the township though mostly indirectly – the rents were used for investment purposes although some distributions were made.

Ultimately, the prejudice to the wider Parata whānau (the first-generation and second-generation heirs of Hemi Matenga) lay in the loss of all control and decision-making over the township and the sale of all its sections. They were prejudiced economically, culturally, and spiritually by the sale of their land without their consent and, in some cases, against their express wishes.

The beneficiaries were prejudiced by the Crown's failure to set aside a full complement of native reserves and by the sale of the two native reserves that were established, which were supposed to have been a permanent endowment.

The Crown deserves credit for enacting the 1941 legislation to prevent any more sales and include beneficiary representation in a new trust, but this was undone as

a result of the 1948 petition. The Crown acted in accordance with the wishes of at least some owners – as far as we know from the evidence, no contrary view was expressed to the Crown in 1948. The terms of Hemi Matenga's will (once restored by the legislation of 1948) inevitably resulted in the sale of the remaining township sections. The Crown was not responsible for Hemi Matenga's decisions but it was responsible for the 1910 legislation, which allowed a permanent endowment to be alienated, and for the individualisation of title, which underlay the breaking up of the tribal estate and the alienation of land by individuals without community control or consent – all to the significant prejudice of Te Ātiawa/Ngāti Awa.

10.6 Specific Claim Issues: Paraparaumu Aerodrome

10.6.1 Introduction

The claims in respect of Paraparaumu Aerodrome are addressed in chapter 7. They covered three main issues within the context of individualised title and Puketapu's significant loss of land in Ngarara West B, which is summarised in section 7.4. These issues are:

- the compulsory taking of land for the aerodrome under the Public Works Act 1928;
- the Crown's sale of Paraparaumu Aerodrome in 1995 to a privately-owned airport company; and
- the Crown's protection of Māori interests, both as Treaty partners and as descendants of the former owners, after the sale of the aerodrome lands to Paraparaumu Airport Ltd.

The Crown made two specific concessions of Treaty breach in respect of the Paraparaumu Aerodrome claims. First, the Crown conceded that the compulsory taking of parts of Ngarara West B4 in 1940 and 1943 were in breach of Treaty principles because the owners were not notified or consulted, and therefore the Crown could not have made an informed decision to take their land. Secondly, the Crown made a post-hearing concession in May 2022 about the sale of Avion Terrace land by the airport company. The Crown conceded that the 'acts and omissions of the Crown regarding the application of the offer back provisions in the Public Works Act to the land at Avion Terrace' meant that the interests of the former Puketapu owners were not 'properly considered or protected when the company sold the land'. This was a breach of Treaty principles.[22]

10.6.2 Public Works Act takings

10.6.2.1 *The 1939 takings: Ngarara West B7 2B, B7 1, and B5 (part)*

On the 1939 takings, the evidence showed that it was not necessary for the Crown to acquire the freehold or to take the land compulsorily for an emergency landing ground. Normally, land required for that purpose was leased from its owners. One of the underlying purposes of the emergency landing scheme was defence, but the documentary sources clearly show:

22. Crown counsel, memorandum, 31 May 2022 (paper 3.2.1223), pp 2–3

- the Crown decided in 1938 to acquire the freehold instead of a leasehold solely because the land was Māori-owned;[23] and
- the Crown decided to take the land compulsorily instead of by agreement solely because the land was Māori-owned.[24]

The Crown's acquisition of the freehold instead of a leasehold was discriminatory and in breach of the Treaty principle of equity, which required the Crown to deal fairly between its Māori and settler citizens. Also, article 2 of the Treaty required the Crown to protect Māori ownership of, and authority over, land for so long as Māori wished to retain it. The Crown's decision to take this land compulsorily *solely because it was Māori land* was an inversion of the article 2 guarantee and a breach of the principle of active protection.

The owners or their trustees were notified and did have an opportunity to object, which was a relatively rare occurrence in the public works regime. An objection was filed, stating that the taking was an injustice and asking the Crown to take a lease instead. The Minister replied that, 'as a considerable amount of work will be carried out by the Government on the land, and for other reasons, it is essential that the freehold be acquired'.[25] Historian Heather Bassett pointed out that the kind of work needed to prepare an emergency landing field (thus requiring the freehold) was in reality little different from the work a lessee would carry out to prepare the land for farming.[26] Although the 'other reasons' were not explained by the Minister, the evidence is clear that the Crown's usual approach was to lease emergency landing grounds, and the only reason for acquiring the freehold in this case was because it was Māori land. The Crown was not prepared to change its mind on this when a trustee for some of the owners objected and offered a lease instead, which compounds the breach.

On the specific issue raised about Kaiherau Takurua, who did not have 'legal capacity to make decisions',[27] the failure to obtain the views of her whānau was a breach of the principle of partnership. The compulsory taking of ancestral land was an extreme step, which affected not only the immediate owner(s) but all the generations to come. It was not sufficient for the Crown to notify the Native Trustee and rely on any objections that the Trustee might make.

Although monetary compensation was paid at the time, and there was some negotiation with the owners' representatives in reaching out-of-court agreements for two of the three blocks, the owners of these blocks (and their hapū community) were prejudiced by the loss of this land.

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23. Minute for land purchase officer, 11 August 1938 (Heather Bassett and Richard Kay, papers in support of 'Public Works Issues' (doc A211(c)), Rawhiti Higgott folder, IMG2544)

24. G Wakelin to under-secretary, 12 October 1938 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5286)

25. Minister of Public Works to P H Taylor, 20 January 1939 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), Archives New Zealand folder, DSCF5272)

26. Transcript 4.1.18, p 727

27. Claimant counsel (D Stone, J Lewis, and K Davis), closing submissions, 24 October 2019 (paper 3.3.54), pp 16–17

10.6.2.2 *The 1940 taking: Ngarara West B4 (part)*

The Crown has conceded that the compulsory taking of Māori land in 1940 was in breach of Treaty principles because the owners were not notified, even though the Crown had actually identified them. Thus, the owners had no opportunity to 'express their view as to whether they were agreeable to the taking or not', and 'the Crown could not have made an informed decision without taking account of the owners' view'. Further, the Crown's 'failure to engage with the owners may have significantly damaged the interests of the owners in terms of achieving adequate compensation (presuming that the reason they were not present at the compensation hearing was because they were not aware of the taking)'.[28]

This concession of Treaty breach is appropriate. The owners were not notified because of section 22(3) of the Public Works Act 1928, which provided that it was not necessary to notify 'any Native who is an owner or occupier of the land or has an interest therein unless his title to the land is registered under the Land Transfer Act, 1915'. This subsection of the Act was in breach of the principles of partnership and equity, and it was applied to Ngarara West B4 in 1940 even though the owners had been identified. Those owners were clearly prejudiced by the use of the application of this subsection, which deprived them of the right to be notified and file an objection which was available to all owners of European (later general) land.

Further, the Crown had no valid reason for acquiring this piece of Ngarara West B4 at all, let alone by compulsion (see section 7.5.3 for the details). The Crown's justification for taking the land – and such a large area of land – was indefensible and in breach of the principle of active protection, especially since the owners were not consulted or involved in any way in the deal that the Crown negotiated with the lessees.

10.6.2.3 *The 1943 taking: Ngarara West B4 (part)*

The Crown conceded that the taking of land compulsorily from Ngarara West B4 in 1943 was in breach of Treaty principles. This was because there was a 'complete absence of consultation with the owners', who had a 'right to be informed of the Crown's intention to take the land and to have an opportunity to express their view as to whether they were agreeable to the taking or not'. Thus, the Crown could not have made 'an informed decision without taking account of the owners' view'.[29] The Crown noted that there was negotiation with the lessees but this did not 'remedy this breach'.[30]

We agree that this compulsory taking was a breach of the principles of partnership and active protection, and that the loss of this land prejudiced its owners.

The Crown submitted that the department's negotiations with the lessees did not remedy the Crown's failure to consult the owners. We would go further and note that for this taking, the 1940 taking, and the 1939 takings, the Crown recognised the lessees' authority over the land rather than that of the owners, negotiating with

28. Crown counsel, closing submissions (paper 3.3.60), pp 70–71
29. Crown counsel, closing submissions (paper 3.3.60), pp 72–73
30. Crown counsel, closing submissions (paper 3.3.60), p 73

them prior to the takings in every instance, in stark contrast to the way in which the owners were treated. This was a breach of the article 2 guarantee of tino rangatiratanga and the principle of equity. The owners' mana and interests were prejudicially affected by this breach.

10.6.2.4 *The 1949 taking: Ngarara West B4 (part)*

Another piece of land was taken compulsorily from Ngarara West B4 in 1949. As in 1939, the Crown took this land compulsorily because it was Māori land. The Crown negotiated with the lessees but not the owners. The Ministry of Works consulted the Māori Affairs Department, which advised: 'There seem to be no reasons of policy or expediency why this land should not be taken, particularly as the owners are absentees and the land is leased.'[31] Neither department consulted the owners, although three of the four owners were at least notified and given an opportunity to object. Compensation was delayed for three years but the owners do not appear to have been prejudiced by the brief delay.

We find that the taking of this land compulsorily because it was Māori land was in breach of the article 2 guarantee of tino rangatiratanga and the principles of equity and active protection. The failure to deal directly with the owners while nonetheless dealing with the lessees and the Māori Affairs Department was a breach of the partnership principle. We accept the Crown's point, however, that no objection was filed.

The owners were prejudiced by the loss of this land but there was potential for the situation to be remedied by a low-price or no-price offer back of the land once the Public Works Act 1981 was enacted.

10.6.2.5 *The 1954 taking: Ngarara West B7 2C (part)*

About five acres of Ngarara West B7 2C were taken by agreement from the Māori owner, who wanted to subdivide his land for residential purposes but was aware of the Ministry's plans to expand the aerodrome. The owner pressed this sale on the Crown so that he could obtain certainty for the subdivision but also because of the urgent need to pay rates arrears. It is important to note that the Crown negotiated an agreement rather than taking the land compulsorily partly because the owner wanted to sell, but also because the Ministry did not realise until late in the negotiations that the land was Māori land.

Compensation was agreed by the parties in an out-of-court agreement, and there were no Treaty breaches in respect of this taking of land by agreement.

10.6.3 Privatisation options and the sale of the aerodrome in 1995

10.6.3.1 *Consultation*

The Crown accepted in 1993 that it had a Treaty obligation to consult. Its view at that time, however, was that there was a 'clear distinction between the Crown's obligations under the Treaty of Waitangi and the rights of [the former owners and

31. Under-secretary, Māori Affairs, to commissioner of Works, 14 July 1948 (Bassett and Kay, 'Public Works Issues' (doc A211), pp 371–372)

their successors] under the Public Works Act'.[32] The Department of Survey and Land Information (DOSLI) had advised the Ministry of Transport that most of the Paraparaumu Aerodrome lands would need to be offered back in the event of an open market sale. This was because of the 'highly coercive nature in which Paraparaumu land was compulsorily acquired from previous owners'.[33] The Ministry did not consider the significance of this point in terms of Treaty obligations to the former owners (who could and did later file claims), despite a number of Tribunal reports at the time which found Treaty breaches in respect of compulsory takings.[34] Rather, the Ministry insisted that there were neither legal nor Treaty obligations for it to consult with the former owners or their local hapū, Puketapu.[35]

As a result, the Crown's consultation was deficient because it focused solely on whether the aerodrome lands were so significant to iwi claimant groups that other compensation would not suffice, even though the chair of Ati Awa ki Whakarongotai Inc repeatedly advised the Crown to consult with the former owners. The Crown's conduct in this respect was not consistent with the principles of partnership and active protection.

The airport claimants in this inquiry were prejudiced because the Crown did not engage with their representatives in detail until it was too late. As a result, the Crown had not informed itself as to their views about the disposal of the aerodrome, possible ways of involving them in the future ownership of the aerodrome, or whether they intended to file a claim with the Tribunal. Nor did the Crown offer them an option of tendering for the aerodrome as part of its limited tender process, as we discuss further below.

10.6.3.2 *Options for disposal*

The Ministry of Transport and various other Government departments, including DOSLI and Manatū Māori, debated various ways of disposing of the Crown's aerodromes in the period from 1989–1993.

DOSLI advised the Ministry of Transport that most of the Māori land had been taken compulsorily and would need to be offered back if Paraparaumu Aerodrome was sold on the open market. As a result, the Ministry advised Cabinet in July 1991 that the aerodrome should be disposed of by setting up a Crown-owned airport company and selling the shares, which would enable the Crown to avoid triggering an offer back. Other options were raised:

32. Nigel Mouat to D M Howden, 23 May 1995 (Nigel Mouat, papers in support of brief of evidence (doc G7(c)), pp 15–16)

33. 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 22–23)

34. Waitangi Tribunal, *Te Maunga Railways Report* (Wellington: Legislation Direct, 1994), pp 68–71; see also 'Report of the Controller and Auditor-General' (Mouat, papers in support of brief of evidence (doc G7(a)), pp 21–22).

35. Niget Mouat to D M Howden, 23 May 1995 (Mouat, papers in support of brief of evidence (doc G7(c)), pp 15–16)

- Manatū Māori raised concerns about land taken for the public good being used for private profit unless the former Māori owners could also benefit from it. Manatū Māori suggested returning the land to Māori and then leasing it to the airport company. The Ngahina Trust also proposed this option to the Crown, but the Minister of Transport did not recommend it to Cabinet.
- Manatū Māori proposed inserting a memorial scheme in the Airport Authorities Act 1966 so that the land could be used in the settlement of Treaty claims if recommended by the Tribunal, which the Minister also advised against in recommendations to Cabinet.
- Establishing a State-owned enterprise (SOE) – this option was selected in 1991 without consultation, although the SOE would have memorials on the title, and the Crown would also made offer-back decisions under the Public Works Act for SOE lands. But this option failed because the SOE would not have been economically viable so this option was abandoned in 1993.

After the SOE option was abandoned, Cabinet reverted to the option of establishing a Paraparaumu airport company and privatising it through selling 100 per cent of shares. In order to keep the aerodrome in operation after sale (but only for so long as commercially viable), Cabinet chose a limited tender to aerodrome users or other local groups. The Crown did not consider the possibility of including the former owners or their hapū as an interested 'local group' in the tender process. By the time Te Whānau a Te Ngarara realised in 1995 that they could not stop the sale and would need to get involved with airport 'users' in submitting a tender, it was already too late. The auditor-general's inquiry in 2005 was critical of the Ministry on this point.

Thus, the Crown chose not to make some form of arrangement that allowed the former Māori owners to benefit from the commercialisation of the land acquired from them (mostly compulsorily) for the public good. (The question of whether the descendants of the European owners would also have had to be included would have been a matter for the Crown to consider.) Also, the Crown declined to introduce a memorial scheme into the legislation, the usual safeguard to ensure that the land could be returned in a Treaty settlement, and its reasons for declining to do so were insufficient (see sections 7.6.4, 7.6.5, and 7.6.7). The Crown therefore failed to choose a Treaty-compliant option, in breach of the principles of active protection and redress.

The transfer of land to the MetService in 1993 is an exception to this finding.

10.6.3.3 *Surplus land prior to sale that could have been offered back*

It is not our role to make a legal determination as to whether there was surplus land that should have been offered back prior to the transfer of the aerodrome to the airport company in 1995. That is a matter for the courts. Nor is it necessary to do so for the purposes of this inquiry. Instead, we rely on what the Government itself said at the time about whether land was surplus. Landcorp (1989), the Minister of Transport (1991), Treasury (1993), the Minister of Finance (1993), the Minister for State-Owned Enterprises (1993), and the sale project group (1995) all

said that there was surplus land at Paraparaumu Aerodrome (see section 7.6 for the details). In addition, the Avion Terrace house sites had been declared surplus back in 1983 (though almost no tenants wanted to buy at that point).

When, however, Te Whānau a Te Ngarara realised that they could not stop the sale or put in a bid themselves, they appealed to the Ministry in 1995 to offer back the surplus land before the sale was completed. The Ministry of Transport refused to do this because the aerodrome was to become a privately-owned business, and commercial decisions about land use would need to be made by the owners of that business. Essentially, the Crown was not willing to take the risk that returning surplus land would make the airport company unviable and lead to closure. But that does not change the protection inserted in the Public Works Act in 1981 that land should be offered back when no longer needed for a public work, a protection that was considered necessary in light of the coercive nature of public works takings. We have found those compulsory takings to be in breach of Treaty principles. The Crown had already sidestepped the public works offer-back obligations for the whole of the aerodrome lands, using section 3A(6A) of the Airport Authorities Act to ensure that it could do so. In that context, the Crown's avoidance of its obligation to offer back surplus land as well was significant.

The Crown's failure to carry out its section 40 obligations prior to the sale was a breach of the principle of active protection, and the claimants were prejudiced thereby. We cannot predict whether the Crown would have offered land back in 1995 – the Crown may have taken advantage of one of the statutory exceptions to offering land back. But the Crown owed it to its Treaty partner to make a section 40 decision whether to offer land back.

10.6.4 The Crown's protection of Māori interests after the aerodrome sale

10.6.4.1 *Section 3A(6A) of the Airport Authorities Act and the sale of land at Avion Terrace*

Section 3A(6A) of the Airport Authorities Act 1966 was inserted in 1992. It stated:

> Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to an airport company under this Act, but sections 40 and 41 of that Act shall after that transfer apply to the land as if the airport company were the Crown and the land had not been transferred under this Act.

From 1995 to 2020, this was interpreted by the Crown as having transferred its section 40 obligations to the company; that is, the company had the responsibility to decide whether land was surplus and should be offered back. Interpreted in this way, section 3A(6A) did not protect the interests of the former Māori owners' successors, either at the time of the sale of Avion Terrace land in 1999 or subsequently.

The Crown changed its interpretation of this section in 2020, specifically in respect of the company's sale of land at Avion Terrace (the reasons for the change of position are set out in section 7.2.5). The Crown's new position is that it had retained the responsibility for section 40 decisions after the land was transferred to the company. The Crown therefore conceded that, in the company's sale of

Avion Terrace, the Crown 'failed to take appropriate action to ensure the protective mechanisms in section 40 of the Public Works Act, which protect the former owners' interests, were fulfilled'. The Crown also conceded that its acts and omissions regarding the application of section 40 to the land at Avion Terrace meant that the former owners' interests were not 'properly considered or protected', in breach of Treaty principles.[36]

The question of whether the Crown is correct in its new interpretation of the Act has not been considered by the courts. If the Crown is not correct, then our view is that the Crown failed to ensure that it retained oversight or the ability to enforce section 40 obligations, and then failed to correct this omission after the sale of Avion Terrace as well. Either way, the Crown's acts and omissions were in breach of the principle of active protection.

We cannot know whether the Crown would have offered back the Avion Terrace land if it had exercised the section 40 responsibilities in 1999, but we are satisfied that the claimants were prejudiced by the Crown's acts and omissions in respect of Avion Terrace.

10.6.4.2 *Section 3A(6A): the search for remedies after the sale of Avion Terrace, and the question of whether additional land has become surplus*

Following the sale of Avion Terrace, the claimants conducted a long campaign to get the Airport Authorities Act amended and to get the return of land that they (and the Crown) considered had demonstrably become surplus to airport requirements.

Te Whānau a Te Ngarara made representations to Ministers in 1999–2000 and were advised by the Minister in Charge of Treaty of Waitangi Negotiations that their only remedy was to take legal action against the company. After the loss of their High Court case in 1995 and the award of costs against them, they were highly reluctant to take that path. Instead, they embarked on a campaign to get the law changed, including submissions to select committees and joining in with a petition to Parliament. They also gave evidence in the auditor-general's inquiry, which followed on from the select committee inquiry into the 2002 petition. The details of their campaign for law reform and redress are set out in sections 7.6.3–7.6.6. None of these efforts were successful because the Crown declined to introduce specific amendments to the Airport Authorities Act 1966 (including in response to the 2004 select committee recommendations). Instead, from 2000–05 the Crown preferred to see the necessary law change carried out through a general reform of the Public Works Act.

The Crown did accept at the time that the law would need to be amended to fix the perceived 'compliance and enforcement shortcomings of legislation divesting Crown-owned works to private providers'.[37] Reform options to deal with the perceived issue of oversight and enforcement were included in the consultation

36. Crown counsel, memorandum (paper 3.2.1223), pp 2–3

37. Acting Minister for Land Information to Minister of Transport, 12 July 2000 (Bassett and Kay, papers in support of 'Public Works Issues' (doc A211(c)), NZTA folder, IMG2030)

on the review of the Public Works Act. As a result of that process, the Minister for Land Information proposed a series of reforms, including the establishment of a 'central agency to make rules for consistent use of the new legislation by the Crown, local authorities and requiring authorities, and provide for monitoring and auditing', and 'registration of any offer back obligation on the title to the land'. Also, the Crown would make offer-back decisions for land transferred from the Crown to private providers.[38] When Cabinet decided to defer the public works reforms in 2005, nothing more was done by the Crown on this matter until very recently.

The terrible irony is that, according to the Crown's new position on the meaning of section 3A(6A), none of this work was necessary in the first place because the Crown was already responsible for Public Works Act decisions in relation to Government works.

At the same time as Te Whānau a Te Ngarara pursued legislative remedies, they and some other groups representing descendants of the former owners objected to zoning changes that indicated commercial development of the airport would occur without any offer back of land. On the earliest application for zoning changes, the Crown also objected on the grounds that 52 hectares of land were demonstrably surplus and should be offered back to the former owners' successors. Neither the Crown nor the claimants were able to convince hearing commissioners that this was an RMA matter. As we see it, the Crown ought to have exercised its Public Works Act responsibilities under section 40 and made an offer back of the land that it considered to be surplus on the basis of the airport company's commercial development plans, such as the land to be rezoned as residential.

When the issue arose again with further zoning change applications (followed by significant commercial development of land by leasing instead of sale), the Crown declined to get involved. Again, we consider the Crown's position that it is responsible for all Public Works Act decisions for Government works required it to intervene as requested, although we did not receive any details as to the settlement that the Crown was being asked to get involved with in 2009–2010 (see section 7.7.8).

The Crown's omissions following the sale of Avion Terrace have breached the principles of active protection and partnership; the Crown failed to work with the claimants to provide a remedy and failed to provide a remedy of its own, despite having acknowledged in 2000–05 that a remedy was necessary. The claimants have been prejudiced by the Crown's Treaty breach. They eventually gave up hope and accepted a private settlement (the terms of which are not relevant or known to the Tribunal). The Crown's recent change of position indicates that a remedy may not have been necessary after all because the Crown was responsible for section 40 decisions all along. This adds further depth to the Crown's omissions, especially

38. Cabinet paper, 'Reviews of the Land Act 1948 and Public Works Act 1981: overview', undated (February 2005) (Crown counsel, documents provided in response to questions from the Tribunal (doc G7(f)), pp [17], [21]–[22])

since the Crown argued strongly in 2000 that 52 hectares of airport land had become surplus and should be offered back.

We accept that, if the Crown had exercised the section 40 responsibilities in 2000 or at any other time, it is possible that the land may not have been offered back – the Crown may have found that it was impracticable, unreasonable, or unfair to offer any land back. The uncertainty of the outcome does not mitigate the Crown's Treaty breach. It does highlight, however, that there may have been issues about the offer-back provisions of the Public Works Act itself.

10.6.4.3 *Did section 40 of the Public Works Act 1981 provide sufficient protection?*

Following the review of the Public Works Act in 2000–03, the Crown accepted that significant reforms were required to ensure that the Crown's Treaty obligations were recognised and met in the public works regime. This would have required a Treaty clause in the Act (among other things). The Crown also considered that it was necessary to strike a better balance between the rights of former landowners whose land had been taken compulsorily and the public good. Matters had also been complicated by corporatisation and privatisation with no corresponding amendments to the Public Works Act 1981. In terms of the adequacy of section 40 to protect the rights of former individual Māori landowners, their descendants, and their hapū, the Minister for Land Information proposed to Cabinet in 2005 that the offer-back provision should apply to all generations of successors for Māori land, and – if they were unable to repurchase it – then there would be a second offer back to the hapū. Also, the Minister proposed to tighten up the transfer of land to another public work without offer back and the statutory exceptions to offer back (which are extremely broad), so that the only exception to offer back in the case of surplus land would be that it was impracticable to offer the land back. Unfortunately, these reform proposals were abandoned when the whole of the Public Works Act reforms were deferred and ultimately discontinued for reasons unknown.

The claimants argued strongly that section 40, especially its limitation of offer-backs to immediate successors, was inconsistent with tikanga and the principles of the Treaty. The Crown did not make any concessions about section 40 but submitted in January 2020 that the Crown was developing proposals to amend the Public Works Act. These proposals would (among other things) 'improve offer-back processes' by 'ensuring that proposals seek to protect the interests of former owners of Māori land, promote participation of Māori throughout the offer-back process and ensure that the offer-back process is clear and easy to understand'.[39] The proposed amendments would also improve the regime by giving a 'better chance for whānau, hapū and/or iwi to regain ownership of their whenua'. This in turn would 'improve their ability to realise their cultural and economic aspirations regarding their whenua and will align the regime more towards the principles of Te Ture Whenua Māori Act 1993'.[40] But the proposals were in the early development stage,

39. Crown counsel, supplementary closing submissions, 22 January 2020 (paper 3.3.62), p 13
40. Crown counsel, supplementary closing submissions (paper 3.3.62), p 13

no details could be provided, and – as far as we are aware – no proposals have yet been put out for consultation.

In our view, the Crown has essentially admitted in this inquiry that there is a need to better align the Public Works Act with Te Ture Whenua Māori Act and improve offer-back arrangements for not just individual owners but 'whānau, hapū and/or iwi'. This accords with the need seen by the Crown for significant reforms to the offer-back provisions back in 2005. We conclude, therefore, that the Crown was, and is, aware that the Public Works Act offer-back provisions are not consistent with Treaty principles. Certainly, our finding is that those provisions are not consistent with the principles of the Treaty, and that the claimants have been significantly prejudiced by the deficiencies of section 40 of the Public Works Act, the lack of a Treaty clause in the Act, and the Crown's failure to implement timely reforms. If the Crown had proceeded to legislate for at least some of the reforms proposed by the Minister in 2005, the situation of the claimants would have been greatly improved prior to their private settlement with the airport company in 2012 (which instead was restricted as the law required to successors in title). We make no comment on that private settlement, which was made without prejudice to the ability of the claimants to have their claims heard and reported upon.

Finally, the issue of when land is to be considered surplus is currently governed by the provisions of section 40. There are no criteria in the Act other than that the land is no longer needed for the public work for which it was taken or for any other public work. In this inquiry, the Crown's position was that land can be developed for commercial purposes unrelated to airport requirements if that development is necessary to keep the airport commercially viable and therefore operational. As a result, the Crown's position in this inquiry was that no land has become surplus since the sale of Avion Terrace, in contrast to the Crown's position back in 2000–01 when it objected to the company's application for a zoning change.

On this issue, it is important to note that Ministry officials gave assurances to Te Whānau a Te Ngarara that the company would have to offer land back if it (a) decided to sell it or (b) stopped using it for airport purposes; no suggestion was made at that time that land would not have to be returned if its commercial development was done by lease instead of sale and was needed to keep the airport commercially viable, which the Crown was later to contend.

The Minister for Land Information's reform proposals in 2005 included an amendment so that land could only be considered surplus if the land-holding authority decided to dispose of it. This would fit well with the Crown's position in this inquiry, but the Minister was conscious of the need not to make repurchase unaffordable because of commercial development and improvements. The possibility of discounts or a requirement that improvements be removed was mooted, although the Minister advised Cabinet that no blanket provision to this effect could be introduced (see section 7.6.6.2 for the details). In our view, this underlines the need for reform on this complex issue, and we note – as stated by the Minister in 2000 – that privatisation was not anticipated in 1981. The new private providers operating as a business are an overlay on the provisions of the Public Works Act. The Minister's observation is very apt in our view, and we agree with

Crown counsel that it is necessary to realign the Public Works Act to better protect Māori land and to better provide for the return of that land to Māori when it is not needed for a public work.

We make a recommendation about this important issue in section 10.9.

10.7 Specific Claim Issues: Waikanae River

10.7.1 Introduction

Specific claim issues about the ownership and control of the Waikanae River are discussed in chapter 8. This does not include coverage of environmental issues or other waterways, which will be addressed in a later volume of the report.

The Waikanae River is a 'highly valuable taonga' to Te Ātiawa/Ngāti Awa.[41] The claimants argued that the Crown had deprived them of ownership and control of the river through the operation of the native land laws, compulsory takings for river control purposes, and the vesting of control in 'a number of public bodies', including the Manawatu Catchment Board. Further, they argued, the Crown has made 'no attempt to ensure ownership and control of the Waikanae River should remain or, once lost, be returned' to Te Ātiawa/Ngāti Awa ki Kāpiti.[42] The Crown responded that the catchment board was not an agent of the Crown, and that Māori interests in the Waikanae River have been recognised at the local level since 1989, citing the Waikanae Floodplain Management Plan and the Waikanae ki Uta ki Tai project as examples. The Crown did not respond on the ownership issue, although its concession on individualisation of title was relevant to the claims about the river.

10.7.2 Ownership and control: the form of title available under native land laws

The Crown accepted that the native land laws 'did not provide for the legal recognition of the full range of complex and overlapping traditional land rights previously held by Māori'.[43] In the case of the Waikanae River, the Crown failed to provide a special form of collective title for rivers that are tribal taonga, nor did it provide a form of title that could encompass a river as an indivisible water body made up of bed, banks, and water. Instead, the bed of the river was included in the riparian land titles through the use of right-line survey boundaries when title to Ngarara West was divided into multiple, individually owned blocks under the Ngarara and Waipiro Further Investigation Act 1889.

The Crown's failure to provide an appropriate form of title and the consequential division of the riverbed into individual parcels along with the land was a breach of the article 2 guarantee of tino rangatiratanga over taonga. It was also a breach of the principle of active protection, which required the Crown to actively protect

41. 'Whakarongotai o te moana, Whakarongotai o te wā: [Draft] Kaitiakitanga Plan for Te Āti Awa ki Whakarongotai' (Mahina-a-rangi Baker, papers in support of brief of evidence (doc F11(a)), p 35)
42. Claimant counsel (D Jones), closing submissions, 24 October 2019 (paper 3.3.49), p 33
43. Crown counsel, closing submissions (paper 3.3.60), p 29

the relationship of the iwi to their taonga and the possession of their taonga for so long as they wished to retain it.

The claimants were prejudiced because they lost possession of the riverbed, which was legally transferred to individual owners and alienated along with the land. This in turn led to issues of control of the river's resources and access to the river and its resources, which have further prejudiced Te Ātiawa/Ngāti Awa. It is clear from the Ngarara West rehearing and subdivision hearing in 1890–91 that the iwi never intended to relinquish their customary rights to the river. They have continued to assert and exercise those rights since 1891, to the extent that they were able to after the issue of title by the Native Land Court and the alienation of riparian blocks out of individual Māori ownership.

10.7.3 Control and ownership: flood protection works and riparian takings

Control of the river was further undermined by local government, particularly the establishment of the Manawatu Catchment Board and the Soil Conservation and Rivers Control Council. This council and the Minister approved a flood control scheme that included a plan to acquire the riverbed. Māori were not consulted, as far as the evidence available to us suggests. Further, the Soil Conservation and Rivers Control Act 1941 enabled the board to acquire any estate or title, including leasehold instead of acquisition of the freehold. It was also open to the board to make an agreement or attempt to purchase the freehold if an agreement over fencing or riparian planting could not be reached. The board did purchase European (later general) land and deal personally with the owners of that land but made no attempt to do so for any of the few remaining pieces of Māori riparian land on the lower stretches of the Waikanae River.

In section 8.4, we set out the details as to how the Minister approved the compulsory takings of Māori land. In each case, taking advantage of the power accorded by section 22(3) of the Public Works Act 1928, the board took the Māori land compulsorily without notifying the owners or giving them an opportunity to object, in contrast with how the European land was taken when agreement to sell could not be reached. The 1962 amendment to the Public Works Act disempowered Māori owners further by taking away any rights or opportunity to be involved in the process to agree the compensation for their land unless it was held in sole ownership. The Minister of Works approved all these takings, as was required under the Soil Conservation and Rivers Control Act 1941.The council, which had senior Crown officials among its members, also approved the takings and the amounts of compensation.

In respect of the takings of Māori land for flood protection works, therefore, the Public Works Act 1928 and the Public Works Amendment Act 1962 were in breach of the principles of active protection and equity. The owners of Māori land were denied the rights accorded the owners of European/general land to be notified of the intention to take their land, to lodge an objection, to negotiate compensation, and to appeal to the Land Valuation Court if an acceptable agreement was not reached. The owners of Māori land did have some role in determining

compensation for the pieces of riparian land taken prior to the law change in 1962. The Māori owners were prejudiced by this unfair and discriminatory process.

Also, the principle of equity was breached by the denial of the opportunity to negotiate a sale, which was made available to most of the owners of general/European land as an alternative to compulsory taking. This discriminatory approach was approved by the Soil Conservation and Rivers Control Council and the Minister when they approved the takings, and the Māori owners were prejudiced thereby. It is difficult to see that the board needed to obtain the freehold at all, given the primary objective was to protect the fencing of riparian planting, but there was no discrimination on this point.

As noted, the Crown argued that the lack of control (which had been delegated to the board) was ameliorated after the local government reforms of 1989, with the examples of the Waikanae River floodplain management plan and the Waikanae ki Uta ki Tai project as evidence of a significant improvement in this matter.

There is no doubt that the situation has improved significantly since the 1980s, prior to which Te Ātiawa/Ngāti Awa were excluded altogether. The requests of Te Ātiawa/Ngāti Awa for something more than consultation, however, do not appear to have been met in the management of the river. We agree that DOC's Waikanae ki Uta ki Tai project intended to operate on a co-governance basis, but that project was only in the very early stages at the time of the hearings. The Crown has agreed to the inclusion of co-governance arrangements for some rivers in Treaty settlements and that may potentially be available to Te Ātiawa/Ngāti Awa. But the RMA's provision for joint management agreements (2005) or the delegation of authority to iwi (1991) have not been acted upon for Te Ātiawa/Ngāti Awa ki Kāpiti.

10.8 Specific Claim Issues: Waikanae Town Centre and the Hemi Matenga Memorial Park

10.8.1 Introduction

In chapter 9, we address specific claims issues in respect of:

- the establishment of the Waikanae town centre in the 1960s;
- the establishment and governance of the Hemi Matenga Memorial Park (which is now on the outskirts of Waikanae); and
- landlocked land adjacent to the park, which only has legal access along the ridgeline separating these blocks from the park.

10.8.2 Waikanae town centre

The establishment of the Waikanae town centre involved the council's rezoning of land as commercial, using the powers accorded to it under the Town and Country Planning Act 1953 and a district scheme established under that Act. The claimants were particularly concerned about the rezoning of the Parata homestead, the Mahara boarding house section, and the Mahara Tamariki homestead, and the impacts of zoning on their papakāinga and marae. The Crown responded that it was not responsible for the decisions of county councils but rather for the statutory framework which governed council decision-making.

The 1960 Waikanae section of the district scheme and the later revised district scheme took no account of Māori interests, the very small amount of Māori land remaining in Waikanae, the effect that zoning land as commercial would have on Māori land (including the historically important homesteads), or even the existence of the marae and papakāinga on what was zoned to be the town/commercial centre. These flaws in the district scheme and the revised scheme were only possible because of the serious flaws in the Town and Country Planning Act 1953. We agree with the findings of the Tauranga Tribunal that the Act was in breach of Treaty principles because it:

- provided no specific protections for Māori or Māori interests, a matter of 'critical concern' in situations where only limited Māori land was retained;
- did not require consultation with Māori or representation (apart from the requirements for the general public); and
- did not require local authorities to take into account the traditional and cultural uses of Māori land in rezoning decisions or planning documents.[44]

In particular, section 47 of the Act, which allowed Māori land to be taken compulsorily for redevelopment and resale for the purposes of a district scheme, was in breach of the Treaty because it allowed land to be taken for very wide-ranging purposes simply because a council had promulgated a district scheme. In conjunction with the Act's failure to require Māori interests to be considered or protected, its failure to provide for consultation with Māori or Māori representation in the decision-making, and its failure to require consideration of Māori cultural values in town planning, this wide-ranging power was inconsistent with the principles of partnership and active protection. In the case of Mahara Tamariki, a notice of intention to take the land meant that the purchase was carried out under the shadow of compulsion, and cannot be considered a voluntary sale of this homestead land.

The claimants were prejudicially affected by the rezoning of parts of their papakāinga as commercial, which was an important factor in the alienation of sections adjacent to the marae (including the 1962 sale of the Parata homestead). The claimants were further prejudiced by the decision to put the town centre on top of the papakāinga, which led to further alienations, compulsory takings, and – ultimately – the difficulties posed for Whakarongotai Marae by the establishment of shops and carparks on its doorstep. Among the prejudicial effects, the iwi have been significantly impeded in their ability to undertake the cultural practices associated with tangihanga, in particular the mourning procession of the deceased and whānau from the marae to the burial site.

We accept that there was negotiation with the marae trustees concerning the exchange of land and the service lane in 1969 and the early 1970s, although the discussions were circumscribed by the decisions already taken on zoning for commercial purposes and the establishment of service lanes. In 1975, a parliamentary committee was 'highly critical of the Crown's town and country planning regime,

44. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 403–404

which it said had "not provided protection for marae but . . . frequently permitted development and use on adjacent land which have been detrimental to the function, value, and character of many marae throughout the country"'.[45] This was certainly the case for Whakarongotai Marae.

In sum, the Town and Country Planning Act 1953 was in breach of the principles of partnership and active protection, and the claimants were prejudiced thereby.

On the issue of the park and ride carpark (see section 9.2.6), we suggest that the Crown should investigate this matter with the regional council.

10.8.3 Hemi Matenga Memorial Park

The Hemi Matenga Memorial Park, which overlooks Waikanae township from the steep slope to the east, is an important taonga for Te Ātiawa/Ngāti Awa. The 805-acre park is vested in the Crown and is managed by the Department of Conservation (DOC). Claimant issues about the park revolved around two key points: the Crown's acquisition of the land for the park, which they claimed was in breach of the Treaty, and their exclusion from the governance and day-to-day management of the park. The Crown denied that there was any Treaty breach in the gifting of the park land to the Crown by the Hemi Matenga Estate trustees, which was done as a reserve contribution under the Land Subdivision in Counties Act. The Crown also denied that there had been any obligation to pay Hemi Matenga's beneficiaries for this land. On the issue of governance, the Crown argued that this could be considered during Treaty settlement negotiations.

Our analysis of the Crown's decision to accept the Hemi Matenga Estate trustees' offer of 720 acres for a scenic reserve is set out in section 9.3.4. The Crown acted reasonably in accepting the accommodation that the estate trustees wanted in respect of reserves contributions for subdivisions. It might have been possible for the Crown to call a meeting of assembled owners to discuss the proposal and ensure that it was supported by the beneficiaries of the estate, but this would have been unorthodox and open to legal challenge from the trustees. It was entirely within the discretion of the Crown, however, as to whether it would accept without payment an additional 759 acres on top of the 46 acres required as a reserve contribution under the Act, as calculated by the Assistant Commissioner of Crown Lands. The evidence shows clearly that the Crown would have had to have acquired the bushland anyway if the trustees had arranged the usual reserves contribution instead. Further, the Crown got an even better bargain than expected, since the Crown obtained 805 acres instead of the 720 acres offered by the trustees. Also, the reserves contribution for the Hemi Matenga Estate turned out to be substantially less than 46 acres. The Crown did not reconsider the agreement when either of those facts came to light.

Thus, it was inconsistent with the principle of active protection for the Crown to have made what it considered a 'very good bargain' at the expense of the

45. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, vol 1, p 336

beneficiaries of the Hemi Matenga Estate, who had no say whatsoever in the offer of this land at no cost to the Crown.

The issue of prejudice is complicated. The assistant Commissioner of Crown Lands argued that the estate (and therefore the beneficiaries) got a good bargain in financial terms because it kept valuable land for subdivision that would otherwise have been required for reserves contributions. In reality, the Crown acquired much more land at no cost than it should have done. In addition, Māori lost control of the bushland and the ability to act as kaitiaki of this precious remnant of the lowland forests. They had remained kaitiaki while the land was an undivided part of the estate but once it was separated out and transferred to the Crown, their ability to act as kaitiaki was lost. Thus, the claimants have been prejudicially affected in spiritual and cultural terms as well as financially.

The Crown could have compensated to some extent by placing control and management of the reserve under a board with Māori members, as it did for the Lake Horowhenua domain board (see the *Horowhenua* volume of this report). At the time of hearing DOC evidence in 2019, the Crown had still not used the legislation available to it to include Māori representatives in the governance and management of the Hemi Matenga Memorial Park. This is disappointing and does not live up to the spirit of the agreement signed with Māori rangatira in February 1840. DOC has consulted from time to time on operational matters such as pest control since 1995, and has consulted on the conservation management strategy (which is outside the scope of this phase of the inquiry). But this does not equate to the exercise of tino rangatiratanga and kaitiakitanga in respect of the reserve. We accept that DOC was not aware of some of the claimant dissatisfaction about the reserve's management, or the wish for co-management of the reserve and/or the return of ownership, prior to these hearings.

The prejudice created by the Crown's Treaty breaches has been mitigated to some extent by the Crown's preservation of the bush in the reserve. This was what Wi Parata ultimately intended when he offered to gift it to the nation under arrangements requiring a special Act of Parliament (see section 9.3.4). What is missing is the ability for the claimants to exercise tino rangatiratanga and kaitiakitanga over this taonga, and this is a breach of the Treaty guarantee of rangatiratanga and the principle of partnership. Section 4 of the Conservation Act 1987 and DOC's policies require DOC to provide some mechanism enabling the claimants to exercise tino rangatiratanga over the reserve in partnership with DOC.

In addition, the individualisation of title has impacted on Te Ātiawa/Ngāti Awa in a myriad of ways, including the vesting of so much of the tribal estate in an individual and the empowerment of an individual to dispose of taonga such as the bushland of Ngarara West C41 lot 5. The rest of the tribe had no say in any of these matters, which was antithetical to Māori customary law and the Treaty guarantee of tino rangatiratanga in article 2. The loss of this taonga is, we believe, of wider importance than just to the estate beneficiaries.

Suggestions for remedy and a formal recommendation on this matter are set out in section 10.9.2.

10.8.4 Landlocked land adjoining the Hemi Matenga Memorial Park

When part of Ngarara West C41 was divided into lots 1–5, the legal access to lots 1–4 ran across the steep ridgeline of lot 5, which later became reserved as the Hemi Matenga Memorial Park. While the legal access had not been very practical, the alienation of lot 5 and its establishment as a scenic reserve had the effect of rendering lots 1–4 landlocked. DOC's position today is that a road through the reserve to lots 1–4 would be neither practical nor desirable.

As noted several times in this report, the Crown conceded that the individualisation of title facilitated the fragmentation, alienation, and partitioning of Māori land. The Crown also conceded that its acts and omissions have left Te Ātiawa/Ngāti Awa virtually landless. In closing submissions, however, the Crown did not consider the impact of the process of fragmentation, partitioning, and alienation on the few remaining pieces of land left in Māori ownership. In our view, the flawed title system established by the Crown in the nineteenth century was responsible for these remnants of Māori land, such as Ngarara West C41 lots 1–4, becoming landlocked and unusable, surrounded by Crown and general land. This was very common in other districts, as the Tribunal has found most recently in the Taihape district.[46]

The Native Land Amendment Act 1913, which was in force at the time Ngarara West C41 lots 1–5 were partitioned, gave the court discretion to provide or not provide for access as it saw fit. The statute stated that, when land was being partitioned, the court 'may' lay out such road lines ('if any') as the court thought 'necessary or expedient'. Alternatively, the court 'may, if it thinks fit', create private rights of way. In making partition orders, the court was to have regard 'as far as practicable' to road access and the interests of the owners (among other things). We did not have the benefit of technical research on access issues but the form of access provided by the court in 1916 was clearly neither practical nor reasonable. We accept that the Native Land Court was not the Crown, and its decisions were not those of the Crown. In our view, however, the Crown was responsible for the legislation that enabled:

- individualisation of title;
- the impact of individualisation of title on the authority of tribal structures to make collective, strategic decisions about what land to partition, sell, or retain; and
- the subsequent uncontrolled partitioning, fragmentation, and alienation which left the Māori landowners of Ngarara West C41 without access to this steep, hilly remnant.

Thus, the Crown's native land laws contributed to the landlocked state of Ngarara West C41 lots 1–3 and part lot 4, in breach of Treaty principles. The prejudice has been the division of the Māori owners from their ancestral land, in effect a virtual alienation of their land, with the consequential lack of opportunities to care for the land, protect the bush from pests, or make any use of the land whatsoever.

46. See Waitangi Tribunal, memorandum concerning landlocked Māori land in the Taihape inquiry district, 14 August 2018 (Wai 2180 ROI, paper 2.6.65).

We are aware that the Taihape Tribunal will shortly be releasing a report on landlocked land issues, based on the evidence and submissions in that inquiry. The Crown and claimants will have worked through the issues in greater detail than we have been able to do to date, as about three-quarters of the Māori land in that district is landlocked. We will consider what recommendations we might make in respect of Ngarara West C41 lots 1–3 and part lot 4 after that report has been released.

On the issue of pest control, our view is that DOC should fund and carry out pest control on the landlocked sections as well as the surrounding Hemi Matenga Memorial Park and Kaitawa scenic reserve. This would surely benefit the reserves as well as the Māori land.

10.9 Recommendations

10.9.1 Amendments to the Public Works Act 1981

The Waitangi Tribunal has made findings and recommendations about reforming the Public Works Act 1981 in various reports. In 2008, the Te Tau Ihu Tribunal recommended that the Crown address several problems with the Act's offer-back provisions. These included a recommendation that the Crown consult with Māori to determine whether land should be offered back to iwi or hapū instead of individuals.[47] In 2010, the Wairarapa Tribunal made detailed recommendations for improvement of the offer-back provisions of the Public Works Act 1981, in order to make that Act consistent with Treaty principles.[48] The Tauranga Tribunal and the Te Rohe Pōtae Tribunal have both recommended that the Crown adopt all the recommendations of the Wairarapa Tribunal in respect of reforms to the Public Works Act.[49] Those recommendations were based on a full inquiry (which we have not yet completed). In the interim, we note our agreement with two recommendations that are particularly relevant to the circumstances of this phase of the inquiry. Our recommendations are based on our findings in respect of the Paraparaumu Aerodrome claims, also taking into account the reform proposals already put forward by the Minister in 2005.

First, we recommend the inclusion of a Treaty of Waitangi clause in the Public Works Act 1981 (as the Minister had recommended in 2005). The Wairarapa Tribunal's recommendation was that 'the Public Works Act 1981 be amended to provide that it should be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi'.[50] We agree with this recommendation, and consider that the Crown should carry it out urgently.

47. Waitangi Tribunal, *Te Tau Ihu: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 3, pp 1443–1444

48. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, pp 801–802

49. Waitangi Tribunal, *Tauranga Moana*, vol 2, p 859; Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pt 4, p 313

50. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 2, p 801

Secondly, we recommend that the offer-back provisions of the Public Works Act 1981 be amended to provide for offering land back to successive generations of descendants (no longer limited to immediate successors), and – if they do not or cannot take up the offer back – a second offer to hapū or iwi (as the Minister had recommended in 2005). The Wairarapa Tribunal recommendation on this point stated: 'If for any reason the former Māori owners are unable or unwilling to take up the offer back, we recommend that the Crown or local authority is to offer the land to the wider hapū or tribal group to which the former Māori owners belong.'[51] Our recommendation is in agreement with this but we add that offer-back of land should not be limited to successors in title, a matter which caused great distress to the Paraparaumu Aerodrome claimants.

Finally, we note that we may have more specific recommendations on reform of the offer-back regime and other aspects of the Public Works Act in a later volume of the report, having heard the evidence and submissions of all parties. Nonetheless, we urge the Crown to carry out the recommendations of the Wairarapa Tribunal, the Te Tau Ihu Tribunal, the Tauranga Tribunal, and the Te Rohe Pōtae Tribunal for reform of the Public Works Act, which is long overdue.

It may be that some or all of these matters are already contemplated for inclusion in reforms to the public works regime. Crown counsel submitted in 2020 that the Crown was in the process of 'developing a package of proposals for legislation to amend the Public Works Act 1981 in ways which will have positive outcomes for Māori in relation to Māori land while balancing the need for accessing land for public works'.[52] The reform proposals, which were said to be in the 'early stages of development' at that time, included amendments to the offer-back regime. Crown counsel submitted that one aim of the proposals was to enable the return of more land to Māori, supporting the land retention principles in Te Ture Whenua Māori Act 1993. We ask that the Crown update the Tribunal and all parties on progress following the receipt of this report.

10.9.2 Hemi Matenga Memorial Park

As set out in chapter 9, we agree with the Crown that Treaty settlement negotiations are the forum for resolving the future governance and management of the Hemi Matenga Memorial Park. The mandated entity would be resourced to negotiate and communicate with the affected people during the negotiations. For the removal of prejudice to the relevant beneficiaries of Hemi Matenga's will, we recommended that the Wi Parata Waipunahau Trust, which is the landowner of Ngarara West C41 lots 1–3, be consulted in any such negotiations about the ownership and/or management of the Hemi Matenga Memorial Park.

In terms of appropriate redress, we noted two points in chapter 9. First, the principle of partnership requires a co-governance arrangement to be the object of negotiations, so as to enable the exercise of tino rangatiratanga and the fulfilment of kaitiakitanga obligations in respect of the reserve. We did not want to

51. Waitangi Tribunal, *Wairarapa ki Tararua*, vol 2, p 802
52. Crown counsel, supplementary closing submissions (paper 3.3.62), p 12

be prescriptive on what form that might take. Secondly, the principles of active protection and redress require the Crown to consider restoring legal ownership so that the exercise of mana whenua may be provided for in respect of this important taonga. This would enable the conservation of the taonga while giving effect to the article 2 guarantees of the Treaty.

10.9.3 Settlement of claims

As with Muaūpoko in the *Horowhenua* volume, we recommend that the numerous findings of Treaty breach and prejudice found in this volume of the report make it urgent for the Crown to negotiate a Treaty settlement with Te Ātiawa/Ngāti Awa. The parties may wish to consider whether they await findings and recommendations on issues excluded from this volume (such as environmental claim issues), but that is a matter for them to decide.

Dated at Wellington this 14th day of December 2022

Deputy Chief Judge Caren Fox, presiding officer

The Honourable Sir Douglas Lorimer Kidd KNZM, member

Dr Grant Phillipson, member

Tania Te Rangingangana Simpson, member

Dr Monty Soutar, member

APPENDIX I

TE ĀTIAWA / NGĀTI AWA CLAIMS, NAMED CLAIMANTS, AND COUNSEL

I.1 The Claims, Claimants, and Counsel

Claim: 1
Wai: 88
Claim name: Kāpiti Island Claim
Named claimants: Te Pehi Parata (deceased), Ani Parata, Darrin Parata, and Damian Parata on behalf of Te Āti Awa Marae Committee, other whānau and hapū of Te Āti Awa / Ngāti Awa ki Waikanae, and descendants of Te Kakakura Wi Parata Waipunahau.
Representation: Te Haa Legal: Daniel Jones, Moana Sinclair

Claim: 2
Wai: 89
Claim name: Whitireia Block Claim
Named claimants: Te Pehi Parata (deceased), Ani Parata, Darrin Parata, Karen Marama Parata, Matthew Love-Parata, Lois Ruhina McNaught, Hauangi Kiwha, Doris Theresa Lake, Sandra Louise Marama Edwards, and Ratapu Nelson Solomon on behalf of Te Āti Awa Marae Committee, other whānau and hapū of Te Āti Awa / Ngāti Awa ki Waikanae, and descendants of Te Kakakura Wi Parata Waipunahau.
Representation: Te Haa Legal: Daniel Jones, Moana Sinclair

Claim: 3
Wai: 238
Claim name: Hough Whānau Claim
Named claimants: Robert Hough, Katarina Ruru (née Hough), and William Henry Hough on behalf of themselves and the descendants of William Hough.
Representation: Te Mata Law: Keith Hopkins

Claim: 4
Wai: 609
Claim name: Paraparaumu Airport Claim
Named claimants: Anne Colgate, Yvonne Beverly Mitchell, Bridget Kerry Mitchell, Carol Teira-Capon, and Teoti Tangahoe Ropata on behalf of themselves and members of Te Whānau a Te Ngarara.
Representation: Te Mata Law: Keith Hopkins, James Lewis

Claim: 5
Wai: 612
Claim name: Paraparaumu Airport (No 2) Claim
Named claimants: Kaye Tini Korehe Rowe on behalf of herself, Edythe Yvonne Meripona Sharp, and their descendants.
Representation: Did not present at hearing.

Claim: 6
Wai: 648
Claim name: George Hori Toms and Colonial Laws of Succession Claim
Named claimants: Te Aratangata Te Kotua, Joan Carew, Riria Te Kotua Chester, Roy Te Kotua, and Joanie Wilson on behalf of the descendants of George Hori Thoms.
Representation: Te Nahu Legal Ltd: Hemi Te Nahu

Claim: 7
Wai: 875
Claim name: Paraparaumu Airport (No 3) Claim
Named claimants: Ngapera Taupiri Teira, Irihapeti Isherwood, Muri Takahiao Upoko-ongo-ariki Parata, Hari Rangikauwhata Jackson, Harriet Ann Colgate, Neta Ngatai, Poiria Love-Erskine, Teakerama Manuka Taikai, Wharemawhai Mina Timutimu, Georgina Fay Taiaki, Maikara Kararaina Tapuke, Kura Marie Teira Taylor, Maraea Hargreaves, Wairingiringi Taiaki, Orewa Wikaira, Kore Lemon, Patricia Harrison, Melda Tui Buckley, Charles Robert Jackson, Dennis Erueti Taylor, Maurice Nepia Taylor, Leo John Taylor, Elizabeth Dawn Taylor, Lesley Diane Hikaka, Hemi Rangikauwhata, Ngarere Pirihira Dearing, Hine Werenia Thompson, David Awa Love, Marama Shaw, Tui Love, Wikitoria Michalanney, and Philip Love on behalf of themselves.
Representation: Leo Watson

Claim: 8
Wai: 876
Claim name: Paraparaumu Airport (No 4) Claim
Named claimants: Phillip Reeves, Kevin Kemp, Tamati Reeves (deceased), and Jean Casserley on behalf of Kaiherau Whānau Trust.
Representation: Did not present at hearing.

Claim: 9
Wai: 877
Claim name: Paraparaumu Airport (No 5) Claim
Named claimants: Tahu Wiki Taylor (Teira), Carol Capon, and Makiterangi Matthews on behalf of ngā uri o Hoani Ihakara.
Representation: Did not present at hearing.

Claim: 10
Wai: 1018
Claim name: Ngātiawa ki Kāpiti Lands Claim
Named claimants: Apihaka Tamati-Mullen Mack, Rawiri Evans, Marama Rhonda Mullen, and Sonny Thomas on behalf of Ngātiawa ki Kāpiti.
Representation: Te Mata Law: Keith Hopkins; Kaupare Law: Alana Thomas; Phoenix Law: Janet Mason

Claim: 11
Wai: 1620
Claim name: Paraparaumu Airport (No 6) Claim
Named claimants: Colleen Rangipeka Walker, Moana Steedman, Denise Parata, Vere Ridler, Phillip Lake, Bernard Lake, Doreen Elizabeth Sheerin (deceased), and Ronald Clarence Lake (deceased) on behalf of Te Whānau a Te Ngarara and Puketapu hapū.
Representation: Te Pātaka o te Mana Tangata Chambers: Mireama Houra, Tony Sinclair

Claim: 12
Wai: 1628
Claim name: Baker Whānau Land Alienation Claim
Named claimants: Matiu Baker and André Baker on behalf of themselves, descendants of Matenga and Haua Baker, and ngā uri o Te Āti Awa ki Whakarongotai.
Representation: Mahony Horner Lawyers: Bryan Gilling, Sophie Dawe

Claim: 13
Wai: 1799
Claim name: Parata Township Claim
Named claimants: Hyrum Stubbs Parata on behalf of himself and other descendants of Te Kakakura Wi Parata.
Representation: Self-represented

Claim: 14
Wai: 1945
Claim name: Ngarara West A14B1 Block Claim
Named claimants: Paora Tuhari Ropata (deceased), Tutere Paraone Parata, and Mahutonga Blankensop on behalf of themselves and the Kaunihera Kaumatua of Te Āti Awa ki Waikanae.
Representation: Mahony Horner Lawyers: Bryan Gilling, Sophie Dawe

Claim: 15
Wai: 2228
Claim name: Ngati Awa of Taranaki (Moore and Taylor) Claim
Named claimants: Robert Trent Taylor and Andrea Maria Moana Moore on behalf of Ngatiawa.

Representation: Te Mata Law: Keith Hopkins, Catherine Leauga; Te Puna Chambers: Alex Hope

Claim: 16
Wai: 2361
Claim name: Kāpiti and Motungaro Islands (Webber) Claim
Named claimants: Christian Webber on behalf of the descendants of Wi Parata Te Kakakura and Utauta Parata.
Representation: Self-represented

Claim: 17
Wai: 2390
Claim name: Takamore Trust Claim
Named claimants: Benjamin Rameka Ngaia on behalf of the Takamore Trust and the descendants of those who lie in the Takamore wāhi tapu area.
Representation: Leo Watson

1.2 The Crown

At the time of hearing, the Crown was represented by Jacki Cole, Ellen Chapple, Ashleigh Allan, Mihiata Pirini, Gemma Plank, and Estelle Prado of the Crown Law Office. Throughout the hearings, the Crown was supported by the kaumatua Wiremu (Bill) Kaua. The Crown's further concessions on Paraparaumu Airport were filed in May 2022 by Tim Stephens of Stout Street Chambers.

APPENDIX II

LIST OF WITNESSES AT TE ĀTIAWA / NGĀTI AWA HEARINGS

II.1 Witnesses at ngā Kōrero Tuku Iho Hearing

The Ngā Kōrero Tuku Iho hearing for Te Ātiawa / Ngāti Awa claims was held at Whakarongotai Marae on 22 April 2015.

The following Te Ātiawa / Ngāti Awa speakers gave evidence at the hearing: Paora Ropata senior, Hepa Potini, Paora Ropata junior, Rawhiti Higgott, Hauangi Kiwha, Queenie Rikihana Hyland, Jim Webber, Christian Webber, Yvonne Mitchell, Albie Ellison, Mahutonga Blankensop, Mahina-a-Rangi Baker, Miria Pomare, Ngapera Parata, Ane (Ani) Parata, Karen Parata, and Darrin Parata.[1]

II.2 Witnesses at Te Ātiawa / Ngāti Awa Hearing 1

The first hearing of the Te Ātiawa / Ngāti Awa phase was held at El Rancho Conference Centre at Waikanae Beach from 20 to 23 August 2018.

The following claimant witnesses gave evidence at the hearing: Ratapu Solomon, Manu Parata, Hauangi Kiwha, Patricia Grace, Ane (Ani) Parata, Karen Parata, Carmen Timu-Parata, Joan Carew, and Benjamin Ngaia.

The following technical witnesses gave evidence at the hearing: Lou Chase and Tony Walzl.[2]

II.3 Witnesses at Te Ātiawa / Ngāti Awa Hearing 2

The second Te Ātiawa / Ngāti Awa hearing was held at Southward Car Museum in Paraparaumu from 2 to 4 October 2018.

The following claimant witnesses gave evidence at the hearing: Hauangi Kiwha, Ane (Ani) Parata, Darrin Parata, and Michele Parata-Hamblin.

The following technical witnesses gave evidence at the hearing: Suzanne Woodley, Dr Terry Hearn, Dr Vaughan Wood, Mark Derby, Dr Huhana Smith, Dr Helen Potter, Mahina-a-rangi Baker, and Aroha Spinks.[3]

1. Transcript 4.1.10
2. Transcript 4.1.16
3. Transcript 4.1.17

II.4 Witnesses at Te Ātiawa/Ngāti Awa Hearing 3

The third Te Ātiawa/Ngāti Awa hearing was held at Whakarongotai Marae at Waikanae from 11 to 15 February 2019.

The following claimant witnesses gave evidence at the hearing: Kahu Ropata (on behalf of himself and Paora Ropata), Tutere Paraone Parata, Damian Parata, Mahina-a-rangi Baker, André Baker, Hemi Neihana Sundgren, John Barrett, Rawhiti Higgott, Reina Solomon, Te Tokawhakaea Graham, Hariata May Higgott, Cherie Seamark, Andrea Marie Moana Moore, Robert Trent Taylor, Ray Watembach, Ane (Ani) Parata, Lois McNaught, Christian Webber, Dr Christine Kenney, Matthew Parata, Hari Rangikauwhata Jackson, Takiri Cotterill, Rowan Cotterill, Poiria Love-Erskine, Maikara Kararaina Tapuke, Rei Ngatai, Albert Ellison, Andrew Ellison and Tahlia Ellison (on behalf of Norma Ellison), Carolin Borck, and Colin Patangotango Hanita Paki.

The following technical witnesses gave evidence at the hearing: Dr Barry Rigby, Ross Webb, Heather Bassett, and Dr Mike Joy.[4]

II.5 Witnesses at Te Ātiawa/Ngāti Awa Hearing 4

The fourth Te Ātiawa/Ngāti Awa hearing was held at Southward Car Museum in Paraparaumu on 10 to 12 June 2019.

The following claimant witnesses gave evidence at the hearing: Moana Steedman, Denise Parata (nee Lake), Raymond Lake, Carmen Lake, Joanne Lake Bramley, Muri Stewart, George Leighton Blair Jenkins, Tracy Henare, Moira Cooke, Hepa Potini, Reina Solomon, Te Raukura Solomon, Mahina-a-rangi Baker, Peti Transfield, Dr Catherine Love, Albert Ellison, Apihaka Tamiti-Mullen Mack, Barbara Goodman, Carol Ann Rangimarie Magrath-Jonassen, Rhonda Martin, and Sonny Thomas.[5]

II.6 Witnesses t Te Ātiawa/Ngāti Awa Hearing 5

The fifth and final hearing of the Te Ātiawa/Ngāti Awa phase was held at the Waitangi Tribunal Unit offices in Wellington on 22 and 23 August 2019.

The following Crown witnesses gave evidence at the hearing: Dean Whiting, Te Kenehi Teira, Mary O'Keeffe, Kathryn Hurren, Nigel Mouat, Jack Mace, and Tracey Thompson.

The following technical witness gave evidence at the hearing: Tony Walzl.[6]

4. Transcript 4.1.18
5. Transcript 4.1.20
6. Transcript 4.1.21

GLOSSARY

ahi kā	burning fire; continuous occupation; rights to land by occupation
ariki	paramount chief or high chief
aroha	affection, sympathy, charity, compassion, love, empathy
atua	the gods, spirit, supernatural being
awa	river or stream
hāngī	earth oven to cook food with steam and heat from heated stones
hapū	clan, section of a tribe
harakeke	New Zealand flax (*Phorium tenax* and *P cookianum*)
hau	a shorter type of eel
heke	migration, emigrant, party of emigrants
hīnaki	eel pots
hotu	sobbing
hui	meeting, gathering, assembly
īnanga	whitebait
iwi	*tribe, people*
kahawai	an edible greenish-blue to silvery-white schooling coastal fish with dark markings and spots (*Arripis trutta*)
kahikatea	white pine, a tall coniferous tree of mainly swampy ground (*Dacrycarpus dacrydioides*)
kai	food
kaimoana	seafood
kāinga	home, village, settlement
kaitiaki	guardian, protector; older usage referred to kaitiaki as a powerful protective force or being
kaitiakitanga	the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection
kākahi	freshwater mussel, shellfish (*Hyridella menziesi*)
kakariki	yellow-crowned parakeet (*Cyanoramphus auriceps*), red-crowned parakeet (*C novaezelandiae*) – small green parrots with long tails
kāmahi	a forest tree with long, leathery, dark green leaves having blunt teeth (*Weinmannia racemosa*)
kanae	grey mullet (*Mugil cephalus*)
kānga pirau	fermented corn
kānuka	white tea-tree, leaves similar to mānuka but soft to touch (*Kunzea ericoides*)
karakia	prayer, ritual chant, incantation
kārearea	New Zealand falcon (*Falco novaeseelandiae*)
kaumātua	adult, elder, elderly man, elderly woman, old man – a person of status within the whānau

kawau	cormorant, shag – a general term for several varieties of shags which are medium to large diving birds
kererū	a large green, copper and white native bush pigeon (*Hemiphaga novaeseelandiae*)
kete	basket, kit
kiekie	a thick native vine which has long leaves with fine teeth crowded at the end of branches (*Freycinetia banksii*)
kina	sea egg, common sea urchin (*Evechinus chloroticus*)
kō	digging stick – wooden implement for digging
koarō	native trout
kohekohe	a tree with 3–4 opposite pairs of dark, shiny leaves (*Dysoxylum spectabile*)
koka	mat
kōkopu/kokopū	a name for several species of fish of the *Galaxias* genus, sometimes also referred to as native trout or whitebait depending on the species
kōrapa	hand netting
kōrero	discussion, speech, to speak
korimako	bellbird (*Anthornis melanura*)
kotahitanga	unity, togetherness, solidarity, collective action
koumu	eel-trench
kōura	freshwater crayfish (*Paranephrops planifrons* and *P zealandicus*)
kuia	female elder
kūkū	another name for kererū (*Hemiphaga novaeseelandiae*)
kura	school, education, learning gathering
kuta	bamboo spike-sedge (*Elocharis sphacelata*)
mahinga kai	food gathering places
māhoe	whiteywood, a common tree in regrowth and coastal bush (*Melicytus ramiflorus*)
mana motuhake	separate identity, autonomy, self-government, self-determination, independence, sovereignty, authority – mana through self-determination and control over one's own destiny
mana whenua	customary rights and prestige and authority over land
mana	prestige, authority, reputation, spiritual power (a form of power)
manaakitanga	hospitality, kindness, generosity, support – the process of showing respect, generosity and care for others
Manatū Māori	Ministry of Māori Affairs
manu	bird – any winged creature including bats, cicadas, butterflies, etc
manuhiri	visitor, guest
marae ātea	courtyard, public forum – open area in front of the wharenui where formal welcomes to visitors takes place and issues are debated
marae	courtyard before meeting house and associated buildings
mata rau	eel spearing

mataī	black pine, a coniferous, long-lived native tree of lowland forests (*Prumnopitys taxifolia*)
mate	a word used to mean dead or deceased, but sometimes refers to a mourning ceremony
maunga	mountain
mauri	life force
mere/meremere	a short, flat weapon of stone, often of greenstone
miro	brown pine, a coniferous tree of lowland forest (*Prumnopitys ferruginea*)
moana	ocean, sea
mokopuna	grandchild, child of a son, daughter, nephew, niece etc
motu	island, country, land, nation, clump of trees, ship – anything separated or isolated
muka	prepared flax fibre used for rope
muru raupatu	to confiscate
ngā kōrero tuku iho	knowledge/stories/histories that have been passed down
ngāhere	bush, forest
ngeri	short haka with no set movements and usually performed without weapons
ngohi	troop, company (of fighting men) division, column
ōhākī	parting wish, last words – final instructions before death
ope taua	battalion, troops, armed force, war party
pā tuna	eel weir
pā	fortified village, or more recently, any village
Pākehā	New Zealander of European (mainly British) descent
pānui	public notice, announcement, poster, proclamation
papaka	a common silver-bellied eel
papakāinga	original home, home base, village, communal Māori land
papatapu	ancestral land – Māori land held under customary title and not having a European title
Papatūānuku	Earth, Earth mother and wife of Ranginui
paremata	parliament
pārera	grey duck, a dark brown duck of remote wetlands (*Anas superciliosa superciliosa*)
pātaka	storehouse
pātiki	flounder (a general term for flounder-type fish)
patu tuna	eel striking
pāua	abalone, sea ear (*Haliotis* spp)
pīngao	golden sand sedge, traditionally used for weaving and rope-making (*Desmoschoenus spiralis*)
pipi	a common edible bivalve with a smooth shell found at low tide just below the surface of sandy harbour flats (*Paphies australis*)
pōhutukawa	trees found in coastal areas which bear large, red flowers about Christmas time (*Metrosideros excelsa*, *M kermadecensis*, *M bartlettii*)

pou	pillar
pōwhiri	invitation, rituals of encounter, welcome ceremony on a marae, welcome
pūhā	a name for several species of sowthistle of the *Sonchus* genus
puhi	a longer type of eel
pukeata	a tall forest tree of damp or wet areas (*Laurelia novae-zelandiae*)
pūkeko	purple swamp hen (*Porphyrio porphyrio*)
puna	spring, well, or pool
rāhui	temporary ban, closed season, or ritual prohibition placed on an area, body of water, or resource
rama tuna	eeling by torch light
rangatira	chief, tribal leader
rapu tuna	eeling by hand
rātā	large forest tree with crimson flowers and hard red timber (*Metrosideros robusta* and *M umbellata*)
raupō	bulrush, a tall, summer-green swamp plant (*Typha orientalis*)
rehi rehi	type of eel
rimu	red pine, a tall coniferous tree with dark brown flaking bark (*Dacrydium cupressinum*)
rohe	territory, boundary, district, area, region
rongoā	medicine, medicinal purposes
rūnanga	council, tribal council, assembly, board, boardroom, iwi authority – assemblies called to discuss issues of concern to iwi or the community
take tupuna	ancestral land right – continuous occupation of land through several generations
takiwā	district, area, territory, vicinity, region
tamariki	children – normally used only in the plural
tangata whenua	people of the land
tangi	cry, weep, grieve (also the abbreviated form of tangihanga: funeral)
tangihanga	weeping, crying, funeral, rites for the dead
taniwha	water monster, guardian spirits
taonga tuku iho	heirloom, something handed down, cultural property, heritage
taonga	a treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships
tapu	sacred, sacredness, separateness, forbidden, off limits
tarakihi	a silver marine fish with a black band behind the head (*Nemadactylus macropterus*)
taua	war party, army – tauā in some dialects
tawa	a tall tree with yellow-green foliage of long, narrow leaves (*Beilschmiedia tawa*)
Te Waipounamu	South Island – sometimes written as Te Wai Pounamu, Te Wāhi Pounamu or Te Wāi Pounamu

Te Whanganui-a-Tara	Wellington
tētē	brown teal
tī kōuka	cabbage tree, a palm-like tree with strong, long, narrow leaves (*Cordyline australis*)
tikanga	custom, method, rule, law, traditional rules for conducting life
toetoe	native plants with long, grassy leaves with a fine edge and saw-like teeth (*Cortaderia* spp)
toheroa	a large edible bivalve mollusc with a triangular shell found buried in fine sand between tides, often below large sand dunes (*Paphies ventricosa*)
tohi	baptism
tohunga	priest, specialist, expert
toi	fishing for eels with an eel-bob – flax loops with bait attached used for entangling the eels' teeth (ie, without hooks)
tōpū	pair, couple, a brace, two times – when added to a number it indicates double the number
tōtara	large forest trees with prickly, olive-green leaves not in two rows (*Podocarpus totara* and *P cunninghamii*)
tuatua	an edible bivalve mollusc found buried in fine sand near low tide level on open sandy ocean beaches (*Paphies subtriangulata*)
tūī	parson bird, a songbird that imitates other birds' calls (*Prosthemadera novaeseelandiae*)
tuku whenua	gifting of land
tuku	presentation, offering, release, submission
tumuaki	head, leader, president, principal, head (of an institution), chancellor, chief executive
tuna	eels
tungāne	brother (of a female), male cousin (of a female)
tupuna/tūpuna	ancestors, forebears
tūrangawaewae	domicile, standing, place where one has the right to stand – place where one has rights of residence and belonging through kinship and whakapapa
tūturu	real, genuine, proper
uri	offspring, descendant, relative, kin, progeny, blood connection, successor
urupā	burial grounds, burial site, cemetery, tomb
utu	an important concept concerned with the maintenance of balance and harmony in relationships between individuals and groups and order – sometimes described as reciprocity or revenge
wāhi tapu	sacred place, place of historical and cultural significance
wāhi whakahaumaru	places of protection
wāhi whakawātea	places where tapu was removed
wāhine/wahine	woman
wai ora	reviving health and soundness
waiata	song, chant, psalm

waka	canoe
wānanga	tertiary institution ; traditional school of higher learning
wētā	large insects of various species found in trees and caves
whakahoki	support
whakamā	shame, embarrassment
whakapapa	ancestry, lineage, family connections, genealogy ; to layer
whakataukī	proverb
whānau	family, extended family
whāngai	adopted child
whare karakia	church (building), synagogue, house of prayer – a building for religious services
whare kōhanga	building erected for childbirth, maternity ward
whare rūnanga	meeting house
wharekai	dining hall
whatukura	male atua who dwells in the heavens
whenua	land, ground, placenta, afterbirth