

TURANGA TANGATA

TURANGA WHENUA

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THE REPORT ON THE
TURANGANUI A KIWA CLAIMS

VOLUME I

WAI 814

WAITANGI TRIBUNAL REPORT 2004



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

A Waitangi Tribunal report

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CONTENTS

VOLUME I

Letter of transmittal	xiii
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Executive summary	xv
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CHAPTER 1: THE INQUIRY

1.1 Introduction	2
1.2 The interlocutory process	2
1.3 Hearings	3
1.4 Historical evidence	4
1.5 Inquiring into mandate	5
1.6 Inquiry boundary	9

CHAPTER 2: TURANGANUI A KIWA: THE CLAIMANTS

2.1 Distinctions between claimant groups	12
2.2 'Hapu or iwi' communities	14
2.3 Community rights in land	16
2.4 The principal Turanga claimants	19
2.5 Concluding comments	38

CHAPTER 3: WAERENGA A HIKA: 'THE HINGE OF FATE' IN TURANGA

3.1 Introduction	39
3.2 1840 to 1865: whose Turanga?	43
3.3 Waerenga a Hika	62
3.4 Crown and claimant cases	94
3.5 Tribunal analysis and findings	104

CHAPTER 4: EAST COAST LEGISLATION

4.1 Introduction	125
4.2 Early confiscation policy in Turanga	128
4.3 Crown and claimant cases	158
4.4 Tribunal analysis and findings	161

CONTENTS

CHAPTER 5: THE STORY OF TE KOOTI AND THE WHAKARAU

5.1	Introduction	169
5.2	The detention of Turanga Maori on Wharekauri.	171
5.3	Crown and claimant cases on the detention of the Whakarau	189
5.4	Tribunal analysis and findings	192
5.5	The Whakarau and Turanga	195
5.6	Crown and claimant cases on the return of the Whakarau and the attacks at Matawhero	207
5.7	Tribunal analysis and findings	210
5.8	Ngatapa, January 1869	219
5.9	Crown and claimant cases on Ngatapa	227
5.10	Tribunal's analysis on Ngatapa	229
5.11	Tribunal findings	244
5.12	Epilogue.	248
5.13	The Claim by Nga Uri o Te Kooti.	251

CHAPTER 6: TURANGA DEED OF CESSION 1868/CROWN RETAINED LANDS

6.1	Introduction	253
6.2	Turanga deed of cession, 1868	256
6.3	Who ceded for whom?	269
6.4	The Crown's retained lands	273
6.5	The claim of Joseph Anaru Hetekia Te Kani Pere on behalf of Te Whanau a Wi Pere and others	324
6.6	Compensation for the Patutahi cession	327
6.7	Conclusion	338

CHAPTER 7: THE POVERTY BAY COMMISSION, 1869–73

7.1	Introduction	339
7.2	Adjudicating claims to the returned lands: process and jurisdiction	342
7.3	An instrument of punishment	350
7.4	Cleaning up past mistakes – the commission validates settler titles.	368
7.5	Specific claim – the Wi Pere Whanau and the Pouparae block	376
7.6	Transforming customary title	379
7.7	1873: the end of the Poverty Bay Commission	388
7.8	The significance of the work of the commission	392

VOLUME II

CHAPTER 8: THE NATIVE LAND COURT AND THE NEW NATIVE TITLE

8.1	Introduction	395
8.2	The Native Land Court as adjudicator	407
8.3	The individualisation of Maori title	426

CONTENTS

CHAPTER 8: THE NATIVE LAND COURT AND THE NEW NATIVE TITLE—*continued*

8.4	Was the Native Land Court system simple and efficient while providing adequate safeguards for Maori in land dealings?	446
8.5	Did the new title system result in Maori alienating more land in Turanga than if community title had been recognised from the outset? If that was the effect, did the Crown intend it?	469
8.6	Conclusions and the Treaty	533

CHAPTER 9: THE PRICE OF COMMUNITY CONTROL: THE TURANGA TRUST LANDS, 1878–1955

9.1	Introduction	539
9.2	The history of the trusts	540
9.3	Crown and claimant cases	549
9.4	Tribunal analysis and findings	551
9.5	What was the long-term impact on Turanga iwi of the failure of successive initiatives by Rees and Pere?	568

CHAPTER 10: TE HAU KI TURANGA

10.1	Introduction	587
10.2	The Crown's acquisition of Te Hau ki Turanga.	589
10.3	The ownership of Te Hau ki Turanga	598
10.4	The custodial history of Te Hau ki Turanga since Crown acquisition	602
10.5	Current management	605

CHAPTER 11: THE TRIAL OF HAMIORA PERE

11.1	The trials	610
11.2	Tribunal analysis and findings	622

CHAPTER 12: PUBLIC WORKS

12.1	Introduction	627
12.2	The Crown's ability to take Maori land under public works legislation.	627
12.3	Public works takings in the Turanga district – some examples.	631
12.4	The Crown and claimant cases.	645

CHAPTER 13: RATES

13.1	Introduction	649
13.2	Maori and rating law – a brief background	649
13.3	Rates – a cause of the loss of Maori land at Turanga?	651
13.4	The Crown's case.	652
13.5	The claimants' case.	653
13.6	Tribunal analysis and findings	653
13.7	Rates – the Cookson claim	653

CONTENTS

CHAPTER 14: MANGATU TITLE DETERMINATION – THE NGARIKI KAIPUTAHĪ STORY

14.1	Introduction	659
14.2	Jurisdiction	661
14.3	The Ngariki Kaiputahi case.	662
14.4	The Crown case	663
14.5	The 1881 hearing	663
14.6	The determination of relative interests, 1916–17	679
14.7	The introduction of Te Whanau a Taupara.	684
14.8	Tribunal finding and analysis.	693

CHAPTER 15: MANGATU AFFORESTATION

15.1	Introduction	697
15.2	The afforestation of Mangatu	698
15.3	Towards afforestation	703
15.4	The Crown and claimant cases.	727
15.5	Tribunal analysis and findings	728

CHAPTER 16: HEI WHAKAMAHUTANGA: THE HEALING

16.1	The Treaty established a nation based on the rule of law	735
16.2	The Treaty stood for just and fair Government	737
16.3	The Treaty ensured that the Crown would respect Maori autonomy	738
16.4	The Turanga stories must be told	739
16.5	Who can settle?.	741
16.6	Loss and reparations.	743
16.7	Values and comparisons	748
16.8	Hei Kapinga Korero	751

APPENDIX I: RECORD OF INQUIRY

Record of hearings	755
Record of proceedings.	757
Record of documents	781

APPENDIX II: THE NATIVE LAND ACT 1873

The Native Land Act 1873	805
------------------------------------	-----

APPENDIX III: A LEGACY OF PROTEST

A legacy of protest	835
Glossary	845

TABLE OF MAPS

VOLUME I

Map 1: The Gisborne inquiry district	6
Map 2: The eastern boundary of the Gisborne inquiry district	8
Map 3: The location of marae in the Gisborne inquiry district	10
Map 4: The land blocks within the Gisborne inquiry district.	20
Map 5: Detail of the central blocks on and around the Gisborne flats	22
Map 6: The southern land blocks in the Gisborne inquiry district.	37
Map 7: Places of conflict, 1864–67, showing Waerenga a Hika.	41
Map 8: Raupatu boundaries as shown on Chapman's map of the North Island, 1865–66. . . .	141
Map 9: Biggs' proposed cession, 1867	146
Map 10: The 1869 sketch map presented to the Poverty Bay Commission	<i>facing page 280</i>
Map 11: The five blocks that later comprised the Te Muhunga block	288
Map 12: A representation of the survey of 1873.	292
Map 13: Bousfield's 1873 survey plan.	<i>facing page 294</i>
Map 14: A representation of the survey of 1873	306
Map 15: A representation of the 1869 sketch map	309
Map 16: The Tribunal's view of the 1869 sketch map	312
Map 17: A representation of Bousfield's 1873 survey plan	317
Map 18: A representation of the 1869 sketch map	320
Map 19: A representation of the 1869 sketch map	320
Map 20: Old land claims granted by the Poverty Bay Commission, 1869.	369

VOLUME II

Map 21: Blocks awarded Crown grants and land passed through the Native Land Court . . .	396
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TABLE OF FIGURES

VOLUME I

Fig 1: Mangatu Incorporation offices	26
Fig 2: Rongopai Marae	29
Fig 3: Mangatu Marae	31
Fig 4: Manutuke Marae	35
Fig 5: Muriwai Marae	38
Fig 6: The Gisborne waterfront, with the settlement in the background, 1867	43
Fig 7: Turanga, Archdeacon Williams, 1855	45
Fig 8: <i>Native Christian Church at Turanga, New Zealand</i>	47
Fig 9: Waerenga-a-Hika Mission Station, circa 1858	90
Fig 10: The remains of Waerenga a Hika Pa after its capture and destruction in 1865	93
Fig 11: Poverty Bay massacre memorial	205
Fig 12: Armed Constabulary, Gisborne massacre, 1868	221
Fig 13: James Richmond, <i>Ngatapa from the East</i> , 1869	225

VOLUME II

Fig 14: Sled house	480
Fig 15: Close up of sled house runner	481
Fig 16: Sheepdipping at Barker's holding, Whataupoko, 1895.	522
Fig 17: Maori leaders of Gisborne, circa 1908.	541
Fig 18: Read's Quay Wharf, 1896	544
Fig 19: Rukupo Epa from Te Hau ki Turanga.	586
Fig 20: Te Hau ki Turanga.	588
Fig 21: Makaraka racecourse under flood water, 1950.	696
Fig 22: Flooding, Evans-Nield, 1910.	696

ABBREVIATIONS

AJHR	<i>Appendix to the Journal of the House of Representatives</i>
AJLC	<i>Appendix to the Journal of the Legislative Council</i>
app	appendix
Archives NZ	National Archives of New Zealand
ATL	Alexander Turnbull Library
BPP	<i>British Parliamentary Papers: Colonies New Zealand</i> (17 vols, Shannon: Irish University Press, 1968–69)
c	circa
CA	Court of Appeal
ch	chapter
CMS	Church Missionary Society
comp	compiler
DNZB	<i>The Dictionary of New Zealand Biography</i> (5 vols, Wellington: Department of Internal Affairs, 1990–2000)
doc	document
DOSLI	Department of Survey and Land Information
ed	edition, editor
ha	hectare
IA	Internal Affairs file
JHR	<i>Journal of the House of Representatives</i>
Le	Maori–English lexicon file
LS	Lands and Survey file
ltd	limited
MA	Maori Affairs file
MS	manuscript
n	note
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
OLC	old land claim
p, pp	page, pages
para	paragraph
PC	Privy Council
pt	part
RDB	<i>Raupatu Document Bank</i> (139 vols, Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act)
sec	section (of this report, a book, etc)
SOC	statement of claim
TROTAK	Te Runanga o Turanganui a Kiwa
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, footnote references to claims, papers, transcripts, and documents are to the record of inquiry, which is reproduced in appendix 1.

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Researching, hearing, and reporting on the Gisborne claims under the new approach format would not have been possible without the tireless dedication and commitment of a large team of Tribunal staff. We acknowledge the contributions of Rhonda Pohatu and Hemi Pou (claims administration and claimant liaison); John Hutton (claims facilitation); Margot Fry and Kate Riddell (report writing); Nathan Milner (legal research); Noel Harris (mapping); Grant Phillipson (general editing assistance); Laura Burberry (reference checking); and Dominic Hurley (production).

Tenei maatou, te mihi atu nei ki a koutou. Na whero na pango, i oti.

The Honourable Parekura Horomia
Minister of Maori Affairs
Parliament Buildings
WELLINGTON



The Waitangi Tribunal
110 Featherston Street
WELLINGTON

8 October 2004

E nga Minita tena korua

E te Minita Maori, tena koe e tu ana i te kei o te waka Maori. E te Minita Nona te Mana Whakarite Take e pa ana ki Te Tiriti o Waitangi, tena koe, te kai whakamoe i te wairua riri o te iwi Maori. Tena korua i o tatou tini mate, e tuhono nei ratou ki a ratou.

We have the honour of presenting you with our report on the claims of the iwi, hapu and whanau of Turanganui a Kiwa.

As you know, we trialled a new form of inquiry process in Turanga by committing the parties to increased preparation time and reduced hearing time. We had hoped as a result, to have our report available in 2003, but in the event that did not prove possible. We are none the less pleased that, in completing the whole process (from the first judicial conference to the handing over of the report to the claimants) within 4½ years, we have considerably reduced the time which the claimants and the Crown spend in the inquiry process. With other improvements, we are confident that further savings in time and resources can be made without affecting the quality of our inquiry.

In Turanga, we heard the claims of all major iwi and hapu groupings. We heard of the horrific events that unfolded in this district from 1865 to 1869, and the lasting impact they had on Maori and non-Maori. Of particular concern to us was the fact that Turanga Maori lost proportionately more killed at the hands of Crown forces in the New Zealand wars than any other district. We were struck also by the lawless brutality of many of those killings. We heard further of the numerous attempts by Maori from the 1870s on, to make the best they could of the new order which transformed the district after the wars. Some of those attempts were successful, some were not. We devoted particular attention to the operations of the Native Land Court in Turanga, in the hope that our work in this respect might provide greater guidance to you and the claimants in your negotiations.

The process by which Turanganui a Kiwa became Poverty Bay contains salutary lessons for us today as we struggle to accommodate our distinctive characteristics and aspirations as many peoples living in this country. We were reminded throughout that enduring and just peace in New Zealand must be founded on three things: the rule of law, wise and protective government, and the recognition of Maori autonomy. Our forebears, Maori and Pakeha in

Turanga, failed to find the fulcrum point at which these three great elements could be held in balance. It falls to this generation of leaders to find a new balance that works for all in the twenty-first century.

We have made no general recommendations in respect of possible settlements. We prefer instead to leave it to the parties to construct settlements which represent their choices rather than ours, although it is always open to claimants or the Crown to seek further assistance from us if that is desired. We have given some thought to relativities between claimant groups and our views on that matter can be found in chapter 16. They are intended to do no more than provide an independent guide in the hope that this will assist the parties to focus on the real issues in the negotiation such as overall quantum for the district.

We wish you and the claimants well in your search for a fair and durable settlement of these long-standing grievances.

Ma te ringa o Te Atua koutou hei pupuri, hei arahi i roto i a koutou korero me a koutou whiringa.



JV Williams

Presiding Officer

EXECUTIVE SUMMARY

The region of Turanganui a Kiwa, or Poverty Bay as it has come to be known in English, is the home of three closely related iwi: Te Aitanga a Mahaki, Rongowhakaata, and Ngai Tamanuhiri. Other important kin groups also reside there. These include Te Whanau a Kai and Ngariki Kaiputahi. All five groups lodged claims with the Waitangi Tribunal. Claims were also lodged by the descendants of two Maori leaders whose respective contributions to the story of nineteenth-century Turanga were quite unparalleled. They were Te Kooti Rikirangi and Wi Pere. Finally, claims were also brought by a small number of individuals acting for themselves and their immediate families. Details of these claims may be found in the body of our report. In the volumes that follow, we report our findings in respect of the claims of these kin groups and individuals. Since almost all claims arise out of the process of colonisation of Turanga, our report contains much of that colonisation story: from a 25-year period of peaceful coexistence between Maori and settlers, to nearly five years of conflict, followed by a much longer period of Maori adjustment to, and accommodation of, the new order. We set out in summary form here our key findings of fact and Treaty principle in respect of these events. We rely generally on the primary chapter headings in our report to structure this summary (some of the smaller claim issues are not covered here). We would stress, however, that this is no more than a summary. Our actual findings, and the analysis that underpins them, are to be found in the body of our report.

WAERENGA A HIKA

Twenty-four Maori signed the Treaty of Waitangi at Turanga in 1840, although not all signatories were from there. But, in the 25 years that followed, there was little evidence that effective sovereignty had been taken up by the Crown in accordance with the promise of the Treaty. Although a resident magistrate was stationed there for five years, Turanga remained a fully autonomous district for all practical purposes until 1865. Indeed, between 1860 and 1864 – the period of armed conflict in Taranaki and Waikato – Maori in Turanga had taken a position of considered neutrality, refusing to support either the British Crown or the Maori King.

Then, in March 1865, emissaries of a new Maori religious movement, Pai Marire, arrived in Turanga from Opotiki. A majority of Turanga Maori converted to the new faith, promising as it did to protect their lands and independence against an apparently aggressive Crown. This caused tension in the local community – which numbered around 1500 Maori and somewhere between 60 and 70 settlers – and some initial panic among settlers. That was

EXECUTIVE SUMMARY

understandable. One of the Pai Marire emissaries had been involved in the murder of the Reverend Carl Völkner in Opotiki. The tension was exacerbated by sustained conflict, which broke out between Crown and Pai Marire-aligned Ngati Porou hapu, further up the coast. Though some settlers were afraid, the arrival of Pai Marire in Turanga did not itself result in violence, civil unrest, or rebellion against the Crown. Indeed, the Turanga area remained quiet for the next six months. Equilibrium was unaffected by the arrival of a small contingent of colonial troops in September of 1865. Unrest in the form of looting abandoned settler homes did break out when a 30-strong Ngati Porou Crown force arrived in Turanga in late October, but property was returned and offers of reparations were made. The Ngati Porou force was fresh from fighting with Ngati Porou Pai Marire converts further up the coast and their numbers quickly swelled in early November to 120. It was at this crucial point that Donald McLean, the Crown's principal agent on the East Coast, decided to grasp the opportunity to use the Ngati Porou and colonial forces then in the district to destroy the Pai Marire influence along the East Coast and, in the process, break the independence of the Turanga tribes.

McLean arrived in Turanga on 9 November with additional Ngati Porou and colonial troops. He immediately issued a set of 'terms' to Turanga Maori. They were to surrender all of their arms, take an oath of allegiance, and give up all non-Turanga Pai Marire among them. In a letter prepared in the name of Raharuhi Rukupo, a leading Turanga rangatira, and signed by him and 15 other chiefs, the terms were accepted. The only proviso was a request that McLean personally visit them to 'make final arrangements' and that they be given an opportunity to respond to the allegations of wrongdoing contained in the Crown's terms. McLean refused to meet and talk. Rukupo relented and came to McLean to plead his case. He failed. On 16 November, McLean left it to the field commander to commence the attack.

On 17 November 1865, Crown forces attacked and besieged the Pai Marire defensive position at Waerenga a Hika, just inland from modern-day Gisborne. Around 800 Maori, including 300 women and older children, were in the pa at the time of the attack – almost the entire population of Turanga at the time. The pa fell after five days with those inside either escaping or surrendering to Crown forces. Seventy-one defenders were killed during the siege. Crown forces suffered about 11 casualties. We found that the attack was unlawful and in breach of the principles of the Treaty of Waitangi.

The Crown may only turn its guns against its own citizens if they are in 'rebellion'. That is, if those attacked are engaged in concerted action against the Crown for the purpose of overthrowing by force or threat of force, the Crown's authority. But there was no rebellion in Turanga. There had been no civil unrest in the district capable of being interpreted as actions against the existing legal order. Waerenga a Hika pa was a defensive position held against imminent Crown aggression. That is demonstrated by the fact that 300 women and children were present in the pa. Rukupo and the hapu at Waerenga a Hika were entitled to defend themselves against that aggression.

IMPRISONMENT, CONFISCATION, AND THE EAST COAST LEGISLATION

After the surrender of the pa, the Crown imprisoned 113 men, purportedly the ‘worst offenders’, and transported them to the Chatham Islands.* By late 1866, a further 73 male prisoners had been sent over after fighting in Hawke’s Bay. In total, 123 prisoners from Turanga were held in this way. Wives and children of some prisoners were allowed to join them, increasing the total number on the Chathams to around 300. No prisoner was charged with, tried for, or convicted of, any offence in relation to the battle at Waerenga a Hika whether before, during, or after the imprisonment.

The Crown also decided to confiscate land as punishment for the purported ‘rebellion’ of Turanga Maori. However, a patch war developed between two rival provincial governments, Auckland and Hawke’s Bay. Because Turanga was part of the Auckland province, profits from the sale of confiscated land would go to Auckland province. Donald McLean, who was superintendent of Hawke’s Bay, wanted Turanga and the money to go to his province. He therefore delayed triggering the confiscation Acts until the provincial disagreement was settled. Meanwhile, the Turanga prisoners would not be released until the confiscation was completed. In late 1866, the superintendent of Auckland province, Frederick Whitaker, drafted special legislation that would enable selective confiscation of East Coast land through the Native Land Court. The resulting legislation, the East Coast Land Titles Investigation Act, was incompetently drafted. It mistakenly enabled the award of land *to* rebels instead of confiscation *from* them. Another year went by before an amendment was passed correcting the mistake. Finally, in 1868, the Government enacted the East Coast Act, which allowed for the confiscation of land and the transfer of ‘rebel’ land to ‘non-rebels’ through the Native Land Court. None of this special legislation was in fact used. At the same time, Captain Reginald Biggs of Turanga tried to pressure Turanga Maori into agreeing to a substantial voluntary cession of land by way of reparations to the Crown. Turanga Maori refused. They maintained that the imprisonment of those on the Chathams was punishment enough. Meanwhile the prisoners remained where they were indefinitely.

Since there were never any charges, trials, or convictions, and since the Turanga prisoners had committed no crimes, we found that the imprisonment was unlawful and in breach of the principles of the Treaty of Waitangi. But the breach was greatly aggravated because the period of detention was made indeterminate for mere bureaucratic convenience.

Te Kooti and the Whakarau

Conditions on the Chathams were harsh. The prisoners were unused to the cold climate. They were required to build their own accommodation and grow food to subsidise their limited Government rations. Approximately 22 men died from illness. Further deaths are recorded

* In the body of our report, we refer to the Chatham Islands by the name the prisoners used – Wharekauri – but here for ease of reference we use the more common modern name.

EXECUTIVE SUMMARY

among the women and children. As the incarceration stretched to two years with no prospect of release, the initial sense of grievance grew among the prisoners.

One prisoner who fell ill was a Rongowhakaata man, Te Kooti Rikirangi. Following his illness, Te Kooti advised his fellow prisoners that he had received a series of divine visions. He studied the Bible and built up the tenets of a new faith, which offered salvation to the prisoners: God would deliver them from oppression as he had once saved the Israelites in the Old Testament. Te Kooti planned their escape.

In early July 1868, the prisoners – or the Whakarau (exiles or unhomed) as Te Kooti had named them – seized a visiting schooner, the *Rifleman*. In all, 163 men, 64 women, and 71 children escaped on the ship. On 9 July, they made landfall at Whareongaonga some 20 kilometres south of modern-day Gisborne. From there, the Whakarau moved inland toward Taupo.

The Government's representative in Turanga, Captain Reginald Biggs, sent messengers demanding the Whakarau's immediate submission. Te Kooti refused, making it clear instead that he wished to travel unmolested elsewhere. Colonial forces made three separate attempts in the bush to apprehend the Whakarau and prevent their progress. On each occasion, the Whakarau attacked the arresting column pre-emptively. All attempts at rearrest failed. Meanwhile, Te Kooti sent messages to Tuhoe and King Tawhiao asking, respectively, for passage and sanctuary. The replies brought little comfort. Tawhiao informed Te Kooti that he was not to fight or renew the wars. Tuhoe refused safe passage through the Urewera.

With his plans to travel inland thwarted, the ongoing threat of capture and further imprisonment by the military, and continuing attempts by the Crown to acquire land in Turanga as punishment for Waerenga a Hika, Te Kooti resolved to strike Turanga. While there is now no way of knowing for sure, it is likely that he had also learned of two further facts by this stage: the carved meeting house of his uncle Raharuhi Rukupo had been forcibly removed by the Crown; and Captain Biggs had himself settled on land at Matawhero claimed by Te Kooti. If he did know these things (and we think it highly likely that he did), it would have strengthened his resolve. In Te Kooti's Old Testament vision, the dispossessors would receive their just deserts and the Whakarau would be repatriated to their ancient lands. From 8 to 14 November, the Turanga settlements of Patutahi, Matawhero, and Oweta were attacked. The attackers killed between 29 and 34 settlers including women, children, and young people of dual descent. Captain Reginald Biggs and his family were among the dead, as were 13 militiamen. They killed another 20 to 40 Maori. Around 300 Maori were taken prisoner and the Whakarau escaped into the bush.

We found that the Whakarau were entitled to make good their escape from the Chathams because they were unlawfully detained. We found that their initial intentions upon return were peaceful, although this later changed. We found further that the Whakarau were entitled to resist the ill-considered attempts by colonial forces to rearrest them. But we reached the firm conclusion that there could be no justification for the killing of between 50 and 70 largely

EXECUTIVE SUMMARY

innocent settlers and Maori at Matawhero and elsewhere. That action was disproportionate and indiscriminate. Even though the Whakarau were greatly provoked by Crown action, the Treaty of Waitangi continued to speak for reasonableness, moderation, and ethical response. Accordingly, we found that although Te Kooti and the Whakarau were entitled to defend themselves against Crown actions which were illegal and in breach of Treaty principle, they breached their own responsibilities as citizens and Treaty partners in attacking and killing or forcibly detaining unarmed civilian targets.

Understandably, the colonial Government reacted to the attack on Turanga with horror. Colonial forces were mobilised, including Ngati Porou and Kahungunu contingents. The two sides engaged in late November and early December at Te Karetu. The Whakarau then fell back to an old mountain-top pa deep in the interior called Ngatapa.

On 1 January 1869, Government forces under Colonel Whitmore invested Ngatapa. The defenders' provisions were short and water was at a premium. They lasted for a few days only. On 4 January the besiegers took the outer defences of the pa. Early in the morning of 5 January, a woman called out to the attackers: the defenders had escaped down the unguarded and precipitous northern face of the pa. The pa was rushed and looted, and a number of prisoners were taken. Between 48 and 53 of the defenders had been killed during the siege.

The Government's Ngati Porou force then set out in pursuit of those who had escaped.

From this point exact casualty figures are elusive but it is possible to calculate, with some accuracy, the range of losses suffered by those besieged at Ngatapa. Between 16 and 30 men were killed in fighting during the pursuit. A much larger number were captured in the bush and taken back either to Ngatapa or to the colonial encampment known as Fort Richmond. Between 86 and 128 of those taken to Ngatapa or Fort Richmond were executed. It is possible (but unlikely) that the upper figure was higher than 128 because we chose conservative options wherever calculations required us to make choices between different figures. But it is clear that the absolute minimum number of executions was 86.

None of those executed was charged, tried, or convicted of any offence prior to execution. None of those executed was armed. The executions almost certainly included a significant number of those who had themselves been taken prisoner by Te Kooti two months earlier. Between 22 and 34 male prisoners and nearly all women and children were spared. Te Kooti and a small number of his followers were not captured. They escaped into the bush.

Though the executions were carried out by the Ngati Porou contingent, they were carried out by Crown forces and in the Crown's name. Settler military commanders in the field were aware of and sanctioned the executions, as did the senior settler politician present at the battle, JC Richmond.

We found that the executions were unlawful and in breach of the Crown's obligations under the Treaty of Waitangi, if not also the rules of war then in force in the British Empire. Put simply, the horrors of Ngatapa were perpetrated to avenge the horrors of Matawhero. While the Crown was entitled to bring the full force of the law to bear on the Whakarau after

EXECUTIVE SUMMARY

the events of Matawhero, and while we can understand (though not condone) individual acts of revenge, the scale of the systematic killing at Ngatapa represents one of the worst abuses of law and human rights in New Zealand's colonial history. The Crown had to be above behaviour of this kind. It had to respect the rule of law. It had to comply with the standards it expected of its own citizens. How else could the Crown claim a legitimate right in accordance with article 1 of the Treaty, to govern in the name of all?

Taken together, Te Kooti's attack on Matawhero and the Crown's revenge at Ngatapa constitute some of the most distressing events in New Zealand's colonial past. From the Crown's attack on Waerenga a Hika in November 1865 to the fall of Ngatapa in January 1869, we estimate that approximately 240 adult men, or 43 per cent of the adult male population of Turanga, were killed in armed conflict with the Crown. This is an extraordinary level of loss for any community anywhere. It is, we believe, the highest casualty rate suffered by Maori in any region in New Zealand during the land wars.

Following Ngatapa, Te Kooti and the small group of his surviving followers withdrew into the Urewera. He was pursued by Crown forces until February 1872 but was never captured. He was given shelter in the King Country by King Tawhiao, and he lived there in peace until his death in 1893. It was during this time that he developed the prayers and rituals of the Ringatu Church which he founded. The church remains a strong presence in the Urewera, eastern Bay of Plenty, and Turanga communities to this day. Te Kooti was never allowed to return to Turanga.

THE DEED OF CESSION

Throughout the period of military action against the Whakarau, the Crown continued to pursue the cession of land in Turanga in order to punish Turanga Maori for their rebellion. Immediately after the attack at Matawhero, in November 1868, the Government Minister JC Richmond warned Turanga Maori that unless land was given up the Crown would withdraw its military protection, leaving the area to be invaded by either Te Kooti or Ngati Porou. This threat convinced 279 of those Maori who remained (and who were not either with Te Kooti or his prisoner) to sign a deed of cession.

By the deed, the signatories declared their loyalty to the Crown and transferred to it some 1.195 million acres of land – an area significantly larger than our inquiry district. Some of this land was to be kept by the Crown, though the actual area had yet to be identified. The balance was to be returned to 'loyal' Turanga Maori. The allocation to 'loyal' Maori would be through an independent commission, later called the Poverty Bay Commission. The interests of Maori found by the commission to be in 'rebellion' would be confiscated and transferred either to the Crown or 'loyal' Maori.

EXECUTIVE SUMMARY

We found that the deed had been signed under duress – that is, under threat of the withdrawal of the Crown’s protection. The protection of the Crown had been promised to Maori in the Treaty of Waitangi. The deed was therefore both ineffective as a contract and in breach of the principles of the Treaty. We found further that for the majority of Turanga Maori who had not signed the deed, it was ineffective in extinguishing their rights because they had not consented.

Though the exact identification of the land to be retained by the Crown was left to be resolved after the deed of cession was signed, all parties understood why it would be retained. It was to be for the accommodation of military settlers and as payment to Ngati Kahungunu and Ngati Porou for their military service. Three strategic areas on the Poverty Bay flats were selected: Te Muhunga, Te Arai, and Patutahi. These lands commanded all three inland access ways into Poverty Bay. According to evidence later given by Maori who were present at the negotiations, each block was to be 5000 acres in area, making a total of 15,000 acres. The negotiations took place as the Poverty Bay Commission began sittings in Turanga at the end of June 1869. William Graham, surveyor, appeared at the commission on the second day of sittings to advise that an agreement had been reached. He pointed out all three blocks to the commission and named the boundaries of the Patutahi and Te Arai blocks. He used a rough sketch map he had prepared in order to point the boundaries out, but none of the relevant detail had been sketched onto it at that stage. The proposed block boundaries and estimated acreages were drawn in months after the commission hearing. For its part, the commission kept no detailed record of the purported agreement as described to it by Graham. As a result, Maori and the Crown appear to have come away from the commission with quite different understandings of the extent of land to be retained by the Crown. Maori believed they were to lose three blocks of 5000 acres each, located mostly on the highly valued flats. The Crown thought it was to get this area plus an additional, and much larger area of hill country. The Crown was expecting an area in excess of 50,000 acres.

The muddle was never clarified. The block Te Muhunga, when surveyed as a composite block, comprised 5395 acres. The Patutahi and Te Arai blocks were surveyed after a four-year delay. The survey joined the blocks together and added a large area of hill country. The surveyor found that this new block totalled 31,301 acres. However, this did not match the Government expectation that the area was to contain around 57,000 acres. The surveyor therefore extended the block by a further 19,445 acres, taking the total to 50,746 acres.

We found that there was no common understanding between the Crown and Maori as to the size of the Crown’s take at Patutahi. We found that, if Turanga Maori agreed to anything, it was that three 5000-acre blocks would be retained by the Crown. For its part, the Crown expected to receive a much larger area. We found further that Crown officials retrospectively ‘fixed’ both the sketch map and the record of the commission in order to give the appearance of mutuality between the parties when none actually existed. We found finally that, in

addition to wrongfully pressing Maori to cede any land at all, the Crown took up to 40,000 acres more than Maori were prepared to give up. In doing so the Crown further breached the principles of the Treaty.

The Poverty Bay Commission

Once the issue of the lands to be kept by the Crown had been aired in the Poverty Bay Commission in June 1869, the commission set about discharging its real functions. It had three tasks: first, to punish ‘rebels’ by confiscating their lands; secondly, to investigate the claims of settlers to lands which they had allegedly purchased in Turanga in the 1840s, in order to award them formal Crown titles; and, thirdly, to transform the tenure of lands returned to ‘loyal’ Maori into Crown-derived titles.

As to the confiscation of ‘rebel’ lands, we found that the Crown could not, by mere proclamation, create a new court with punitive powers in a manner that usurped the constitutional role of the pre-existing civil and military courts. Nor did the Crown, without the grant of specific statutory authority, have the power to confiscate the lands of its citizens. It was inappropriate and unlawful, therefore, for the commission to act as the Crown’s instrument of punishment in Turanga. We found further that the process by which the commission proceeded to take away the lands of ‘rebels’ was unfair. Few ‘rebels’ were given an opportunity to be heard, the definition of ‘rebel’ changed during the course of the hearings, and the commission relied too heavily on lists drawn up by ‘loyal’ Maori who stood to gain additional land through the exclusion of ‘rebels’. In short, the commission did not comply with the basic standards one would expect of a fair legal process in the nineteenth century. The result was that perhaps 30 per cent of Turanga Maori lost their lands on the Poverty Bay flats.

As to the award of lands to settlers, we found that while Turanga Maori had initially objected to these awards, the events at Matawhero and Ngatapa both removed those Maori who were most likely to object and created a climate, among those who remained, of sympathy for settlers and the losses they had suffered.

As to the transformation of titles, we found that the grant to ‘loyal’ Maori of joint tenancy titles instead of tenancies in common was prejudicial.

In all, the Poverty Bay Commission processed just over 100,000 acres of the best lands in the district. The balance of the 1.195 million acres originally ceded was then placed in the hands of the Native Land Court to be investigated and awarded in the usual way. The confiscation process ended, but the transformation process continued at even greater speed.

Taken together, the deed of cession and the commission signalled the final accession of Turanga Maori to the newly imposed absolute authority of the Crown. British law was in place and the institutions of the settler Government were permanently established in the new town of Gisborne. The majority of Maori who had resisted crown aggression from 1865 to 1869 were dead or, if still alive, had been deprived of their lands. The vast body of Maori land

in the district had either been transformed into a Crown-derived title through the commission, or was about to commence that process in the new Native Land Court.

The Native Land Court and the new native title

The Native Land Court commenced title investigations in Turanga in 1875. In the 35 years that followed, the entire district was investigated, new titles were awarded, and three-quarters of the district was sold. Two-quarters had been purchased by settlers, and one-quarter by the Crown, the latter being the largest single buyer in the district by far. Turanga was thus transformed, through land alienation, from an almost entirely Maori district to one in which they were a minority both demographically and economically. Were Maori essentially the authors of their own downfall, or was the Crown implicated in this process of marginalisation? In our assessment of the Maori Land Court system, as it operated in Turanga, we avoided dogged transaction-by-transaction assessments of the quality of consent, fairness of price, and the like. We were interested primarily in the system of land tenure and transfer and whether it contributed in any way to the situation in which Maori found themselves by the turn of the twentieth century. We concentrated on four key questions: Did Maori want the Native Land Court to determine questions of title? Did Maori want title individualisation? Was the Native Land Court system simple and certain? And did the new title system lead to Maori alienating more land than would have alienated if community title and management had been recognised from the outset?

We found as follows:

- ▶ Although Maori were very interested in the official ratification of their customary titles, most did not wish to hand over the power to award such titles to a colonial court. They wished to adjudicate their own title questions. The Native Land Court therefore expropriated from Maori, without their consent, the right to make their own title decisions. This breached the tino rangatiratanga guarantee in the Treaty.
- ▶ The native land legislation removed community land management rights and individualised the alienation process against the generally expressed wishes of Maori both nationally and in Turanga. This breached both the title and tino rangatiratanga guarantees in the Treaty.
- ▶ The system of title and transfer provided for in the Native Lands Acts from 1873 onwards was complex, inefficient, and contradictory.
- ▶ The refusal to support community land management, combined with the individualisation of undivided interests, meant that land alienation was the only means by which Maori could access the benefits of the colonial economy. But the complexities and inconsistencies of the individualised sale process provided under the Native Lands Acts, and the fact that titles remained in customary tenure, caused prices to be significantly discounted. Cumulatively, these factors caused Maori to sell more land as individuals

than they would have sold as communities and at far lower overall prices. The system was designed to produce this effect. It therefore breached both the title and rangatiratanga guarantees in article 2 of the Treaty.

Maori quickly lost control of the pace and volume of alienation, but the Crown took no effective steps to prevent Maori landlessness even though it had been warned by Maori, officials, and politicians that this would be the result of the system in place. While it cannot be definitively concluded that the Crown designed the system to produce Maori landlessness, it can certainly be said that the Crown was aware of the risks and remained recklessly indifferent to them throughout the crucial 35-year period from 1875. This breached the Crown's fiduciary and active protection obligations.

The Turanga trusts

Turanga Maori developed sophisticated schemes to escape the strictures of the Native Lands Acts so as to derive maximum benefit from their lands whether through alienation or development. The trust mechanism was tried first, by Wi Pere of Te Aitanga a Mahaki and William Rees a liberal lawyer and politician based in Turanga. Turanga Maori communities vested 70,000 acres in the Rees Pere trusts as they came to be known. The trusts failed to achieve their objectives for two reasons. First they had to spend too much reacquiring undivided interests in part-sold blocks on the Turanga flats. This created an unsustainable debt burden. Secondly, in the *Pouawa* decision of Chief Justice Prendergast, the trusts were found to be legally void because the Native Lands Acts made no provision for them. Although the Poverty Bay Commission lands were not affected by that decision, the impact across the whole trust operation was too great. The trust mechanism had to be abandoned.

We found, in respect of the Rees Pere trusts, that the failure of the Crown to provide adequate systems for community title and management and to prevent piecemeal erosion of community land interests, breached the guarantee of tino rangatiratanga in article 2 of the Treaty. It also breached the Crown's obligation of active protection. We found that this failure was the primary reason that the Rees Pere trusts did not succeed.

Rees and Pere then tried a joint venture arrangement with Auckland property speculators. They incorporated the New Zealand Native Land Settlement Company in 1881 in order to shift to an equity-financed close settlement scheme. Just over 200,000 acres (including the Rees Pere trusts lands) were vested in the company or purchased by it. This included the lease of the 90,000-acre Mangatu 1 block. The company failed too. This was partly because of the debts it inherited from the trusts, partly because the Government discredited a promotion run by the company in England, but mostly because of the poor economic conditions at the time and some bad business decisions.

As to the failure of the New Zealand Native Land Settlement Company, we found that in large part this was attributable to bad business decisions or poor economic conditions.

EXECUTIVE SUMMARY

Clearly, the investors and promoters of the company had to take responsibility for their own mistakes in these respects. To some degree, the company suffered under defective land court titles, and because the New Zealand Government refused to support a company promotion in Britain, but although these issues contributed to the company's problems they were not the decisive cause of failure in our view.

In 1891, the company's primary creditor, the Bank of New Zealand, took the company lands to mortgagee sale. Thirty-six thousand three hundred acres were sold at auction before the sale was abandoned owing to legal action by Rees. Negotiations continued over how to untangle the mess.

In 1892, James Carroll, Wi Pere, and the bank put together a rescue package in order to save as much of the remaining land as possible from further mortgagee sales. The new Carroll Pere trust was to be the vehicle. Just under 100,000 acres were transferred to the trust during its 10-year life. It too struggled to make headway in retiring debt. Its primary problems related to insecure titles. The trust had to spend an inordinate amount of time and money fixing the defective or partial titles it received from its predecessor, the company. Since it had little income during this period, and as a result of compounding interest from unserviced debt and extremely high legal costs arising from problems with titles, the overall debt doubled in size during the operation of the trust. In order to spread the large debt load, a number of important blocks such as parts of Maraetaha and Tahora were drawn into the trust by the Validation Court which was established in 1894 to clean up the mess left by the native land transfer system. It is clear that they should not have been included. Most such blocks were sold to meet debt.

As to the Carroll Pere trust, we found that responsibility for its failure, and for the loss of lands that ought not to have been included in it, lies substantially with the Crown. It was the complex, inefficient, and contradictory system of individual transfer that destabilised the trust's titles. It made the cost of doing business too high, particularly when added to the debt burden inherited from the Native Land Settlement Company. It was the operation of the Validation Court that allowed for the inappropriate inclusion of debt-free lands into the trust. We found, as we did with the entire system of native land titles, that in allowing these things to happen the Crown breached the principles of the Treaty.

In 1902, after several warnings to the Crown of the dire consequences of neglect, and several attempts by politicians, judges, East Coast settlers, and Maori at achieving government intervention, the Government finally stepped in. This was done partly to prevent widespread landlessness among Turanga Maori when the trust inevitably failed, but mostly in order to avoid the collapse of the trust's primary creditor, the Bank of New Zealand. The collapse of the bank would have had ramifications throughout the economy and could not be tolerated. The East Coast Native Trust Lands Board was established by statute to administer about 100,000 acres of Maori land. All trust titles were guaranteed, litigation over them was barred and the trust estate was effectively put into statutory management until 1955. For most

EXECUTIVE SUMMARY

of this period the owners were denied any role in trust decisions – including decisions to sell trust blocks. On the positive side, such lands as were returned to them when the trust was terminated were returned as profitable going concerns. Twenty-seven thousand acres were eventually returned. The rest (nearly 75,000 acres) had been sold in the intervening 53 years to meet debt.

As to the East Coast Native Trust Lands Board, we acknowledged the Crown's welcome intervention in 1902. We found, however, that the Crown was aware from various sources at a much earlier stage both of the nature of the problem and of the implication of its own title system in it. The failure to intervene earlier, when it first became aware of the problem, resulted in an escalation of the trust debt and ultimately in further loss of land. In addition, once it became evident that the trust would not be a short-term institution, we found that the Crown should have required the board, and later the commissioner who superseded it, to include Maori in the development of policy for the administration of their lands. In both respects, we found that the Crown failed to discharge its Treaty obligation of active protection.

Other chapters

In a series of smaller chapters we dealt with specific claims requiring particular assessment but unable to be integrated neatly into the main thematic chapters. They were as follows.

The claim in respect of the carved wharehau held at Te Papa museum in Wellington

In regard to the claim in respect of the carved wharehau called Te Hau ki Turanga held at Te Papa museum in Wellington, the Crown accepted that Te Hau ki Turanga had been acquired in a manner which breached the principles of the Treaty. We reached the further view that there was a real question about where legal title to the wharehau resided and that this ought to inform negotiations between the claimants (primarily Rongowhakaata) and Te Papa over arrangements for custody and management of the taonga.

The claim by Te Whanau a Kai in respect of the trial and execution of Hamiora Pere

While we took no issue with Pere's conviction for treason – we had already found in chapter 5 that the attacks on Turanga in which he participated were acts of rebellion – we expressed concern about the decision to execute him. Our full reasons are to be found in chapter 12. We decided, however, that since the trial occurred a long time ago, we were not present at it, and since, in any event, we are not expert in criminal matters, we are not in a position to make any firm findings. Instead, we recommended that the Attorney-General review the record in order to assess whether the decision to hang Pere was made for proper reasons and in accordance with appropriate principles. If a serious doubt was raised on the evidence, consideration ought to be given to an appropriate acknowledgement of that.

The Ngariki Kaiputahi claim in respect of the Mangatu title investigation

We found that the 1881 award of the Native Land Court was clearly unsafe insofar as it found Ngariki to be a conquered people with no rights in Mangatu except those arising from actual residence. Such a conclusion was inconsistent with the evidence, the stance of other claimant parties in court, and the way in which those parties conducted the affairs of the Mangatu lands even after the decision. We found also that the review of the 1881 decision in 1918 and 1922 (following a petition by Te Whanau a Taupara) made matters worse by further reducing the Ngariki share in Mangatu 1 in order to make way for Te Whanau a Taupara owners. This was done without giving Ngariki a fair opportunity to reargue their share at the same time. We found that, in practical terms, the effect of the awards of 1881 and 1922 on Ngariki were significant. The interests of Ngariki shareholders in Mangatu were inappropriately discounted because of their Ngariki descent; owners with multiple hapu claims in Mangatu consistently disclaimed Ngariki descent and preferred claims through other hapu for that reason; and Ngariki were wrongly stigmatised as a conquered tribe living in servitude in traditional times.

Finally, we found that, although it is now inappropriate, indeed impossible, to upset relative hapu interests in the Mangatu lands, it is still open to the Crown to apologise for the wrongs suffered by Ngariki at the hands of the land court, and to compensate them for the significant loss of mana and land which they have suffered.

The claim by Te Aitanga a Mahaki in respect of the acquisition of the Mangatu Forest as an erosion protection measure

We found that the Crown acquired approximately 8500 acres of the Mangatu lands for the purpose of the Mangatu State Forest in a manner that was not fair, even-handed, or honest. In particular, officials and politicians repeatedly advised the owners that the forest would be managed primarily as a protection rather than a commercial forest. It would, the Crown advised, therefore be uneconomic for the owners to retain the land and enter into some kind of management or lease arrangement with the Crown for the establishment and operation of the forest. The owners, who were initially strongly opposed to sale, eventually agreed to sell for that reason. In fact the Crown had, for some months prior to the conclusion of negotiations, been planning to plant and operate 75 per cent of the forest as production forest for commercial return. The forest is now run profitably. We found the way in which the Crown conducted itself during the negotiations breached its Treaty obligations to act reasonably and with the utmost good faith.

Public works claims

Public works claims were made in respect of a number of blocks, and we received evidence, particularly from Crown witnesses, relating to many of them. The evidence was far from comprehensive, however, and we were not in any position to make general findings on public

works takings in Turanga. Such limited findings as we were able to make are set out in chapter 12.

Rating claims

Rating claims were made at a general level by Rongowhakaata and Te Aitanga a Mahaki and in respect of the Te Karaka 16A block by Robert Kotuku Cookson on behalf of himself and his late wife, Huinga Jane Cookson.

As to the general rating claims, we received insufficient evidence to make any findings. As to the Cookson claim, we considered that it was inappropriate for this Tribunal to make findings while the matter is the subject of appeal to the High Court. But we set out, for the record, extracts from the evidence of Mr Cookson before us that may inform in some small way that appeal process.

Te Whakamahutanga – the healing

In the last chapter of our report, we drew together some of the key themes arising from our investigation of the Turanga claims. We focused on the importance in the Treaty of three important ideals: the rule of law, just and good government, and the protection of Maori autonomy. These ideals (and the failure of the Crown to live up to them) were at or near the surface of Maori–Crown relations in Turanga throughout the nineteenth and early twentieth centuries. When we measured Crown action against these ideals, we were struck time and again by:

- ▶ the ease with which the Crown could disregard its own law when expedient in its dealing with Turanga Maori;
- ▶ the consistency with which the Crown preferred to adopt policies and laws which gave priority to settler interests over Maori interests in any event; and
- ▶ the Crown's persistent refusal to allow Maori to manage their own affairs at community or tribal level in accordance with Treaty promises, and its insistence on treating Maori communities as unassociated collections of private individuals.

Almost every Treaty breach we found in the Turanga claims could be traced back to one or other of these fundamental failures.

We went on to express frustration at the ignorance in local communities today of our collective past and the obstacle this presents to reconciliation within those communities. We expressed the hope that in promoting Treaty education, the Government will address this unmet need.

We then turned to address matters relating to future negotiations. We offered our view of whom the Crown should negotiate with for the settlement of the Turanga claims, the comparative size of the claims that are well founded, and the relativities between the claimant groups in Turanga. The sensitivities around these particular matters are such that we do not consider

EXECUTIVE SUMMARY

it useful to summarise our views here. The reader is referred to our brief conclusions in these regards in chapter 16.

We finally wished the claimants and Crown well in their negotiations over the settlement of these long-standing claims and expressed the hope that a durable settlement will be arrived at with all possible speed and a minimum of stress on claimant communities.

CHAPTER 1

THE INQUIRY

*Haramai a Paoa i runga i tona waka i a Horouta
Ka pakaru ki tuarae nui o Kanawa
Ka haramai ki uta ra
Ki te rapa haumi
Ki te rapa punake
Ka kitea te haumi
Ka kitea te punake
E kai kamakama ka miia tona mimi
Rere ana Motu, rere ana Waipaoa
Ko Kopututea te Putanga ki waho
Ki a unu mai tona kuri
E pakia mai ra, e nga ngaru o te moana
E takoto nei . . . i
Ka huri ka huri te haere a Paoa ki te Tairawhiti.*

*And Paoa came on his canoe called Horouta
It was wrecked at Tuarae nui o Kanawa
He landed
To search for haumi [a bow of a canoe]
To search for punake [the splicing section of the prow]
To search for haumi
To search for punake
He then partook of the ritual feast and released his urine
Thus was born the Motu, thus was born the Waipaoa
And Kopututea is its mouth
That his dog may drink [of the river's water]
There yonder [Te Kuri a Paou] it is dashed by the ocean waves
That lie before us
And Paoa turned to the rising sun.*

1.1 INTRODUCTION

The Turanga Tribunal has been the first to adopt the ‘new approach’ to inquire into historical claims against the Crown. By way of introduction, we summarise the objectives of this new approach. We then turn to a discussion of the process itself: the historical research; the inquiries into mandate and the inquiry boundary; and the interlocutory process and hearings.

The new approach seeks to speed up Tribunal inquiries into historical claims while remaining mindful of the requirements of natural justice. It is, we feel, a necessary improvement to the savings in time and resources already made through the Tribunal’s district approach; that is, the hearing together of claims in a clearly defined geographical area. Important aspects of the new approach are the early identification of mandate and the isolation and management of mandate disputes (should they arise). We discuss this further below.

The primary innovation of the new approach has been the introduction of a formal pleadings process after the completion of the claimants’ research and prior to the beginning of the hearings. First, all the claimants were required to identify and carefully document their grievances in fully particularised statements of claim. The successful completion of these enabled the Crown to make an early but thorough response (the statement of response). The Tribunal then identified issues of agreement and contention between the parties and generated a statement of issues. At all stages, the claimant communities remained involved through their participation in public judicial conferences.

While this interlocutory stage necessarily lengthened the time spent in preparation, the focus and tight management generated by it allowed for a concentrated series of hearings. The repetition of evidence and argument between the parties was curtailed. Thus, instead of 20 hearing weeks spread over a period of three to four years, the Turanga Tribunal was able to hold 8½ weeks of hearings spread over eight months. Hearing time was divided between the claimants (five weeks), the Crown (2½ weeks), and the closing submissions of all the parties (one week).

Such a reduction in time was achieved only through cooperation between the parties and the deployment of significant resources by Treaty sector agencies. Different claimant groups and claimant counsel often worked together, sharing the load of pleadings and enabling key historical witnesses to give evidence for the benefit of all. The Crown’s response and the highly focused research that supported it were also vital to the Tribunal’s examination of historical issues.

1.2 THE INTERLOCUTORY PROCESS

In Turanga, we spent several months in an interlocutory process. We held a series of judicial conferences aimed at fully preparing the parties for the hearing process. The interlocutory process is essentially one of planning and formal pleadings, with tight management exercised

at all levels. As mentioned above, the claimants filed statements of claim, the Crown filed a statement of response, and the Tribunal generated a statement of issues. An important part of the process was the testing of a draft of each document at a judicial conference. Concerns were voiced either by the Tribunal or by other parties, and amendments were made accordingly. All the parties attended the judicial conferences, as did significant numbers of people from the claimant communities.

The key phases of the interlocutory process were as follows:

- (a) Casebook deadline – 15 January 2001. With some minor exceptions, all claimant research was completed and filed with the Waitangi Tribunal by this date. Crown research was filed after the completion of the pleadings.
- (b) Statements of claim – registration 18 April 2001.
- (c) Crown statement of response – registration 23 July 2001.
- (d) Tribunal statement of issues – registration 12 September 2001.

There are advantages to this approach. All the issues advanced by all the claimants were on the table for everyone to see, and this reduced unfounded concern about the stance co-claimants might take on issues such as boundaries. Furthermore, a number of issues that were shared by most of the claimants were identified as such (eg, the hostilities at Waerenga a Hika and Ngatapa, and the 1868 deed of cession). These commonalities were capitalised upon in the opening week of the hearings. Effectively, this meant that the claimants worked cooperatively to present parts of their claims as a single case.

The statement of issues (a document containing 30 sections, with each section containing an average of 10 questions) was extensively used throughout the inquiry. Expert witnesses were required to summarise their reports so as to answer questions raised in the statement of issues. The Crown's research effort was usefully predicated upon the statement of issues, which had the overall effect of reducing the production of unnecessary evidence during the hearings. Above all, it enabled parties to get quickly to the heart of contentious historical issues. In this report, we have sought, where possible, to engage with the arguments presented by the parties on these issues and to set out clearly our analysis of, and decisions on, them.

1.3 HEARINGS

Claimant hearings were spread over five months. The first hearing week was a cooperative effort and dealt with issues of war and confiscation, as well as with environmental issues. Both the Tribunal and the Crown were welcomed onto Whakato Marae in Manutuke by seven kaiwero, each representing one of the principal claimants of Turanga. Speakers from each of the claimant groups greeted the Tribunal.

In succeeding months, each group of claimants hosted the Tribunal in turn, with Crown hearings following soon afterwards. Closing submissions were made by the claimants and the Crown in the last week of June. The hearing dates and locations are summarised below.

Date	Venue	Agenda
19–23 November 2001	Whakato Marae	All claimants
10–14 December 2001	Offices of the Mangatu Incorporation	Te Aitanga a Mahaki
28 January–1 February 2002	Rongopai Marae	Te Whanau a Wi Pere, Te Whanau a Kai, Ngariki Kaiputahi
25 February–1 March 2002	Mangatu Marae	Rongowhakaata Nga Uri o Te Kooti
	Te Mana o Turanga	Rikirangi
2–6 April 2002	Muriwai Marae	Ngai Tamanuhiri
15–19 April 2002	Offices of the Mangatu Incorporation	Crown
21–23, 27–31 May 2002		
24–28 June 2002	Gisborne Boys' High School	Closings

Tribunal hearings

1.4 HISTORICAL EVIDENCE

A significant body of historical research was placed before us. Twenty-one expert witnesses gave evidence for the claimants, their research being contained in 30 reports. Ten expert witnesses appeared for the Crown, and they presented a total of 24 separate reports. In addition, all witnesses prepared summaries of their work, writing answers to questions generated in the statement of issues. Some witnesses answered questions of clarification that had been submitted by parties prior to their appearance on the stand, and all witnesses were subject to cross-examination by counsel and questions from the Tribunal. Of considerable assistance to the Tribunal were maps prepared by the Crown Forestry Rental Trust's mapping team, a number of which are reproduced in this report. In addition, Crown researchers produced a land alienation database.

We note that the Crown's historians and experts were able to draw upon an extensive body of pre-existing claimant research. While this may be seen as giving them an advantage, the effect of their evidence in reply was to better focus the minds of the parties and the Waitangi Tribunal on issues of importance in the inquiry district and on points of difference between them. We acknowledge both the high quality of scholarship from all sides and the agencies which made resources available for research and other purposes. We acknowledge in particular the Crown Forestry Rental Trust, the Crown Law Office, the Office of Treaty Settlements, and the Legal Services Agency.

The evidence of expert witnesses was complemented by the evidence of witnesses from the claimant communities. In total, we heard from 47 claimant witnesses, both young and

old, a few of whom gave evidence more than once. Most (but not all) claimant witnesses spoke to or read from well-prepared briefs of evidence. Some claimant witnesses were cross-examined by counsel or were asked questions by the Tribunal. The claimants took the Tribunal on a number of site visits, one of which was by boat. Throughout the hearings process, the claimants sang or performed waiata, patere, ngeri, and haka. These articulated the claimants' identity or history, or affirmed evidence given by indicating that the views expressed by the witnesses in hearings were consistent with long-held oral traditions. Sometimes, haka were used simply to express anger at the manner in which they alleged the Crown had treated the claimants' tupuna.

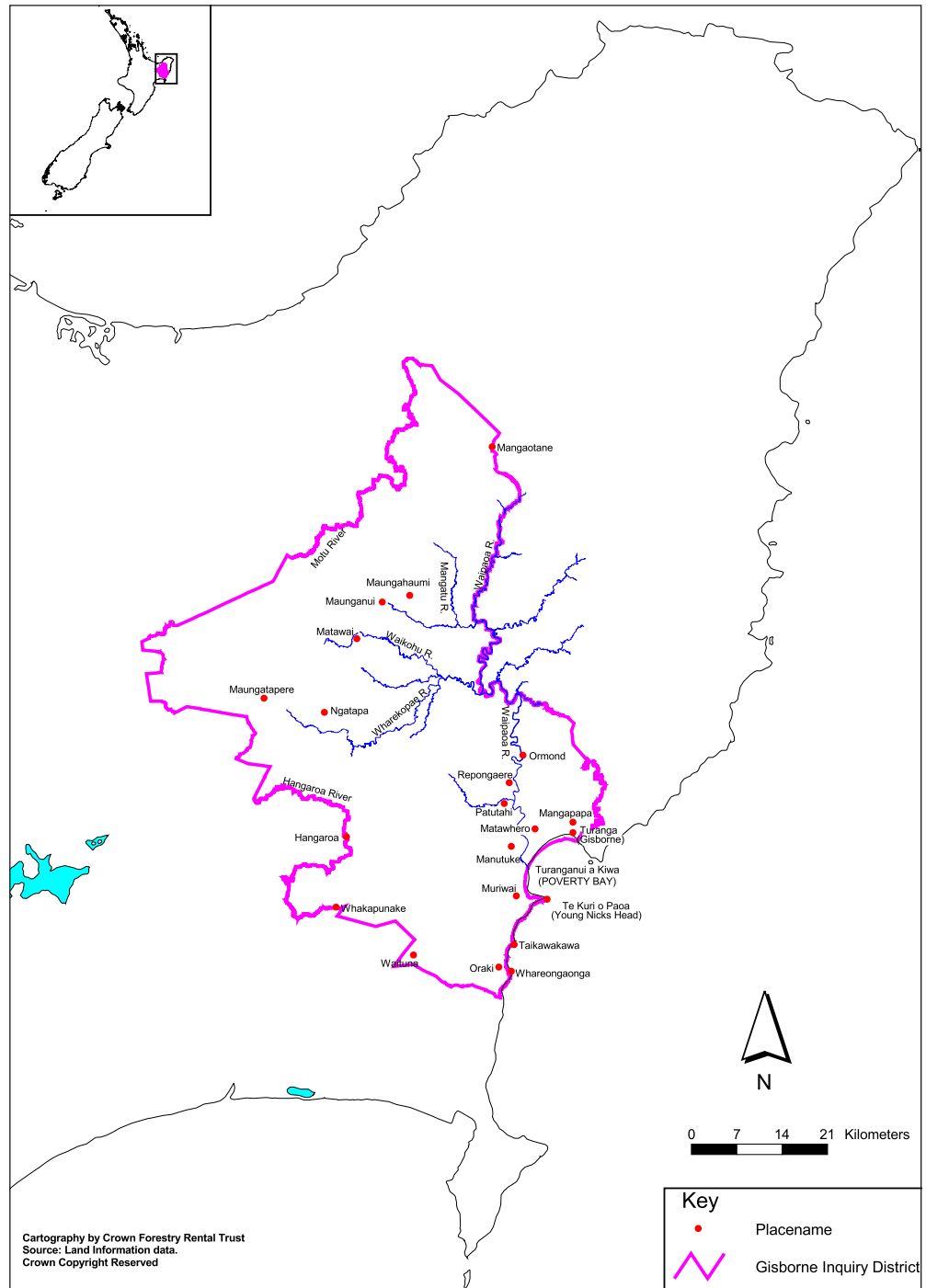
In addition, many hearings were opened or closed with karakia of Te Kooti's Ringatu Church, and much evidence from the claimants was accompanied by waiata which had been composed by Te Kooti to record, as he saw them, some of the historical events which were the subject of claim. We found this body of evidence to be of great assistance in understanding the claimants and their claims. In a few crucial circumstances, the oral traditions conveyed through waiata came to be decisive in enabling us to arrive at the truth of a matter.

We would also acknowledge the fact that detailed claimant research and oral evidence enabled the Tribunal to gain an understanding of both the shared and the distinct history of claimant groups in Turanga. Customary history reports were claimant specific, but they often stressed shared genealogical origins and connections between kin groups. Some historical reports were generic in nature but also addressed matters important to specific groups. Yet other reports dealt with the minutiae of historical events and processes at a local or even block level. While it is impractical, indeed impossible, for this Tribunal to reproduce the detail contained in this wider body of research, where possible we have sought to identify the impact of historical events and processes on particular claimant groups. These claimant-specific findings will normally be found at the end of the substantive chapters, close to the Tribunal's summary of the Treaty breaches and findings.

1.5 INQUIRING INTO MANDATE

Integral to our approach was the early identification of mandate and boundary disputes among claimants. By 'mandate', we meant essentially who had the right to speak for a particular community (usually a kin group) in respect of a particular grievance or grievances. By 'boundary disputes', we meant, in respect of land claims, disputes over which kin group 'owned' the grievance.¹ We were aware of the difficulties caused to hearings on some

1. The term 'boundary' is not particularly useful in this context because Maori custom did not contemplate the concept in the same way as English surveyors and lawyers did. Rights in Maori custom rarely followed lines on the ground. They followed (and still follow) lines in a whakapapa. None the less, 'boundary dispute' is the term generally used to denote the issue of which kin group has the right to carry a grievance, so we have used it here.



Map 1: The Gisborne inquiry district, showing the major geographical features

occasions by tribal boundary disputes or by a lack of agreement over mandate. Clarification of these disputes, how they would be dealt with so as to avoid their becoming a focus in the inquiry, and how they could be resolved before settlement negotiations commenced, were matters which had to be dealt with early.

During the planning phase of the inquiry, prior to the commencement of the interlocutory process, the Tribunal looked at the mandate asserted by different claimants.² This was done in a public and transparent manner by asking parties to state who they represented at well-attended judicial conferences. Parties, including the Crown, were given the opportunity of objecting to such statements of representation. In some instances, objections were made or questions raised, and over time such disputed mandates were clarified.

The Crown has asked this Tribunal to give it a steer on mandate issues. The Crown has chosen not to take statements of mandate made at judicial conferences or in statements of claim at face value. The Crown's view is that 'where someone makes a claim that they are acting in a representative capacity, their evidence should establish this and the Tribunal should remark upon whether it has done so or not'.³ The Crown has also sought advice from this Tribunal on 'the appropriate level at which negotiations in the . . . Turanga region might take place'. It has asked: 'is it the Tribunal's view that negotiations should take place at a regional level or at an individual iwi level, and, if the latter, what are the appropriate iwi groupings?'⁴ Overall, the Crown is concerned to avoid 'counter claims' and the significant delays to settlement that can develop because of them.

What we saw and heard in Turanga is that mandate for inquiry and negotiations is a complex and subtle thing. There is, of course, a difference between the mandate required to bring a claim before the Waitangi Tribunal and the mandate required to proceed to settlement with the Crown. Any individual Maori can make claims to the Tribunal. Conversely, the Crown wishes to settle with 'large natural groupings'.⁵ The political reality, however, is that inquiry mandate and negotiation mandate are closely related. During the inquiry process, we saw both an evolution of and a demonstration of mandate. The very fact that communities mobilised to prepare claims and host inquiries offers a tangible expression of mandate.

We have observed too that the inquiry process functioned as a kind of bridge to settlement. Hearings provided claimants with a forum in which to build mandate in a positive way. They provided an opportunity for the leadership to articulate a vision with their people, and for the people to work towards it. The inquiry process, and the mandates that developed within it, could thus be seen as building blocks for negotiation.

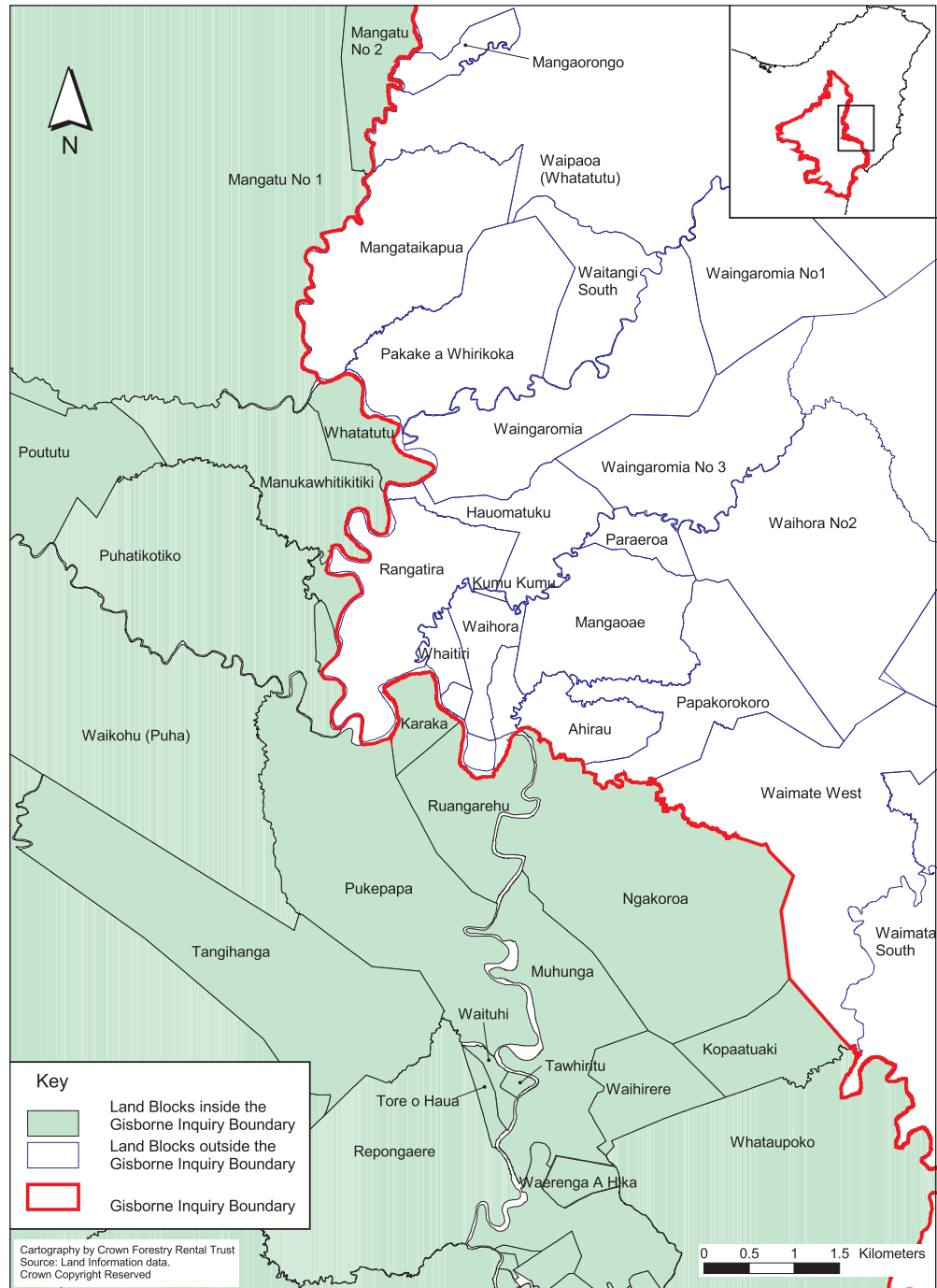
We provide guidance to claimants and the Crown on the issue of mandate for settlement in three ways. First, chapter 2 introduces the different claimants who appeared before the Turanga Tribunal. Claimants appeared to us to be characterised in four ways: the claimants as a whole; hapu or iwi claims; whanau claims; and individual claims. The rohe, principal ancestors and hapu of each of the main claimant groups are also described, albeit in summary form.

2. See papers 2.2, 2.21, 2.72

3. Paper 2.194, p2

4. Document H14(SOI 1), p18

5. Ibid



Map 2: The eastern boundary of the Gisborne inquiry district

Secondly, when the Tribunal identifies Treaty breaches and prejudicial outcomes in the main body of the report, these are tied as much as possible to particular claimant groups. At times, these analyses will necessarily be broad. At other times, specific findings are made, such as a quantification (in so far as is possible) of deaths in battle, or the specific blocks of

land to which particular historical processes were applied (for instance, the actions of the Poverty Bay Commission, or Crown purchasing).

Thirdly, the last chapter outlines our thoughts on the appropriate level at which the Crown could negotiate settlement. In this we are guided by the idea that some issues are generic to Turanga, some issues are iwi specific, and some issues operate at a hapu or even whanau level. Here assistance is given on the relative grievances suffered by the different claimant communities. We also consider the issue of proportionality: that is, the relative grievances suffered by different claimant communities.

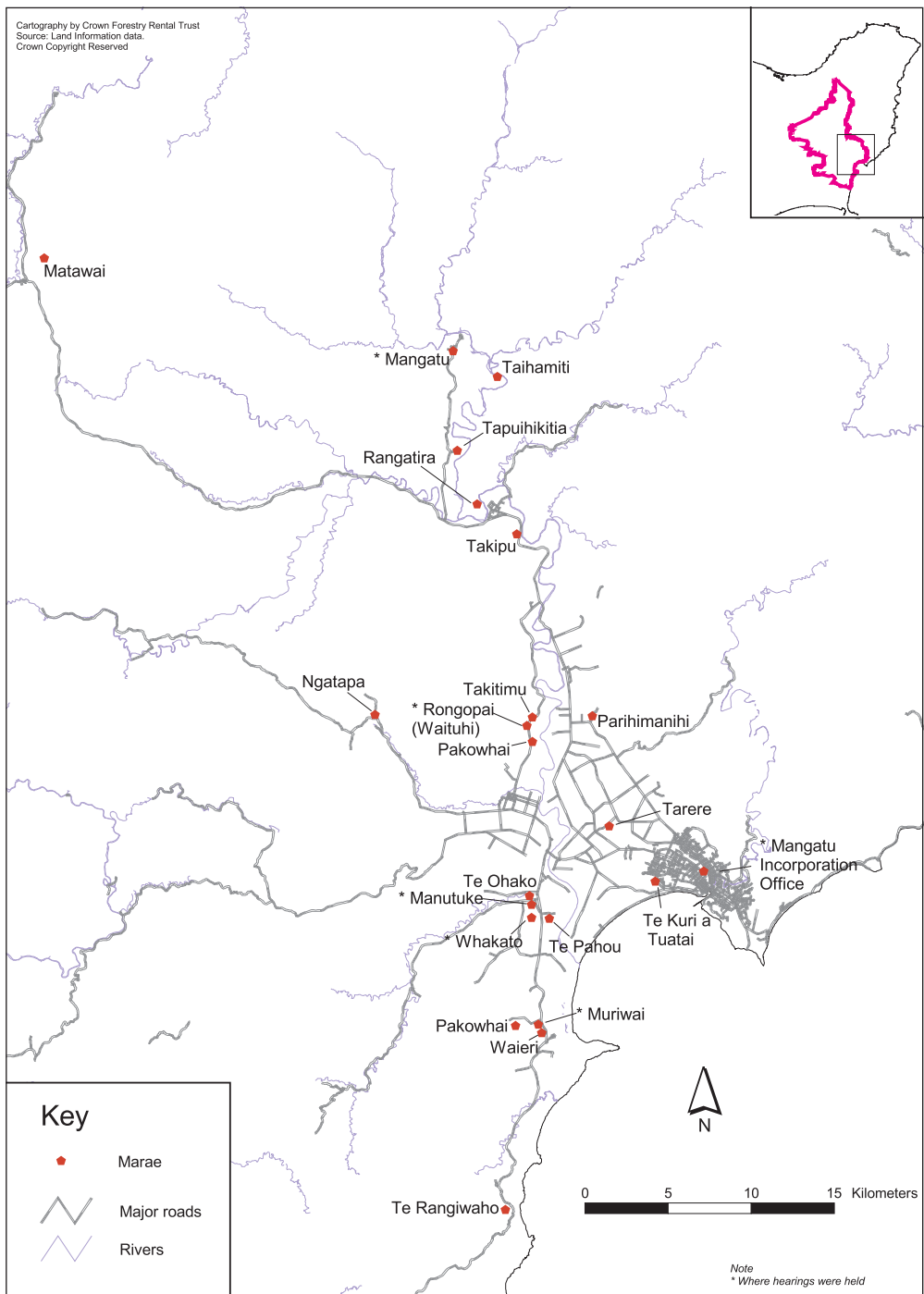
1.6 INQUIRY BOUNDARY

As a matter of necessity, the Turanga Tribunal set out a district within which claims would be heard. The approach taken by the Tribunal was to create a boundary that included core tribal interests of the claimant groups.⁶ In some instances, this boundary has cut through part of the rohe of claimant groups, an inevitable result of drawing lines on any Maori customary landscape. Similarly, some groups whose primary interests are excluded from the Turanga inquiry have other interests within it. We have noted, for general reference, where particular claimant rohe extend over this boundary (see ch 2).

However, because the inquiry district included the core interests of the claimant groups, and because of the comprehensive investigation into historical grievances made by this Tribunal in respect to those groups, we expect that the Crown will be able to proceed quickly to settlement negotiations. In a few instances, it may be necessary for the Office of Treaty Settlements and claimant groups to agree to an independent survey of interests outside the inquiry district to ensure that the Crown is fully aware of wider tribal interests before attempting a settlement purporting to be 'full and final'. We are thinking particularly of Te Aitanga a Mahaki interests across the bend of the Turanganui River, in blocks such as Rangatira, Hauomatuku, and Mangaoae, or in other places to the west or south of the inquiry district where Rongowhakaata, Ngai Tamanuhiri, or Te Whanau a Kai interests may extend. We note that some of the reports before this inquiry have in fact covered lands outside the inquiry boundary.⁷ Any approach to this should be taken in such a way as to avoid conflict between the Turanga claimants and their neighbours.

6. Paper 2.21, p6

7. Documents A4, A17, A18



Map 3: The location of marae in the Gisborne inquiry district

CHAPTER 2

TURANGANUI A KIWA: THE CLAIMANTS

Hutia te rito
Hutia te rito o te harakeke
Kei hea komako
Ki mai ki ahau
He aha te mea nui
He aha te mea nui o te ao
Maku e ki atu
He tangata
He tangata
He tangata, hi.

Pluck out the heart
Pluck out the heart of the flax bush
And where can the komako [bell bird] alight?
If you ask me
What is the greatest thing
What is the greatest thing in the world
I will tell you
It is people
It is people
It is people.

We heard evidence from 12 separately represented claims.¹ We also heard evidence from the Crown. This chapter serves as an introduction to the claimants. After outlining the different claims, we discuss Maori social organisation and the nature of Maori rights in land and resources. This is intended to introduce a more detailed discussion of the principal claimant groups in Turanga.

1. See statement of issues, vol1, p6, table. A number of statements of claim incorporated more than one registered claim: soc 1 comprised Wai 274 and Wai 283; soc 2 (Wai 323); soc 3 (Wai 499, Wai 507); soc 4 (Wai 684, Wai 337, Wai 351); soc 5 (Wai 856); soc 6 (Wai 874); soc 7 (Wai 878); soc 8 (Wai 892); soc 9 (Wai 895); soc 10 (Wai 896); soc 11 (Wai 917); soc 12 (Wai 129).

2.1 DISTINCTIONS BETWEEN CLAIMANT GROUPS

The Turanga claims were advanced at four different levels: Turanga-wide claims, iwi and hapu claims, whanau claims, and individual claims.

Where there was common cause among Turanga Maori, claims were advanced by a single collective representing all. Partly, such collective action was organised in an informal way. During the first week of hearings, for example, claimants and their counsel cooperated in presenting evidence on issues generally common to them all. The result was the presentation of a coherent and clear picture of the claimant communities and their claims covering the district over 30 years of colonial contact following the Treaty.

Some Turanga-wide claims, however, were brought on behalf of all iwi and hapu by a separate and formal legal entity, Te Runanga o Turanganui a Kiwa (TROTAK). TROTAK brought an environmental claim on behalf of and with the support of all iwi, hapu, and claimants. It was established in 1986 under the Charitable Trusts Act 1956 as a body to establish and advance social programmes on behalf of Te Aitanga a Mahaki, Rongowhakaata, and Ngai Tamanuhiri. TROTAK is governed by nine trustees – three from each of the founding iwi. TROTAK's environmental claim was wide ranging and comprehensive but focused particularly on the vexed issue of wastewater treatment. We were requested by counsel for TROTAK to address the issues as they currently stood. For two reasons, we declined to do so. The first was that the presiding officer of this Tribunal had been instructed as counsel in 1991 in an Environment Court appeal by TROTAK and so could not preside over such a claim. The second was that matters of wastewater treatment were currently the subject of a further appeal by TROTAK to the Environment Court. We considered it inappropriate to hear, collaterally, essentially the same matters as would be heard in that forum. It would, in our view, be far better to allow the matter to be completed under the Resource Management Act 1991 before TROTAK considered the necessity of recourse to this Tribunal. We caution, however, that we do not say that this should invariably be the Waitangi Tribunal's approach. There may be circumstances where the Tribunal should not defer when same issue proceedings are in hearing elsewhere. But, in the circumstances of this case, our approach seems appropriate. In the event, counsel for TROTAK agreed that wastewater issues only up to 1991 would be advanced in this forum, with leave reserved to apply for a further hearing before a differently constituted Tribunal in respect of aspects of the claim from 1991 to the present, should counsel consider that necessary in due course.

We think it important to emphasise the high level of both formal and informal cooperation amongst Turanga claimants, partly because without it we would not have completed our hearings so expeditiously. More importantly, claimants chose to accentuate those things that they shared at the expense of their differences, just as, throughout the history of Turanga, iwi and hapu have found common cause when facing a single external challenge. Having said that, we do not underestimate for a moment the difficulties that the claimants had to overcome in achieving the high level of collective action that they did. It is our earnest hope that this

willingness to cooperate and, where appropriate, act collectively finds even fuller expression in negotiations with the Crown for the settlement of these claims. We will return to this issue later in our report.

At the second level are the hapu and iwi claims in Turanga. These comprise claims by Te Aitanga a Mahaki, Rongowhakaata, Ngai Tamanuhiri, Te Whanau a Kai, and Ngariki Kaiputahi. The relationship between these groups, particularly between Te Aitanga a Mahaki, Te Whanau a Kai, and Ngariki Kaiputahi, is a complex matter. We note at this stage that claims of Treaty breach as made by all hapu or iwi groups are broad-reaching in nature and cover a wide range of historical evidence of loss and grievance against the Crown.

At the whanau level, the Tribunal heard from Te Whanau a Wi Pere and Nga Uri o Te Kooti Rikirangi. (The term ‘whanau’ is here used in a metaphorical sense to denote the direct descendants of a tipuna. We use the term to describe this level of claim because it is the claimants’ own term, even though strictly speaking these descent groups are much larger than ‘whanau’ commonly so-called.) Both whanau are large, comprising respectively the direct descendants of Wiremu Pere and Te Kooti Rikirangi, leaders of national importance in their day. Both whanau assert grievances specific to these ancestors. Both whanau cooperated with and supported wider kin groups during hearings: Nga Uri o Te Kooti Rikirangi with Rongowhakaata, and Te Whanau a Wi Pere with Te Whanau a Kai and Te Aitanga a Mahaki. It should be noted that Te Whanau a Wi Pere argued two separate claims, one regarding the Waitawaki block (part of the ceded Muhunga block), and the other regarding the Pouparae block (a private land claim heard by the Poverty Bay Commission).

Claims made by individuals representing themselves, their families, or some other individuals included those of David Brown, Robert Cookson, and Sue Te Huinga Nikora.

David Brown claimed by virtue of a Ngariki Kaiputahi identity. He represented his brothers and sisters and their children, and his uncle, Phillip Brown. All are descendants of Edward Brown.² His claim is therefore a Ngariki Kaiputahi claim on behalf of some of the members of that kin group. Statements made in this report about the grievances of Ngariki Kaiputahi will apply also to David Brown and those he represents.

Robert Cookson’s claim dealt with a current-day rating issue, affecting himself and his immediate family. We have reported on this claim in the chapter that deals with rates (see sec 13.7).

For the purposes of the Gisborne inquiry, Sue Te Huinga Nikora represented herself and Te Atauoterangi III.³ Her claim concerned losses suffered through the alienation of the Maraetaha 2 block. This block is one of the core Ngai Tamanuhiri blocks. Thus, as with the relationship between David Brown and Ngariki Kaiputahi, Mrs Nikora’s claim is in reality a Ngai Tamanuhiri claim, provided, that is, that she can prove descent from their tipuna. Statements made in this report about the losses suffered by Ngai Tamanuhiri in the Maraetaha 2

2. Paper 2.79, p2

3. Paper 2.49

block can be seen to apply to Mrs Nikora and Te Atauoterangi as individuals in a manner similar to any other individual able to show Ngai Tamanuhiri descent. Our findings in respect of Ngai Tamanuhiri therefore apply with equal force to Mrs Nikora's claim.

2.2 'HAPU OR IWI' COMMUNITIES

In this report, we have used the combined category of 'hapu or iwi' deliberately. In our view, a strict adherence to these labels fails properly to explain either current or historical Maori communities. The common but misplaced view is that hapu are subordinate to iwi. Alternatively, the view is sometimes advanced that hapu exist as entirely autonomous political and social entities, but this is also incorrect. The relationships of obligations and counter-obligations between hapu, and between iwi and hapu, are complex, and it is also important to understand the role and function of leadership within and between the groups.

Historically, hapu were the primary social unit of Maori society. They were kin groups claiming common descent (whakapapa) from an ancestor or ancestors, upholding its mana, maintaining rights in land over a specific territory (although that territory might intersect with the territory of other kin groups), and putting forward leaders who exercised temporal and spiritual power. Currently, hapu retain enormous importance as functioning social communities, although it is fair to say that they have given ground to iwi in some areas.

Within hapu are whanau – multigenerational extended family units. Whanau were the primary unit of day-to-day residence and labour but they were not necessarily households. Though with urbanisation day-to-day co-residence no longer carries the same importance, the whanau still has enormous emotional importance to its members and continues to be a locus for much cooperative effort. Sometimes, close kin can identify with different hapu, such as when brothers and sisters were raised by different grandparents.⁴

While hapu and whanau made (and often continue to make) their own decisions, and, while they could disagree with or fight one another, more often than not they interacted through gift exchanges, competitive feasts, strategic marriages, and practical cooperation of various kinds (eg, resource harvesting). Hapu almost invariably shared lines of descent with their neighbours, their whakapapa weaving back to mutual ancestors. There is no such thing as an isolated hapu, a hapu separated forever from outsiders. Indeed, different hapu often lived and continue to live in close proximity to one another, forming communities of common residence and interest. The connections by marriage among closely related hapu often meant that people within a single community identified themselves by a variety of hapu names, so that the community encompassed a number of hapu.

Naturally, too, the authority or mana of individual hapu can wax and wane over time. New

4. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p18

hapu were sometimes formed through the descendants of a great leader, while older hapu became redundant or were defeated through battle and absorbed into other groups. Thus, some larger hapu had their own hapu within them – whanau that had grown to prominence.

Whakapapa, the fundamental logic of Maori cultural life, tends to function as a grid or network of possible relationships within and between hapu. Whakapapa makes it feasible, indeed natural, for hapu to work together, building larger polities or communities that we now often term iwi.

While the leadership of iwi usually came from within hapu structures, high-ranking chiefs, ariki, or rangatira were often able to command considerable authority, directing the actions of multiple hapu or across iwi lines. The role of Wi Pere from about 1874 is an obvious example of this in Turanga. A leader like Pere could call on wide-ranging whakapapa connections embodying the mana of all whom they represented. Even then, however, hapu retained a significant level of autonomy within iwi; a federalism born of the obligations of kinship, rather than from a formal constitution.

There is a subtlety to Maori leadership structures which colonial authorities found difficult to understand. On the one hand, macro-level policies of the kin group were often placed in the hands of ariki or high-ranking rangatira. Such persons took responsibility for managing external relationships with neighbouring iwi or hapu (or with Pakeha or the Crown), concerning themselves less with day to day resource use. On the other hand, leadership functioned as part of the kin group – leadership was the kin group's very embodiment, each being tied to the other through a kind of reciprocal contract of kinship many generations deep. Even if they wielded considerable influence, leaders consulted with the community in their decision making, not just because it was the wise thing to do, but because tikanga required it. As the Orakei Tribunal commented, 'The chiefs or elders were rarely divorced from their people. They were not autocrats but the facilitators and locators of consensus.'⁵

Therefore, while closely related hapu might disagree among themselves, or break away for a time from their neighbours because of insult or injury to their mana, the whakapapa which connected them remained. Moreover, relations between iwi themselves could remain cooperative and amicable for long periods of time. Principles of whanaungatanga and manaa-kitanga, rather than those of difference and separation, could prevail. In oral evidence, the kuia Heni Sunderland reminded the Turanga Tribunal of this in a powerful way:

The caring and looking after each other was a way of life for us. Everybody was helping each other if there was need. Whanaungatanga was an important part of our life when we were growing up. . . . However, I see today that people are claiming on their own. I think that should never have happened. We are the same people and the most important things are our Maoriness and our whakapapa. That's how I was brought up in this Maori world. I don't

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991), p 20

believe in this, each man for himself and boundaries. To me that is not the Maori way of thinking.⁶

Today, though, hapu and iwi face numerous challenges. Responding to nineteenth- and twentieth-century pressures of colonisation, Maori kin-groups worked together, forming alliances and gaining strength in numbers and a common cause. Some modern-day iwi are products of this struggle. But operating at iwi level is not easy. Since the true locus of power is usually at hapu level, decision-making needs to be as much ‘bottom-up’ as it is ‘top-down’, and it is dangerous for iwi leaders to act without the endorsement of their constituent communities.

That said, the tension pointed out above remains. Independent action by hapu, or even whanau, can never supplant common whakapapa. Nor does it preclude later unity or cooperation. In contrast, independent action can bring significant risks for hapu leaders. In the modern Treaty settlement process, cooperation invariably produces superior outcomes, and leaders do not last long if, by insisting on division, they produce inferior outcomes for their people. Maori tradition teaches us that this has always been the case. In tikanga terms, the protection of mana does not necessarily mean separateness – through cooperation, mana can be maintained and, indeed, enhanced.

2.3 COMMUNITY RIGHTS IN LAND

Before introducing the principal claimants of the Turanga inquiry, the issue of hapu or iwi rights in land needs to be introduced in a general way. As we have said, kin groups typically retained areas of customary control, or rohe. Most resided at specific marae, kainga, and pa, hunting and gathering in or cultivating particular areas, as well as accessing the coast or sea. But tribal rohe never entailed straightforward demarcations of territory. Hapu or iwi are not like modern-day nation states, with passports for their citizens and permanent borders, fences, and divisions between them.

First and foremost, the notion of land ownership as an individual freehold right was foreign to Maori. Control and management over resources in land was essentially a community affair. While this fact is well understood in the wider historical and anthropological literature, the basics of the system are worth traversing here.⁷

The control and management of a group’s rohe was expressed through the distribution of finely differentiated rights of access to resources rather than through ‘ownership’, as it would be understood in English law. Through its leaders, the kin group exercised a right of

6. Document D30, paras 13–14

7. For an example of recent scholarship, see Angela Ballara, *Iwi: The Dynamics of Maori Social Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), pp194–207.

management or trusteeship, sometimes termed *kaitiakitanga*. The control of resources was intertwined with ancestral deeds and cemented in *whakapapa*. Rights in land were sourced in a number of ways: ancestral inheritance, the discovery and naming of places by ancestors, victory in battle (commonly followed by marriage into the defeated group), and inter-group transfers (although these often carried reciprocal obligations). These are commonly called the four take: take *tupuna*, take *taunaha*, take *raupatu*, and take *tuku*. All take had to be consummated by the regular exercise of rights held. The term according to *tikanga* is ‘*ahikaroa*’ or ‘*kauruki turoa*’.

Hapu territories usually ranged over a number of different environments, including fertile flat lands, wooded hills, wetlands, lakes, inland waterways, estuaries, and the coast. People moved between different areas as the seasons shifted. Each area had specific resources: rivers had fish and eel; the bush had birds, fern, berries, and timber; and fertile lands had *kumara*, to name but a few. Professor Murton in his evidence described these areas as ‘resource complexes’.⁸ He also pointed out that the fertility of the soil, the elevation, slope, and aspect of the land, and the frequency of frosts all impacted on cultivation patterns.⁹ In Turanga, areas of intensive agricultural production included ‘the alluvial fan area encompassing Ormond, Waituhi, Repongaere, and Waerenga a Hika to Waihirere’.¹⁰ The elevated terraces in the upper Waipaoa were also used for cultivation, as were flats along the Arai River. Near Muriwai, the Maraetaha River valley was a primary horticultural resource.¹¹

These rich alluvial flats were highly sought after and thus, understandably, closely held. This resulted in what might be described as tightly managed boundaries between the cultivations and *kainga* of different kin groups or communities. Obviously, boundaries would change over time owing to necessity, intermarriage, and the waxing and waning in strength of kin groups. In contrast, resources in the hills appear to have been less closely held, although management still normally rested with particular kin groups and their leaders. If there was a basic pattern, it was that areas of hunting and gathering were kept open to the wider kin group (although particularly good bird-hunting trees or rat runs could be individually allocated or access to them be restricted by *rahui*), while areas of cultivation were more closely demarcated. The evidence is that such a pattern was reflected in Turanga through early awards of title by the Poverty Bay Commission and the Native Land Court, which saw inland and hilly blocks being much larger in size than blocks on the flats. The former came to be vested in large numbers of right-holders, while the latter had more restricted or precise lists.

Importantly, though, while use-rights were sometimes exercised exclusively by *whanau*, or even individuals, and could over time become almost indefeasible, the oversight of such

8. Document A26, p48

9. Ibid, pp39–40

10. Ibid, p40

11. Document A35, p19

rights was a matter for the wider kin group and its leadership. The rights were held as against the collective or, perhaps more accurately, on a substratum of community consent, granted in accordance with tikanga. The corollary was that community consent could be withheld, but again, only in accordance with tikanga. Thus, rangatira, on behalf of the collective and in accordance with tikanga, were entitled to involve themselves in the distribution, allocation, and oversight of those rights. The transfer of rights to other whanau, hapu, or iwi was a particularly vital expression of tribal control. This is because the wellbeing of the community depended on the close supervision of which outsiders would be allowed access to the resource complex and its whakapapa lines.

Generally speaking, the rohe of hapu or iwi in Turanga fanned out from the bay, starting at or near the Waipaoa flood plain, which was highly prized for its alluvial soil, and ran up river valleys and watersheds until they reached the hinterland ranges. Although the rohe of some hapu were decidedly more 'inland' than others, and some swept across rather than up watersheds (particularly in the upper Waipaoa catchment area), corridors of access were kept open to the sea through related kin groups. No doubt, reciprocal rights extended for coastal groups to have access to resources in the richly wooded interior.

A difficulty occurs today when people, both Maori and Pakeha, try to translate this customary network of rights and connections into an environment of 'straight line' boundaries. Resource rights were complex, convoluted, and overlapping. They almost never phased cleanly from hapu to hapu as one panned across the customary landscape. Instead, most resource complexes had primary, secondary, and even tertiary right holders from different hapu communities, all with individual or whanau interests held in accordance with tikanga, and therefore by consent of their respective communities. All rights vested and were sustained by the currency of whakapapa. Moreover, use-rights seldom precluded a complex network of other tuku or inherited rights. For instance, the right of one group to gather a resource in another group's rohe would typically be balanced by reciprocal rights in its own. Such exchanges were often matched by marriages, meaning that genealogy could not be separated from day-to-day resource management. What we now term a 'block' could, therefore, involve a range of resource centres, each encompassing different levels of rights of a number of communities.¹² The complexity of rights is both compounded and distorted by over 100 years of statutorily mandated tampering by the Native or Maori Land Court.

Also, people were mobile. Following the rules of whakapapa, an individual could move between groups, using different sets of resources. When a marriage took place between members of different hapu, one person would move to live with the other person's kin. While the children of such a union would normally remain living with the kin-group where they were brought up, it was not uncommon for them to shift for a time to the rohe of the other

12. Indeed, the concept of a block of land, as a single area with coterminous boundaries, was a colonial overlay. It did not exist in tikanga at all.

parent, or a grandparent, renewing whakapapa connections and gaining access to a different resource complex.

Thus, the idea of a permanent, individual, separate, and freely exercisable right to resources, without obligation or even reference to the kin group, was completely un-Maori. It flies in the face of whakapapa and the obligation of kinship. In a society such as traditional Maori society and in an environment such as ours, that simply could not have worked. We will pick up on some of these ideas when we deal with the Native Land Court in Turanga.

2.4 THE PRINCIPAL TURANGA CLAIMANTS

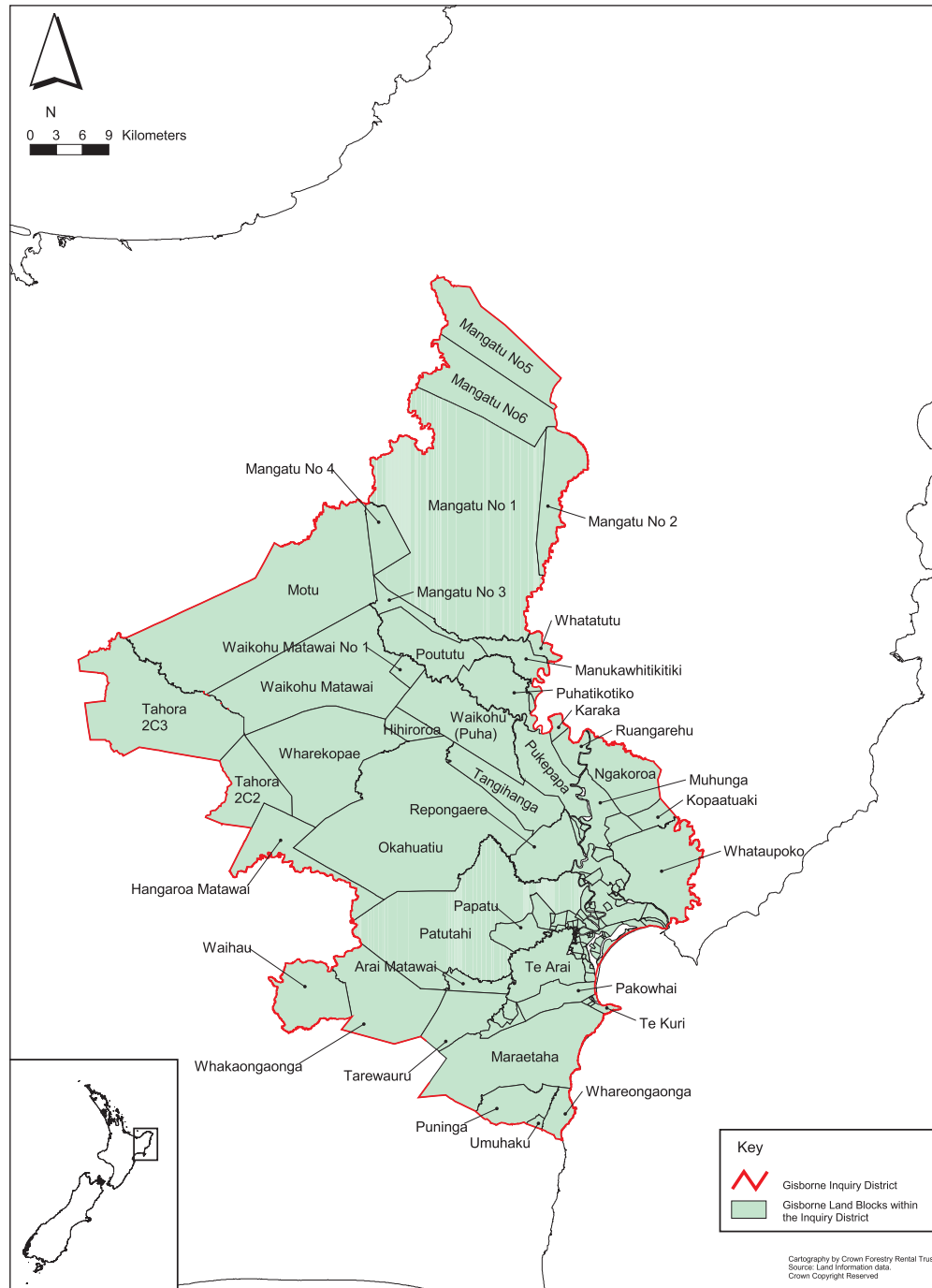
This introduction to the primary claimant groups of the Turanga inquiry follows the order in which groups were heard after the initial ‘shared’ hearing week. It should be noted that this order was determined by consensus among the claimants and roughly follows a geographic sweep of hearing district from the west and north to the south-east.

We have been privileged to hear evidence from kaumatua, kuia, or spokespersons of each claimant group and to read professionally compiled customary history reports (all of which, we understand, were produced in cooperation with claimant communities). This opened a rich body of customary knowledge, the complexity and breadth of which it is impossible to do justice to in this report. We also appreciate that the knowledge placed on the Tribunal record is but a small part of the knowledge currently held by Turanga hapu or iwi.

Our descriptions of each claimant group’s ancestral origins, general rohe, hapu, kainga, and marae serve our purposes but are far from complete. We are conscious that, for all groups, numerous ancestors and many hapu names have been left out. What we provide is only a snapshot, designed to assist non-Turanga readers to identify claimant groups and their customary rohe. It is not our place to be the authoritative recorder of iwi or hapu korero – that is for iwi and hapu themselves.

We voice a note of caution when dealing with the records of the Native Land Court, particularly if they are not combined with other, oral, sources. It is unwise for Native Land Court records to be relied upon uncritically. As is the case with traditional evidence adduced in the Tribunal, we need to be conscious of the context in which evidence was given before the court, the kinds of imperatives operating when cases were being argued, and the importance of the internal consistency of evidence. The broader knowledge within hapu and iwi today can also often illuminate the evidence of their tipuna as recorded in court.

We have also identified land blocks to which various groups today claim affiliation. This is necessarily a contentious task and one fraught with difficulty. Our approach has been to take at face value statements of customary interests made by claimants in their evidence. We do not attempt to readjudicate Native Land Court decisions, nor have we sought to choose sides in situations where more than one group has claimed affiliation in a single block. We see no



Map 4: The land blocks within the Gisborne inquiry district

point in doing so. We see, rather, the connections between the overlapping rohe of different claimants.

The one potential ‘boundary’ problem that this Tribunal has been asked to address in any detail is that of the respective interests of Rongowhakaata and Te Whanau a Kai in the

Patutahi block, and we address this matter in chapter 6.¹³ However, we should state at the outset that we are sceptical about the existence of any fixed and permanent boundary in those lands, particularly one of such an ancient character. We agree with the approach suggested by counsel for Te Whanau a Kai and seek instead to determine something of ‘the complexities of the relationship between two overlapping descent groups’.¹⁴

2.4.1 The ancestors who bind

The Turanga tribes, like all tribes, descend from the gods, tracing whakapapa back to Ranginui and Papatuanuku and beyond. Primary waka affiliations of Turanga peoples are to Horouta and Takitimu, with other connections into Maatatua, Karaerae, Nukutere, and Te Ikaroa a Rauru. For all in Turanga, illustrious ancestors such as Toi Te Huatahi, Paikea, Porourangi, Tamatea Arikinui, Maia, Paoa, and Kiwa are very important to identity and whakapapa. These are the ancestors who can be said to be common to Turanga hapu or iwi, and in fact they connect Turanga peoples to their wider neighbours, Ngati Porou and Te Aitanga a Hauiti in the east, Te Whanau a Apanui and Whakatohea in the north, and descendants of Kahungunu in the south and east.

Other ancestors are shared by many. Ruapani and Kahungunu stand out in most whakapapa. Ruapani held great mana over Turanga because, as Rongowhakaata Halbert states, ‘all the lines of aristocratic descent from Paoa, Kiwa and other members of the Horouta migration converged on him’.¹⁵ Ruapani had three wives: Wairau, Uenukukoihu, and Rongo-maipapa. His children intermarried with members of other kin groups in Turanga and beyond, some from ancient lineages such as his own, as well as with the visitor Kahungunu. Although Kahungunu later left Turanga, as did Ruapani, many of their descendants remained, intermarrying into the chiefly lines of other hapu and whanau.

There is, therefore, a powerful mixture of commonality and difference in the whakapapa of Turanga hapu and iwi. It is from this, perhaps, that the whakatauki ‘Turanga tangata rite’ is coined. Literally, it is said to mean ‘Turanga people are all equal – no one stands above the others’; but there is a double meaning here inherent in the term ‘rite’. The word also alludes to collective action – all of Turanga acting together. For a rangatira of Turanga, mana is gained by the active maintenance of balance in obligations and connections, and thus at times of crisis people can be drawn together, rather than apart. Two other whakatauki common to Turanga allude to such principles. The first, ‘Ka tere Raoa ka tere Pipiwhakao’, refers to the gathering of resources by groups of people going out in force, all together. The second, ‘Ka mate kainga tahi, ka ora kainga rua’, highlights the insurance policy of multiple marriage alliances, and thus the ability to call on one’s neighbours in hard times.

13. Document H5, p3

14. Document C27, para 60

15. Rongo W Halbert, *Horouta: The History of the Horouta Canoe, Gisborne and East Coast* (Auckland: Reed, 1999), p47



We turn now to an introduction of the principal claimant groups of Turanga and the blocks they associate with today, bearing in mind always the comments we have made about the disjunction between tikanga and the European concept of the land block.

2.4.2 Te Aitanga a Mahaki

Mahaki is the primary ancestor of groups who affiliate to Te Aitanga a Mahaki. Hapu which claim descent from Mahaki include, in no particular order, Ngati Wahia, Ngapotiki, Te Whanau a Taupara, Te Whanau a Iwi, Ngai Tamatea, Ngai Tutekenui, and Ngariki. Many other hapu existed, but over time their importance has waned.¹⁶ In regard to Te Whanau a Kai, the position of Te Aitanga a Mahaki today is that Te Whanau a Kai is also a hapu of Mahaki. However, Te Whanau a Kai has currently chosen to maintain separate representation before this Tribunal, placing emphasis rather on the distinctiveness of Te Whanau a Kai. This issue is discussed further below. To prevent repetition, we describe Te Whanau a Kai's origins, rohe and settlements separately. Te Aitanga a Mahaki's relationship with the claimant group Ngariki Kaiputahi is also discussed elsewhere.

Mahaki's father, Tamataipunoa, married Tauheikuri, the youngest child of Kahungunu and Rongomaiwahine.¹⁷ While Mahaki was a famous warrior and leader, waging war with his cousin Rakaihikuroa, and others, it was not so much his deeds, but the achievements of his children and grandchildren from which the hapu of Te Aitanga a Mahaki evolved.¹⁸ If there is a wider theme it is that Mahaki's male descendants sought out women of rank to marry, generating powerful rights for their offspring in the process.

Mahaki married Hinetapuarau, a descendent of Ruatapuawahine (who was the daughter of Ruapani's brother, Tuhoropunga, and who had been raised by Ruapani). It was through Hinetapuarau that Mahaki acquired rights in land in Turanga.¹⁹ Of their eight children, Whakarau was the only one to found a hapu, known today as Ngapotiki.²⁰ Whakarau had three wives, Huruhuru, and the sisters Pare and Kura, descendants of Kahutapere.²¹ Whakarau's son through Huruhuru, Tumokonui, was a particularly important leader.²² Later marriages between Whakarau's descendants and the descendants of another son of Mahaki, Hikarongo, helped secure Ngapotiki's place in Turanga.²³ Ngapotiki exercise customary rights over an area stretching from the present Hauomatuku and Rangatira blocks (just outside the western

16. Document A25, p177

17. Ibid, pp86, 94

18. Ibid, p86

19. Ibid, p94

20. Document A55, p5; doc A25, pp92–93

21. Document A25, p96

22. Ibid, p131

23. Ibid, p97

boundary of the inquiry district), through Manukawhitikitiki and Puhatikotiko and into the Poututu, Waikohu, Waikohu Matawai, and Motu areas. Some Ngapotiki rights were held in the present Pukepapa, Toreohaua, and Waituhi blocks.²⁴ Obviously, many of these blocks are areas where other groups and hapu of Mahaki maintain interests.

Another of Mahaki's sons, Te Ranginuiaihu, was married to Te Nonoikura. She was a child of Ruaroa, a descendant of Kahungunu and Ruapani's eldest daughter, Ruarauhanga.²⁵ Te Ranginuiaihu and Nonoikura are two of the most significant ancestors of Te Aitanga a Mahaki. Their children included the sons Te Ranginaonaoariki, Mokaituatini, Kaikoreaunei, Whakauaki, and Taupara, and the daughter Tauwheoro. A number of hapu claim descent from these children.

Te Ranginuiaihu's eldest son, Te Ranginaonaoariki, married another descendant of Mahaki, Hawearangi. Their son, Wahia, became the primary ancestor for Ngati Wahia.²⁶ Despite his premature death, Wahia had four children through Wharawharakiterangi, Kaikoreaunei's daughter, securing future blood lines. The descendants of Wahia came to be associated with the Manukawhitikitiki, Poututu, and particularly the lands now encompassed by the Mangatu 1, 4, 5, and 6 blocks.²⁷ Interests in these lands necessarily overlap with those of Te Whanau a Taupara and Ngariki, who they married into, and to a lesser extent Ngapotiki.

Te Ranginuiaihu's youngest son, Taupara, was renowned for his hard work. He married Puhaiterangi, daughter of Apanui. Their four children – Kuraiteapata, Whakauika, Tumurau, and Te Kete, and Whakauika's son, Tamauia – contributed to the establishment of the group eventually known as Te Whanau a Taupara.²⁸ The areas in which Te Whanau a Taupara came to exercise rights include Waerenga a Hika, Muhunga, Ngakaroa, Te Karaka, Puhatikotiko, Manukawhitikitiki, Potutu, and Mangatu 1, 4, 5, and 6. The Rangatira, Hauomataku, and Whaitiri blocks are also considered areas common to Te Whanau a Taupara, although they lie outside the Turanga hearing district.²⁹ These blocks contain overlapping rights of other groups, including the rights of older hapu such as Ngati Ruawairau and Ngapuhi (not to be confused with the northern Ngapuhi).³⁰

The only daughter of Te Ranginuiaihu and Te Nonoikura was Tauwheoro. She married Iwipuru, the grandchild of Materoa and Tamaterongo of Rongowhakaata. Their children and later descendants took the name Te Whanau a Iwi. Areas of land commonly associated with Te Whanau a Iwi are the blocks near Gisborne and up the Taruheru River: Waikanae, Whataupoko, Turanganui, Tahoka, Taruheru, Waerenga a Hika, Matawhero 3 and

24. Document A26, p50; doc A25, p182; see also Halbert, pp104–105

25. Document A25, p73. We note that Halbert appears to contradict other sources: Halbert, p47.

26. Document A25, pp138–139

27. Ibid, p183; doc A26, p50; Halbert, p124

28. Document A25, p132; doc A55, p6

29. Document A25, p182; doc A26, pp 49–50

30. Document A25, p134

5, Mangamoteo, and Makauri. Some interest is also claimed in the Kaiti block, although this is outside the hearing district.³¹ Necessarily, many of Te Whanau a Iwi's interests overlap with those of Rongowhakaata around the coast, as well as with other descendants of Mahaki further inland.

The kin group Ngai Tamatea claims descent back to the son of Kahunoke, Tamateaiti (remembering that Kahunoke was the brother of Te Nonoikura, and thus whanaunga to Mahaki through Kahungunu).³² Later deeds, particularly those carried out by Tamateaiti's son Tutepuaki, and then Mutunga, helped to secure rights over an area of land in the north-east of the Turanga hearing district. Blocks within which Ngai Tamatea claim customary rights include Mangatu 2, with most other areas resting outside the inquiry district. These include Mangataikapua, Waipaoa (Whatatutu), Waingaromia 1, 2, and 3, Tutamoe, Waitangi, and part of Tauwharepara. ³³ Part of this area no doubt intersects with some Ngati Porou interests, although this Tribunal has not made inquiry into such matters.

Te Aitanga a Mahaki hold that a group called Ngariki (sometimes written Nga Ariki) were the original inhabitants of the Mangatu area and elsewhere. While this group was defeated in battle a number of times, it also intermarried with Ngati Wahia, creating close connections between the two.³⁴ It may be fair to say that Wahia's rights in the Mangatu area are to a certain extent dependent on these marriages into more ancient bloodlines. The matter of Te Aitanga a Mahaki's relationship with Ngariki Kaiputahi is discussed elsewhere.

Numerous marriages link the descendants of Mahaki to one another, and to neighbouring kin groups such as Rongowhakaata, Ngati Porou, and Ngai Tamanuhiri. For instance, Taupara's daughter, Kuraiteapata, married Kaikoreaunui's son, Te Rangiaia.³⁵ One more 'external' marriage is that of Hinetera, the daughter of Hauiti and Kahukuraiti (a descendant of Rongowhakaata), to Tamateakuku, a son of Kahunoke (Kahunoke was the brother of Te Nonoikura).³⁶ Likewise, Mahaki's niece, Tawake, was married to Rakaimataura of the Ngati Pokai people of Ngati Porou.³⁷ In addition to these, many other connections exist between Te Aitanga a Mahaki and the iwi and hapu of Turanga, as well as to Te Aitanga a Hauiti, Te Whanau a Apanui, Tuhoe, and Ngati Kahungunu.

Most of the principal Te Aitanga a Mahaki settlements can be found inland, up through the rich alluvial river valleys of the Waipaoa River and its tributaries, and into the mountainous interior. Pa, kainga, mahinga kai sites, and urupa are scattered throughout. Te Whanau a Iwi is the only hapu of Mahaki whose lands directly adjoin the sea,³⁸ although other kin groups

31. Document A25, p182; doc A26, p49; Halbert, p125

32. Document A25, p144

33. Ibid, p183; Halbert, p126

34. Document A55, p6; doc A25, p140

35. Document A25, p133

36. Ibid, p105

37. Ibid, p127

38. Document A26, p101



Fig 1: The Mangatu Incorporation offices, where the claims of Te Aitanga a Mahaki were heard. The Crown also presented their evidence here.

gained access to kaimoana through intermarriage.³⁹ The following are the marae to which Te Aitanga a Mahaki currently claim affiliation, with their principal kaitiaki noted, although there are often multiple affiliations. For convenience, we have also included marae to which Te Whanau a Kai and Ngariki affiliate: Rangatira (Ngati Wahia); Rongopai (Te Whanau a Kai); Mangatu (Ngariki and Ngati Wahia); Tapuihikitia (Ngapotiki and Te Whanau a Taupara); Takipu (Te Whanau a Taupara); Parihimanihi / Waihirere (Ngati Wahia and Ngariki); Pakowhai (Te Whanau a Kai); Takitimu at Waituhi (Ngapotiki); Ngatapa (Te Whanau a Kai and Tuhoe); and Tarere (Te Whanau a Iwi).⁴⁰

The claim by Te Aitanga a Mahaki is a comprehensive one. It covers matters of armed conflict with the Crown in 1865, subsequent unlawful detention on Wharekauri, unlawful executions by Crown forces at Ngatapa in 1869, and the forced cession of land. The claim also raises the impact of tenure change through the Poverty Bay Commission and the Native Land Court, subsequent land loss, problems of land development, and environmental and social deprivation issues.

2.4.3 Te Whanau a Wi Pere

For the purpose of the Turanga inquiry, Joseph (Joe) Anaru Hetekia Te Kani Pere advanced a claim on behalf of Te Whanau a Wi Pere. Joe Pere is a direct descendant of Wiremu (Wi) Pere, a man of both local and national importance in his day. Wi Pere was the son of Thomas Halbert, a Pakeha trader, and Riria Mauaranui, a woman of considerable mana in Turanga. Pere grew up largely with his mother. Through her, he could whakapapa into Te Aitanga a Mahaki, Te Whanau a Kai, Te Whanau a Taupara, Rongowhakaata, and other groups of the Turanga region and beyond.⁴¹ While Pere was trained at the Anglican mission, he was also schooled in tribal history and genealogy at the whare wananga, Maraehinahina.⁴²

Through his lifetime, Wi Pere acquired title to a body of land in Turanga, much of which has passed to his descendants in the Wi Pere trust. This trust was first established by Pere through a deed dated 14 April 1899, and later confirmed through various Acts of Parliament.⁴³ Currently, the Wi Pere trust is administered under the Maori Purposes Act 1991. While the claimant group Te Whanau a Wi Pere has no corporate personality, it is closely associated with the Wi Pere trust, the distinction being that not all the descendants of Wi Pere are beneficiaries of the trust.⁴⁴ Te Whanau a Wi Pere have a particularly close relationship with Rongopai Marae at Waituhi. Wi Pere's efforts as a leader to retain and develop land in Turanga and elsewhere are the subject of a separate section of this report (see ch 9).

39. Document A25, p100

40. Document A55, pp8–11

41. Document c2, para 1; doc c2(a), p 2

42. 'Wiremu Pere', 1870–1900, DNZB, vol 2, pp 380–382

43. Document c2(d)

44. Paper 2.21, para 1.5

The claim by Te Whanau a Wi Pere is concerned with the loss of land in two blocks: the ceded Te Muhunga block, within which Wi Pere was the owner of the Waitawaki portion, and the Pouparae block, a private land claim heard by the Poverty Bay Commission.

2.4.4 Te Whanau a Kai

Te Whanau a Kai trace their origins to the marriages between Kaikoreauneī and the two sisters, Te Haaki and Whareana.⁴⁵ Kaikoreauneī's father was Te Ranginuiāihu (or Ihu), the eldest son of Mahaki. Kaikoreauneī's mother was Te Nonoikura, a descendant of Ruapani through the marriage of his daughter, Ruarauhanga, to Kahungunu.⁴⁶ Ranginuiāihu was also, as we have seen in regard to Te Aitanga a Mahaki, the father of Taupara (apical ancestor of Te Whanau a Taupara), Te Ranginaonaoriki (whose son, Wahia, became the apical ancestor of Ngati Wahia), and Whakauaki.

According to a number of sources, Kaikoreauneī's name means 'I am Kai with nothing' (Kaikore meaning without food, or landless).⁴⁷ Unlike his other brothers, Kaikoreauneī did not inherit land through his parents. Rather, Te Whanau a Kai place a special emphasis on rights derived through Kaikoreauneī's marriage to the two sisters, Te Haaki and Whareana. These women were the descendants of Tupurupuru, the favourite son of Rakaihikuroa and his wife Te Orapa. Te Orapa is a descendant of Ruapani, through Kahunoke, Ruaroa, and Ruarauhanga.⁴⁸

According to Te Whanau a Kai, when Rakaihikuroa came to leave the Turanga area, he passed control of his lands to Te Ranginuiāihu, who in turn passed control to the descendants of Tupurupuru.⁴⁹ Te Haaki and Whareana also claimed descent from Hikaaupaki and Tutemakoha, both of whom resided in the lands which the descendants of Kaikoreauneī came to occupy.⁵⁰ The descendants of Kai were thus linked into, and came to absorb within them, the hapu Ngati Maru, Ngati Hine, and Ngati Rua.⁵¹

It should be noted, though, that intermarriage between long-time residents and newcomers, irrespective of whether battles had taken place, is not at all uncommon in the formation of hapu and iwi communities. Kahungunu's many marriages and the proliferation of his descendants today are testimony to this. In Turanga, the interweaving of whakapapa lines between the descendants of Ruapani and Kahungunu appears fundamental to the development of Te Aitanga a Mahaki in general, and to Te Whanau a Kai. If there is a theme, or

45. Document C35, para 7

46. We note again that Halbert appears to contradict other sources: see Halbert, p47; doc A25, p73; doc C11, p29.

47. Document C35, para 8; Halbert, p108; doc A25, p140

48. Document C11, pp28–32, 62–66; We note the Halbert version: 'Te Haaki and Whareana, sisters of Kaihaere of the Ngati Maru and Ngati Hine sub-tribes of the original Ariki settlers': Halbert, p108.

49. Document C11, pp56–66, 83, 88. For a contrasting account, see document A25, pp109–115.

50. Document C11, pp14–15, 58, 73, 77; Halbert, p108

51. Document C12, para 1. Note that Ngati Maru of Te Whanau a Kai is not the same Ngati Maru of Rongowhakaata: doc C11, pp16, 91



Fig 2: Rongopai Marae , where the claims of Te Whanau a Wi Pere and Te Whanau a Kai were heard

possibly a strategy adopted by leading whanau at the time, it is that female descendants of Ruapani (mainly through Ruarauhanga) married male descendants of Kahungunu. Other strategic marriages between first or second cousins, or with two sisters, had further compounding effects, securing or reinforcing rights in land and binding the descendants of close relatives to each other. The marriages of Rakaihikuroa to Te Opara, and of Te Ranginuihau to Te Nonoikura, are good examples of this.

Of Kai's children with Te Haaki, Te Hauoterangi married Takapungaere. Their descendants came to be called Te Whanau a Kai. Another son, Rangiaia, married Kuraiteapata, Taupara's daughter. Their descendants came to be called Ngai Te Ika.⁵² The marriage of Kaihaere (the brother of Te Haaki and Whareana) to Hinepuakirangi also brought significant lines of descent to Te Whanau a Kai.⁵³ Te Whanau a Kai have maintained whakapapa connections to many other kin groups of Turanga. For instance, Wharawharakiterangi, a daughter of Kai-koreaunei and Te Haaki, married Wahia, the son of Te Ranginaonaoariki.⁵⁴ The relationship between Te Whanau a Kai and Rongowhakaata is also strong, particularly in the Patutahi area.⁵⁵

Te Whanau a Kai claim affiliation with a number of marae. The Pakowhai marae was originally on the Repongaere block, close to the Waipaoa River, but was later rebuilt on its current

52. Halbert, p109

53. Document c11, p77

54. Ibid, p36

55. Ibid, pp85-86

site adjacent to Lavenham Road.⁵⁶ The beautiful wharenuī, Rongopai, was built in 1887 in anticipation of Te Kooti's return to Turanga; it is now the marae most closely associated with the Wi Pere whanau.⁵⁷ Te Whanau a Kai also claim an affiliation with Takitimu Marae at Waituhi through their close relationship with Ngapotiki.⁵⁸ Ngatapa Marae is situated on land which Te Whanau a Kai gave to Tuhoe, as both groups claim affiliation to the Ngatapa area.

Te Whanau a Kai claim customary rights in a rohe which runs from the present Repongaere and Patutahi / Kaimoe blocks on the Waipaoa River, up to the north-west through the Okahuatū, Tangihanga, Hihiroroa, Wharekopae, and Hangaroa Matawai blocks.⁵⁹ Te Whanau a Kai also claim rights in parts of Tahora 2; namely, Tahora 2C2 and 2C3. Sites of significance to Te Whanau a Kai, including pa, wahi tapu, and mahinga kai areas, are dotted thickly over their land.⁶⁰ To the south of this rohe, Te Whanau a Kai interests overlap with those of Rongowhakaata, particularly in the Patutahi block. To the west, Te Whanau a Kai interests intersect with Ngati Hine; to the north and north-east, their interests overlap with Ngapotiki and Te Whanau a Taupara. Te Whanau a Kai also have a close relationship with Tuhoe.

The claim by Te Whanau a Kai is a comprehensive one. It covers matters of armed conflict with the Crown in 1865, subsequent unlawful detention on Wharekaui, unlawful executions by Crown forces at Ngatapa in 1869, the forced cession of land (particularly at Patutahi), and the trial and execution of Hamiora Pere under the Disturbed Districts Act 1869. The claim also raises the impact of tenure change through the Poverty Bay Commission and the Native Land Court, subsequent land loss, problems of land development, and environmental and social deprivation issues.

2.4.5 Ngariki Kaiputahi

The claimant group Ngariki Kaiputahi consists of the direct descendants of the rangatira Rawiri Tamanui, particularly through his only son to have issue, Pera Te Uatuku.⁶¹ Rawiri Tamanui was a leader in Turanga from the mid 1820s to the 1850s. Prior to the signing of the Treaty of Waitangi, Tamanui fought in a number of battles beside other Turanga kin groups, such as against Whakatohea at the siege of Kekeparaoa in 1834, and further afield in the Mahia–Wairoa region.⁶² Through his lifetime, Tamanui resided in various places, but he held his primary rights at Mangatu. He died in 1863 and was succeeded by his son, Pera Te Uatuku. Following the pattern set by his father, Pera fought alongside Te Aitanga a Mahaki and

56. Document C35, pp3–4

57. Document C12; doc C35, p 4

58. Document C35, p 4

59. Document C27, pp12–3; doc H5, pp9–10; doc C31, map 1

60. Document C11, pp130–138

61. Document C23, p 21

62. Ibid, p12; Halbert, p123; doc A22, pp5, 11



Fig 3: Mangatu Marae. Te ngawari o enei ra – ngariki kaiputahi.

Rongowhakaata at Waerenga a Hika in 1865, where he was taken captive and sent with his close relatives to Wharekauri.⁶³ He later escaped with Te Kooti and the Whakarau, fighting at Ngatapa and elsewhere until he was captured again by Government forces in March 1870. He was tried under the Disturbed Districts Act of 1869 and sentenced to death, although his sentence was commuted to imprisonment, and he was released in 1873.⁶⁴ (See Pera Te Uatuku's claim in chapter 5.)

Ngariki Kaiputahi hold rights primarily in the Mangatu block, but also in the neighbouring Manukawhikitiki, Whatatutu, Mangataikapua, and Rangatira blocks, sitting as they do near the confluence of the Waipaoa and Mangatu Rivers.⁶⁵ Ngariki Kaiputahi rights thus overlap with those of Te Aitanga a Mahaki, particularly the hapu Ngati Wahia, Ngai Tamatea, and Te Whanau a Taupara. However, Ngariki Kaiputahi traditions stress the distinctive nature of their whakapapa. While they can connect into various kin groups in Turanga through marriages,⁶⁶ their rights in land are derived through a separate line of descent, back to occupants of the Mangatu region who predated the hapu of Te Aitanga a Mahaki. In this regard, Ngariki Kaiputahi stressed that at least two other 'Ngariki' groups are known to exist: Ngariki Po and

63. Document A22, pp 20–22

64. Ibid, pp 22–23

65. Document C40, map 3; doc A22, pp 14–15

66. Document C23, pp 5, 17

Ngariki Rotoawe. These groups were, at various times, defeated in battle and absorbed into hapu of Te Aitanga a Mahaki and Te Whanau a Kai. Currently, Ngariki Kaiputahi have organised themselves into a trust, the Ngariki Kaiputahi Whanau Trust, under the Te Ture Whenua Maori Act 1993.⁶⁷

We report on the claim of Ngariki Kaiputahi concerning the award of title in the Mangatu block in a separate chapter (see ch 11). In other respects, the claim by Ngariki Kaiputahi is a comprehensive one. It covers matters of armed conflict with the Crown in 1865, subsequent unlawful detention on Wharekauri, and the trial of Pera Te Uatuku under the Disturbed Districts Act 1869. The claim also raises the impacts of tenure change through the Native Land Court, subsequent land loss, problems of land development, and environmental and social deprivation issues.

2.4.6 Rongowhakaata

Rongowhakaata, the primary ancestor of the claimant group now called Rongowhakaata, was a descendant of three sons of the ancestor Paikea: Rongomaituahu, Marupapanui, and Pouheni.⁶⁸ Approximately nine generations passed between Paikea and Rongowhakaata.⁶⁹ Rongowhakaata was born at Uawa (Tolaga Bay) to Tumaaurirere and Haupunake, themselves descendants of ancestors from the Horouta waka. When he grew up, Rongowhakaata moved to Turanga, settling at Patutahi, then later at Paokahu.

Rongowhakaata's first marriage was to Turahiri, producing the child Rongomairatahi. After Turahiri died, Rongowhakaata married her sister, Uetupuke. A third sister, Moetai, also wished to marry Rongowhakaata, but Uetupuke objected to this. Uetupuke moved away to Ohiwa, and Tanemoeahi, a brother of Tuhoe-Potiki, took her to be his wife. Uetupuke, though, was carrying Rongowhakaata's child. Tanemoeahi brought up this child, Rongopopoia. Rongopopoia later married two sisters of the Ohiwa chief Pane Kaha. It is through their children that Rongowhakaata remains connected into many of the iwi and hapu of the Bay of Plenty region.⁷⁰

There are currently five main hapu of Rongowhakaata: Ngati Maru, Ngati Kaipoho, Ngati Aweawe, Ngai Tawhiri, and Ngai Te Kete. Rongowhakaata also claim strong affiliations between Ngai Tawhiri and Te Whanau a Iwi, a group that is also described as a hapu of Te Aitanga a Mahaki. As Scott Riki observed, '[there] are still debates amongst the kaumatua of our two iwi about Te Whanau a Iwi, but I will leave that debate to them'.⁷¹ Numerous other hapu descending from Rongowhakaata have existed at various times, such as Ngati

67. Ibid, p21; doc A22, p8

68. Document D20, pp8–9; doc A28, p16

69. Document A28, pp6–8

70. Ibid, pp17–18

71. Document D16, p4

Ruawairau of the Matawhero area, although these have generally been amalgamated into the above.⁷²

Most hapu of Rongowhakaata are descendants of Rongowhakaata's son with Turahiri, Rongomairatahi, and his grandchildren Ruawhetuki, Turourou, and Hinetuwaiwai.⁷³ However, the descendants of Rongowhakaata's daughter, Rongokauwai, are also important.⁷⁴ Rongowhakaata's daughters through his third wife, Moetai, married men who became important ancestors of other kin groups: Rongokauwai (Rongokauae) married Tamateakota, Rongomoeawa and Tawakerahui both married Tautangiao of Whangara, and Kahukuraiti married Hauiti.⁷⁵

The rohe of the hapu of Rongowhakaata extend, generally speaking, across much of the lower Waipaoa flats, including the present Matawhero blocks, Turanganui 1, Waiohiharore, Awapuni, Paokahu, Te Kaiparo, Whenuakura, and other numerous small blocks dotted between the Te Arai block and the Waipaoa River. To the east and north, many of these blocks overlap with the interests of various Te Aitanga a Mahaki hapu. Rongowhakaata also claim rights in hill country to the west of the lower Waipaoa, including the Whatatuna, Te Arai, Rakaukaka, Papatu, Arai Matawai, Tauowhiro, Whakaongaonga, and Waihou blocks. Rongowhakaata are strong right holders in the confiscated Patutahi block, their interests overlapping with Te Whanau a Kai. Pakowhai is seen as an area of overlapping interests with Ngai Tamanuhiri in the south, as are blocks in the upper Te Arai River catchment. Further to the west, Rongowhakaata's interests overlap with those of Ngati Kahungunu.

The Rongowhakaata hapu Ngati Maru claims descent from the marriage between Tapuhere and Tahatu o te Rangi.⁷⁶ As the kin group grew in size, it took the name Ngati Maru after Maruwahakatipua. The principal interests of Ngati Maru lie in the Whakato, Kaupapa, Ahimanawa, Poukokonga, Rahui, Takopa, Tawhao, and Otieri blocks, as well as in Kaiparo, Wharaurangi, Wairau, Ahipipi Kairourou, Pipiwhakao, Whatatuna, and Papatu blocks.⁷⁷

Ngati Kaipoho are descendants of Kaipoho, a grandson of Turourou. Their lands include interests in blocks such as Taurangakoau, Orakaiapu, Manutuke, Waiari, Ahipakura, and Rakaukaka. Kaipoho is an important ancestral figure as from him came other hapu, including Ngai Te Aweawe.⁷⁸

Ngai Tawhiri claim descent from the three children of Rongomaimihiao, that is Tawhirimatea, Tutekiki, and Materoa.⁷⁹ Ngai Tawhiri hold rights in an area mainly comprising the Tarewa, Kohangakarearea, Kupenga, Mirimiri, Opoho, Pouriuri, and Okaunga blocks.⁸⁰

72. See list of hapu in document A46, p8

73. Document A28, p52

74. Document D16, p5

75. Document A28, p18

76. Ibid, pp53–54

77. Document D33, map 3; Halbert, p83

78. Document A28, p55

79. Document D16, p9

80. Document A28, p55

Originally part of Ngai Tawhiri, the hapu Ngai Te Kete developed a separate identity. They hold interests in various Rongowhakaata lands, but particularly in the Rakaukaka and Papatu blocks.⁸¹

The hapu Ngai Te Aweawe have two ancestors named Aweawe, the first of whom successfully avenged the death of his father, Kaipoho. Ngai Te Aweawe have interests in lands including the Kahukurataua, Haehaenga, Waihoru, Tauowhiro, Arai 1 and 2, Taringamotuhia, Taomako, and Okirau blocks.⁸²

Despite their close affiliations, the hapu of Rongowhakaata sometimes fought each other, as the famous conflict between Ngati Kaipoho and Ngati Maru attests. Similarly, relations with neighbouring groups could be either peaceful or fraught. As Riki states, ‘Sometimes, Rongowhakaata would band together to help Te Whanau a Kai and on other occasions they would help Te Whanau a Taupara and Ngapotiki against Te Whanau a Kai. It depended on what was happening at the time’.⁸³ Like all groups, though, strategic marriages and alliances tied Rongowhakaata into relationships with their neighbours.

Pa, kainga, and urupa of Rongowhakaata are dotted over this entire rohe, with many key settlements placed on or near the rich alluvial flats of the lower Waipaoa, particularly around the confluence of the Waipaoa and the Te Arai Rivers. Manutuke is the principal settlement of Rongowhakaata today. The following marae are either within the Manutuke township or situated close by (primary kaitiaki are noted): Whakato (Ngati Maru), Manutuke (Ngati Kaipoho and Ngai Te Aweawe), Pahou (Ngati Maru and Ngai Tawhiri), and Ohako (Ngai Tawhiri, Ngai Te Kete, and Ngati Ruapani).⁸⁴ Rongowhakaata also claim affiliation to Te Kuri a Tuatai marae in Gisborne (Ngai Tawhiri with Te Whanau a Iwi), and to Ngatapa and Mokonuiarangi further inland.⁸⁵ Finally, Rongowhakaata are kaitiaki of the wharenui Te Hau ki Turanga, currently held at Te Papa, Wellington.⁸⁶

The claim by Rongowhakaata is a comprehensive one. It covers matters of armed conflict with the Crown in 1865, subsequent unlawful detention on Wharekauri, unlawful executions by Crown forces at Ngatapa in 1869, the forced cession of land (particularly at Patutahi) and the unlawful taking of the wharenui Te Hau ki Turanga. The claim also raises the impact of tenure change through the Poverty Bay Commission and the Native Land Court, subsequent land loss, problems of land development, and environmental and social deprivation issues. We deal with claims by Rongowhakaata in respect to Te Hau ki Turanga specifically in chapter 10.

81. Document D16, pp9–10

82. Document A28, p57

83. Document D16, p13

84. Document A28, pp60–65

85. Document D33, map 11; doc A28, pp66–67

86. Document A46, p12



Fig 4: Manutuke Marae, where the claims of Rongowhakaata and Nga Uri o Te Kooti were heard

2.4.7 Nga Uri o te Kooti Rikirangi

The claimant group Nga Uri o Te Kooti Rikirangi comprises the direct descendants of Te Kooti Rikirangi, the famous prophet and leader of Turanga. Te Kooti Rikirangi was a man of national importance, his fame arising from his detention without trial, his role as prophet and leader, and his story of escape, bitter conflict, and, finally, peace.⁸⁷ Te Kooti founded the Ringatu church. We discuss these matters in detail elsewhere in this report (see ch 5).

Te Kooti Rikirangi was born in 1832 at the settlement of Paokahu on the coast of Turanga. He was of Rongowhakaata descent, and could claim affiliation with the hapu Ngati Maru, Ngai Tawhiri and Ngati Kaipoho.⁸⁸ Although he had at least eight wives through his lifetime, we understand Te Kooti had only one child, Wetini Rikirangi, by his original marriage to Irihapeti Puakanga.⁸⁹ It is from Wetini that Nga Uri o Te Kooti Rikirangi claim descent. However, Te Kooti and Irihapeti were estranged from one another in the turbulent period of the late 1860s. Wetini Rikirangi was brought up apart from his father. Following his attack on Turanga communities in 1868, and the battle of Ngatapa early in 1869, Te Kooti was unable to return to Turanga for the remainder of his lifetime.

As claimants, Nga Uri o Te Kooti Rikirangi are particularly concerned with the stigmatisation of their koroua, Te Kooti, as well as the loss of whanau lands, taonga and manuscripts.

87. For a substantive biography, see Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press and Bridget Williams Books, 1995).

88. Document A57, p2

89. Document D5, p1

While they share much history with other Turanga Maori, they carry a particular burden into the present of both Te Kooti's and their own whanau's history. Today, Nga Uri o Te Kooti Rikirangi remain closely affiliated to Rongowhakaata.

2.4.8 Ngai Tamanuhiri

Tamanuhiri, the primary ancestor of Ngai Tamanuhiri, was born at Maraetaha.⁹⁰ He was a descendent of Paikea and Tahupotiki. Living around the same time as Rongowhakaata and Kahungunu, Tamanuhiri first married Rongomaiahia, then Hinenui, having a large number of children with both wives.⁹¹ Through a great number of marriages, battles, and alliances, Tamanuhiri's many and prolific descendants secured control over a rohe which, Ngai Tamanuhiri state today, stretches along the coast from Kopututea in the north to Paritu in the south.⁹²

Ngai Tamanuhiri have a number of hapu, not all of which are extant today. Tamaraukura, one of Tamanuhiri's sons through his marriage to Rongomaiahia, had a son named Rangiwha. Rangiwha became the focal ancestor of the hapu Ngati Rangiwha-matua and Ngati Rangiwha.⁹³ These hapu exercise mana principally in the south of Ngai Tamanuhiri's rohe, between Kopua and Paritu.⁹⁴ The deeds of Rangiwha's son, Tutekawa, are of particular significance to the growth of Ngai Tamanuhiri.⁹⁵

Another son of Tamanuhiri, Paea (or Paeaterangi), married twice, first to Hine Te Unuhanga then to Auehaoa. From these marriages came a lineage that grew to include the hapu Ngati Rangitauwhiwhia, Ngati Tawehi, and Ngati Kahutia.⁹⁶ These hapu are based in the northern part of the Ngai Tamanuhiri rohe.

Other prominent ancestors of Ngai Tamanuhiri, all of whom contributed to the growth and development of hapu, include Puraho, Tapunga-o-te-rangi, Mapuna, Takaratu, Rangi-whakatakataka, Kaiariki, Te Rangitauwhiwhia, Tawehi, Haerengarangi, and Kahutiaterangi.⁹⁷ Further details of their deeds can be found in the Ngai Tamanuhiri customary history report and the evidence given by Warren Pohatu.⁹⁸

Through numerous marriages, both ancient and more recent, Ngai Tamanuhiri hapu connect into Rongowhakaata, Ngati Rakaipaaka, Ngati Rongomaiwahine, Te Aitanga a Mahaki, Ngai Tahu, and other iwi. Two examples among many will suffice. Rangiwha married Rongomaiwaiata, who was a descendent of Kahungunu, Rongowhakaata, and

90. In the past, Ngai Tamanuhiri have also been known by the name Ngai Tahupo. For a discussion on this, see document E19, p 31, and document A30, pp133–140.

91. Document E19, pp11–14; doc A30, p73; doc E2, pp10–14

92. See document A35, pp15–17, and document E27 for a discussion of the changing location of Kopututea.

93. Document A30, pp84–85

94. Ibid, p81

95. Document E19, pp17–18

96. Document A30, pp99–105, 135–136

97. Document E19

98. Documents A30, E19



Map 6: The southern land blocks in the Gisborne inquiry district

Ruapani, thus securing connection into all those tribes.⁹⁹ Rangitauwhiwhia (a descendent of Paea) married Te Rioterangi, a descendant of Mahaki.¹⁰⁰

For the Turanga inquiry, the southern land blocks of the Ngai Tamanuhiri rohe include Whareongaonga, Umuhaku, and Puninga. Ngai Tamanuhiri claim customary rights further south, in the Okahu, Paritu, Rahokapua, and Takararoa blocks. There are close relations between Ngai Tamanuhiri and Ngati Rakaipaaka in this southern zone. Other blocks within the Ngai Tamanuhiri rohe are the large Maraetaha and Maraetaha 2 blocks, Te Kuri, Tangotete, Wherowhero, Pakowhai, Rangaiohinehau, Tiraotane, Ranginui, and Tarewauru. The more northern and inland of these blocks contain overlapping interests with Rongowhakaata.

Ngai Tamanuhiri's principal settlement and marae today is Muriwai, sitting almost in the shadow of Te Kuri a Paoa. Ngai Tamanuhiri people also reside to the south, at Maraetaha (Bartletts). Urupa, ancient kainga, pa, and mahinga kai sites are located throughout the Ngai Tamanuhiri rohe.¹⁰¹ All along the coast and out to sea are fishing and seafood gathering sites known to and utilised by Ngai Tamanuhiri. We were given first-hand knowledge of remarkable depth of these sites during a journey down the coast with Ngai Tamanuhiri, to Paritu, to their southern boundary, where the weather and a rainbow required us to turn back.

The claim by Ngai Tamanuhiri is a comprehensive one. It covers matters of armed conflict

99. Document E19, p16

100. Document A30, p100

101. Document E28, map 2; doc E19, pp28–30



Fig 5: Muriwai Marae

with the Crown in 1865, subsequent unlawful detention on Wharekauri, and unlawful executions by Crown forces at Ngatapa in 1869. The claim also raises the impact of tenure change through the Poverty Bay Commission and the Native Land Court, subsequent land loss, problems of land development, social deprivation issues, and environmental degradation, particularly concerning inland and coastal waters.

2.5 CONCLUDING COMMENTS

We have endeavoured here to outline the key strands of the Turanga people: highly independent and inter-dependant kin groups having dominion over a rich landscape of resource complexes prior to British colonisation. They are kin groups inextricably linked by physical proximity and interwoven whakapapa, yet each with its own independent mana born of distinct whakapapa lines, distinct resource ownership, and strong leadership. Turanga claims brought before this Tribunal are equally independent yet highly interdependent. They range from large-scale comprehensive iwi claims that cover relationships with the Crown from the Treaty to the present day, to specific block claims being advanced by individuals or small groups. We have been continually struck by the way in which the many Turanga claims form part of a single cohesive story.

Heoi ano te korero: ko Turanga tangata rite. He mana ano to tena, he mana ano to tena. Kaore tetahi i teitei ake i tetahi e orite ana te katoa. He wa ano ka tae a e Turanga te whakakotahi i a ia, kia rite. Tera pea, koia tenei te wa.

CHAPTER 3

WAERENGA A HIKA: ‘THE HINGE OF FATE’ IN TURANGA

Puritia mai tera o te riri kia kitea te henga katahi ka tuku mai ai. Ki te pai koe ki [te] haere mai, kia tere mai

Let all conflict be withheld until it is established where the fault lies [and it is proven], only then may fighting be justified. If you accept this proposal to come then please do it with urgency.

—Raharuhi Rukupo and others to McLean, 12 November 1865

3.1 INTRODUCTION

3.1.1 Turanga, 1840–65

In one week in 1865, the political landscape of Turanga changed forever. From 17 to 22 November 1865, Waerenga a Hika Pa, defended by several hundred Turanga Maori, was besieged by colonial and kawanatanga Maori forces.¹ After hostilities spread over several days, the Crown forces compelled the surrender of 400 men and women inside the pa. With that victory, the Crown secured the power to settle the Turanga region in accordance with its own settlement priorities.

By contrast, from 1840 to 1865 Turanga Maori had decided how and when contact with colonists would occur – if at all. This chapter explores events in Turanga from 1840 to 1865 in an attempt to determine how such a shift in power relations came about during a single week.

In 1840, 22 Maori signed the Treaty of Waitangi at Turanga, but there was little significant contact with the Crown again until 1855. From 1855 to 1860, a magistrate, Herbert Wardell, was stationed at Turanga. However, he proved singularly unsuccessful in securing respect for the Queen’s law from either Maori or settlers unless they chose to have recourse to it. Wardell was removed in 1860 and was not replaced. Though there was some interest among Turanga

1. We use the term ‘kawanatanga’ in three different ways, depending on the context. First, it is the term for ‘governorship’, as in article 1 of the Treaty. Secondly, it is the general Maori term for the Government. And we use it thirdly in the phrase ‘kawanatanga Maori forces’ to refer to those Maori forces who fought on the Government side.

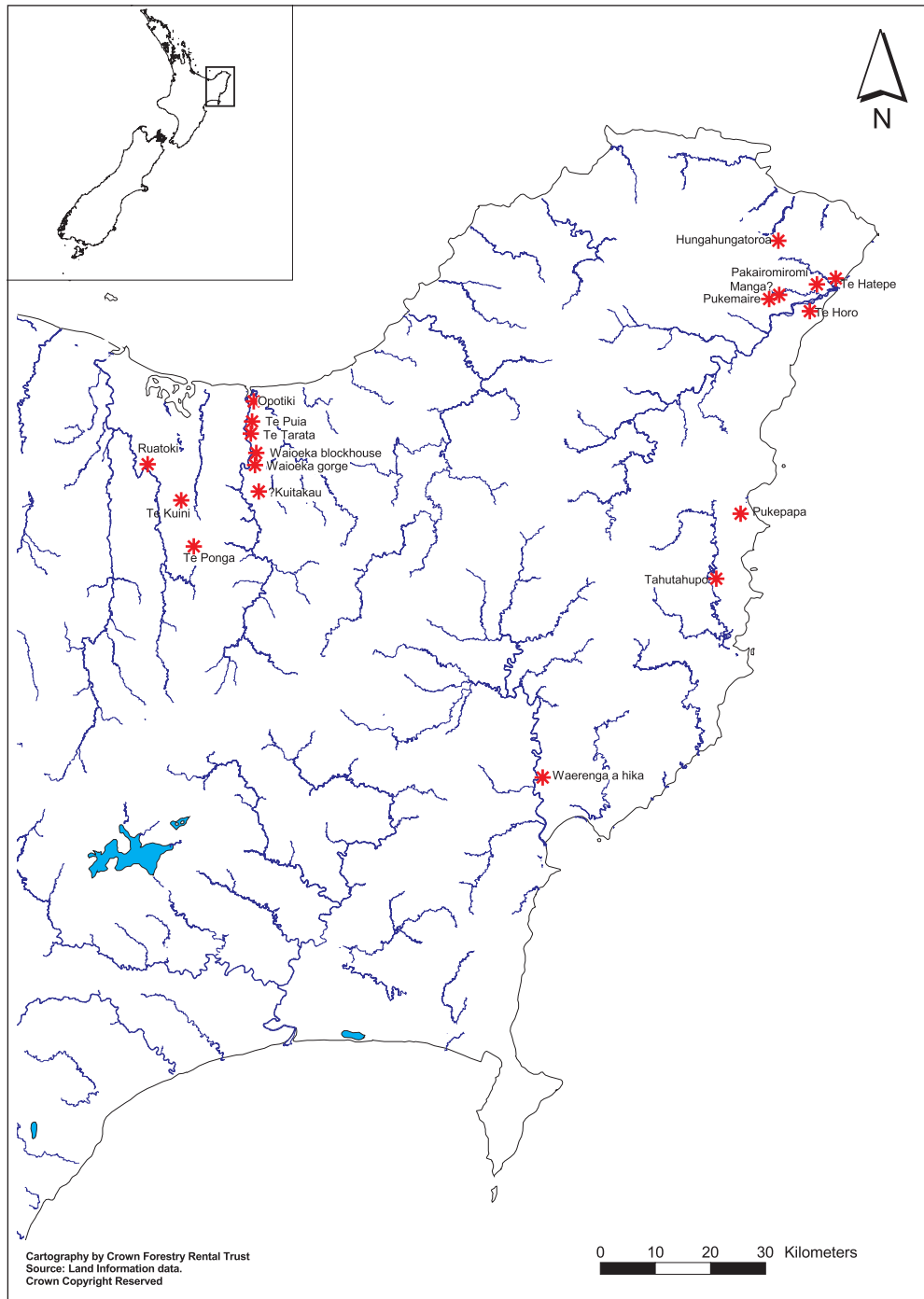
Maori in the judicial and commercial functions of the Crown, the establishment of the new colonial government in New Zealand seemed to have had little direct impact in Turanga. In 1865, it remained a Maori district, with a Maori population of approximately 1500, compared with perhaps 60 or 70 Pakeha.

Turanga Maori were nevertheless for the most part willing to engage with the emerging settler economy. They accepted – and indeed married – some traders into their communities, and they entered into some transactions with them for the lease and sale of land. Maori were themselves cropping wheat quite profitably for the Auckland market in the 1840s and, subsequently, for the Australian goldfield market for a period in the 1850s. But, by the late 1850s, the wheat market had collapsed as the Australian colonies descended into economic depression.

At hui at this time, there were strong expressions of Turanga autonomy, and even rejection of the Queen's authority. In 1859, land claims commissioner FD Bell visited Turanga to hear unresolved settler claims to lands purchased from Maori in breach of Crown pre-emption, amounting to 2200 acres. In Turanga, most of these transactions had taken place after 14 January 1840, the theoretical date on which sovereignty was transferred. By the late 1850s, moves by some Maori to return payments made by settlers for land and to 'repudiate' the transactions had become widespread. In the face of Maori opposition, and the illegality of most of the transactions, Bell made no recommendations for the award of title. Despite two visits in the 1850s by the Government's key land purchase agent, Donald McLean, the Crown had managed to acquire only 57 acres prior to 1865. At the beginning of that year, almost all of Turanga remained Maori land, and the district was clearly under Maori, not Crown, authority.

Tensions heightened in Turanga following the outbreak of war elsewhere in the North Island. But Turanga Maori retained their independence and refused to join either the Maori King or the British Queen. Instead, they opted for studied neutrality as the best means of protecting their own independence. Then, in 1865, a new faith was brought to the area by followers of the spiritual leader Te Ua Haumene of Taranaki. They came via Opotiki, where the missionary Carl Sylvius Völkner was killed and decapitated during their visit. Pai Marire thus arrived in Turanga in a tense atmosphere. Soon afterwards, a number of settlers left, as did Bishop Williams and his family. Pai Marire challenged the hold of missionaries from the Church Missionary Society on the East Coast and also appeared to threaten the Crown's claim to authority in Turanga since 1840. To many Maori, Pai Marire offered both spiritual salvation and the retention of their land and independence. But Pai Marire also divided East Coast Maori. In Turanga, it led to the eventual emergence of a small 'kawanatanga' party.

Hostilities broke out further up the coast from June till October 1865, between Ngati Porou Pai Marire believers and those among Ngati Porou who aligned themselves with the kawana-tanga. Ngati Porou Pai Marire were defeated, and some fled to Turanga. They were followed by senior Ngati Porou rangatira who supported the kawanatanga – particularly, Mokena Kohere and Henare Potae. Their arrival from outside the district, and Mokena Kohere's



Map 7: Places of conflict, 1864–67, showing Waerenga a Hika

earlier hoisting of a Union Jack at Titirangi (Kaiti), created significant anxieties among Turanga Maori, no matter what their political alignments, as to Ngati Porou intentions.

By mid-October, the hostilities within the Ngati Porou rohe were over. Colonial and Ngati Porou kawanatanga forces had defeated the Pai Marire forces and had taken many prisoners.

Donald McLean, the Crown's troubleshooter, returned to Turanga in November, bringing colonial and Ngati Porou forces. In the mounting tension, some settlers abandoned their homes, which were then looted. Still, there seemed to be a possibility of averting conflict, as leading Pai Marire rangatira Raharuhi Rukupo was working for peace. McLean issued to 'offending' Turanga Maori a list of terms with which they had to comply if they were to avoid war: they were required to give up to the Crown for trial any who were involved in murder or other serious crimes; expel all who had been involved in conflict against the Crown elsewhere; take the oath of allegiance; compensate the settlers for their losses; and give up their arms. The Pai Marire leaders were anxious that McLean meet them to discuss the terms but he refused. Instead, he issued an ultimatum, and when the Pai Marire leaders did not 'come in' to lay down their arms, Crown forces and their Ngati Porou allies, along with a smaller force of Turanga kawanatanga Maori, attacked and besieged the fortified pa at Waerenga a Hika on 17 November 1865.

By 22 November 1865, the siege was over. Hundreds of those inside the pa surrendered, though a considerable number escaped out the back. Many of those selected by the Crown as the 'worst offenders' were imprisoned on Wharekauri (Rekohu, or the Chatham Islands).² The Crown attempted, in their absence, to secure a cession of Turanga land, and it finally succeeded in 1868. (We discuss the circumstances of this cession further in chapters 4 and 6.)

By the early 1870s, Turanga had ceased to be an autonomous Maori district. The town of Gisborne was laid out, its name replacing Turanga, and native title was extinguished over the vast majority of the inquiry district lands. Much of this land was processed through judicial forums, clothed with Crown title, and then sold. It is because of these dramatic changes in the Turanga political, social, and economic landscape that Waerenga a Hika may be seen as 'the hinge of fate' of Turanga history.³

3.1.2 Key issues

Some key issues arise from the circumstances of the Crown's military intervention in Turanga in 1865 and its assertion of substantive sovereignty:

- What was the extent of a Crown presence and authority at a practical level in Turanga in the period from 1840 to 1865?

2. 'Wharekauri' is the name that East Coast Maori used for Rekohu or the Chatham Islands in their nineteenth-century correspondence about their detention there; it is also used within the Ringatu church. That is why we use the term in this report, notwithstanding that the Tribunal's *Rekohu* report states that the preferred name in that context is Rekohu, that being the term used by the islands' first occupiers, the Moriori. However, that Tribunal also refers to it by all three names by which they are known: 'Each name is legitimate, each now meaning home for the respective occupants'. See Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p12.

3. The phrase is Oliver and Thomson's; they apply it more generally to 'the Maori Coast.' We confine ourselves here to the Turanga region: William Oliver and Jane Thomson, *Challenge and Response: A Study of the Development of the Gisborne East Coast Region* (Gisborne: East Coast Development Research Association, 1971), p94.

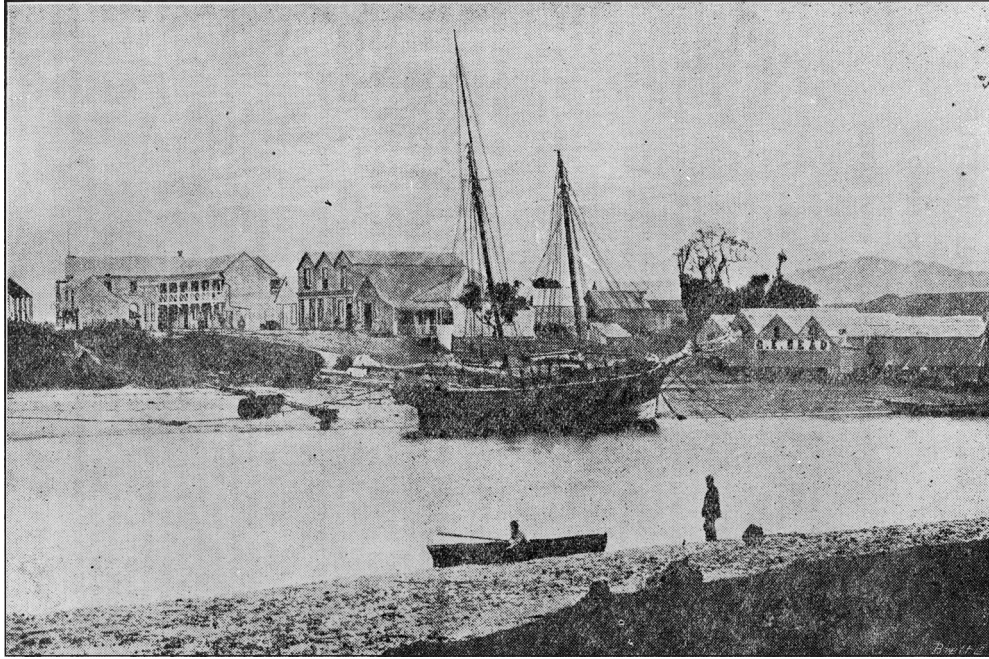


Fig 6: View of the Gisborne waterfront, with the settlement of Gisborne in the background, 1867. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (F-31519-½).

- ▶ Were Turanga Maori in rebellion against the Crown at Waerenga a Hika or were they acting in self-defence against unlawful Crown aggression?
- ▶ Were the ways in which the Crown conducted itself in its dealings with Turanga Maori in the spring and summer of 1865 consistent with its Treaty obligations?

We address each of these issues below.

3.2 1840 TO 1865: WHOSE TURANGA?

The Maori communities of Turanga experienced their first encounter with Pakeha when Captain James Cook's vessel *Endeavour* anchored off their beach near the mouth of the Turanganui River, in October 1769. It was an unhappy meeting, which left nine Maori dead or wounded.⁴ Frustrated by his inability in this, his first New Zealand landfall, to establish peaceful relations with Maori or to secure provisions, Cook departed after a brief visit of 2½ days. The name that he gave the district, and that he recorded on his map, was Poverty Bay, 'because it afforded us no one thing we wanted'.⁵ That name remains better known today to Pakeha New Zealanders than its much older name, Turanganui a Kiwa.

4. Anne Salmond, *Two Worlds: First Meetings Between Maori and Europeans, 1642–1772* (Auckland: Viking, 1993), p132

5. JC Beaglehole, *The Life of Captain James Cook* (Stanford: Stanford University Press, 1974), p201

Sustained contact between Turanga Maori and Pakeha began in the 1830s, when the first traders and shore-based whalers were hosted.⁶ From the early 1830s, Turanga Maori and settlers and traders had developed relationships that enabled them to reside together. Many of the settlers married into Maori communities, and their children were of dual descent. Settlers resided on blocks of land through arrangements with chiefs and communities, either leasing land or living on land that had been granted for the security of part-Maori children. The earliest settlers thus each relied on the protection of a chief; they did not form a community of their own. Turanga Maori were, for their part, attracted by the new skills, technology, and wealth that the traders had to offer.

In the wake of the traders, as happened elsewhere in New Zealand, the missionaries arrived. All along the East Coast, Maori themselves – released from captivity by Ngapuhi, who had taken many north during the raids of the 1820s – played a major role in spreading Christian teachings to the villages. The Reverend William Williams of the Church Missionary Society returned Ngati Porou captives to their homes in January 1834, but he did not visit Turanga. It was 1838 before he went to Turanga, and by then there was already some familiarity with Christianity there. Williams chose Turanga as the site for his mission station because of its strategic location mid-way between Waiapu and Wairoa. He placed three Maori teachers there later that year, returning early in 1840 with his wife, Jane, to establish the station. Initially, he was allocated 12 acres of land by Rongowhakaata just south of Orakaiaapu (within present Manutuke).⁷ By this time, every kainga in Turanga had established a school, and Williams preached to a Maori congregation of 1000 at his first Sunday service on 26 January 1840.

The Treaty of Waitangi was signed early in May 1840 by 22 Turanga leaders. Henry Williams had brought a copy south with him in April, and he left it with his brother William to secure signatures.⁸ Very little information has survived as to how signatures to the Treaty were collected in Turanga and what communities were visited.⁹ We do know that Williams received his copy of the Treaty on 8 April but that he did not record until 5 May that he had ‘Conversed with natives’ about it, who ‘approve of [its] tenor’, and that he had obtained several signatures and expected to gather more.¹⁰

6. Document A23, pp18–22

7. In 1844, Williams moved to nearby Whakato (where eight acres were made available to him) and in 1855, he accepted an offer from the Te Whanau a Taupara section of Te Aitanga a Mahaki, of a large piece of land, and moved to Waerenga a Hika: doc A10, pp21–22, 71.

8. William Williams was asked to obtain the agreement of chiefs from East Cape to Ahuriri. He obtained 41 signatures for this Treaty sheet, including 22 from Turanga and 2 from Nuhaka/Mahia: Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Allen and Unwin, 1990), pp152–154.

9. William Williams identified a number of Turanga communities in his journal of the 1840s: at Toanga, Taureka, Whakato, Patutahi, Patarata, Pa o Kahu, Taruheru, Matawhero, Turanganui, Taikawakawa, Wherowhero, and Whareongaonga. These were settlements he visited regularly, and this is doubtless not a comprehensive list.

10. W Williams, journal, 8 April 1840 (doc A10, p33)



Fig 7: Turanga, Archdeacon Williams, 1855. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (C-103-019-a). This is probably Williams' second mission station, located at Whakato; see the *Turanga Journals: Letters and Journals of William and Jane Williams*.

As he had done elsewhere, it is likely that, in his discussion about the Treaty, Williams stressed the Crown's intention of protecting Maori in possession of their lands. He and his brother Henry had expressed themselves as horrified at the land-purchasing activities both of the New Zealand Company and of speculators who had arrived in the Cook Strait area in the latter part of 1839 to secure 'purchases' from Maori before the Crown declared sovereignty and established its pre-emptive right. On 10 February 1840, Williams held a large meeting in Turanga that was attended by 'nearly every principal chief', and he explained 'the intentions of Europeans' in coming to New Zealand and their recent activities 'buying the whole country out of the hands of the natives, who will soon be left at the mercy of the new proprietors'.¹¹ In particular, Williams warned the chiefs against Captain Rhodes, who was rumoured to be on his way to Turanga to buy 'the whole of this district'. Williams suggested instead that the Turanga chiefs should sell all the land to him on behalf of the Church Missionary Society and that 'the whole of the said land should be kept in trust for the natives and their children for ever'.¹² He prepared a deed and recorded the boundaries of the land, which were 'names of 218 places with the list of principal proprietors'. He then transferred blankets, a horse, 42 sovereigns, and tools and clothing, which together amounted to some £200 in value, to Turanga Maori. Williams recorded that there was general satisfaction with the transaction: 'The extent of land thus secured to the natives is about 30 miles long by an average of about

11. William Williams, journal to the Church Missionary Society, February 1840, *The Turanga Journals, 1840-1850, Letters and Journals of William and Jane Williams, Missionaries of Poverty Bay*, edited by Frances Porter (Wellington: Victoria University Press, 1974), p81

12. *Ibid*, p82

6 wide running in a direct line from the mouth of the harbor back to Opotiki in the Bay of Plenty.¹³

Governor Gipps's proclamation of 14 January 1840, which declared all land titles void unless derived from the Crown, invalidated Williams' transaction.¹⁴ But the point here is Williams' determination to assist in foiling the designs of large-scale purchasers of Maori land. This major transaction – however understood by Maori – would clearly have been fresh in the minds of all concerned when the Treaty was discussed in May, and we consider that Williams would have reiterated his earlier warnings about private land purchasers, and contrasted this with the protective role of the Crown.

During the early 1840s, the Turanga mission prospered. Within two years, 10 chapels had been built in the district.¹⁵ In Turanga, as elsewhere, there was huge interest in Christianity, which offered Maori the opportunity of literacy, the key to a world view quite different from their own, and the possibility of an alternative to Maori law which allowed for dispute resolution and the punishment of offences by peaceful means. A period of consolidation followed in the 1840s, characterised (as elsewhere) by missionary disappointment at what was interpreted as a 'falling away' of faith, as well as at the dreaded challenge of an interest by some chiefs in Roman Catholicism.¹⁶

Maori-Pakeha relationships prior to 1865 were remarkably peaceful. By 1847, there were approximately 2400 Maori living in the Turanga district, and probably around 40 Pakeha traders or settlers, and their wives, and some 50 Pakeha and dual-descent children.¹⁷ Over the next 15 years, the adult Pakeha population increased slightly to 70, but the Maori population plummeted to around 1500.¹⁸ Yet, this dramatic decline in population, due largely to the impact of introduced diseases, seems not to have been reflected in a decline in the vigour of the communities.¹⁹

From the time when New Zealand became a British colony in 1840, the beginnings of a change in the dynamics of Maori-settler relationships were evident. It is not that there was any marked change on the ground as yet. Rather, there was an assumption on the part of the small settler population that the authority of colonial government would ultimately override

13. Williams, p82

14. The proclamation was signed on 19 January and retrospectively dated to 14 January 1840; Governor Hobson reissued the proclamation when he landed in New Zealand on 30 January 1840: Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed (Wellington: Brooker's Ltd, 2001), p37.

15. Document A23, pp27–29

16. Ibid, pp30–31; doc A10, pp24–25. Kahutia of Whanua a Iwi, and Whata of Rongowhakaata for instance, turned to Catholicism, organising a public debate between Anglican and Catholic priests. Archdeacon Williams complained about 'papist' influences in Turanga as early as 1840, and French priests were at Mahia and Opotiki from 1841. Father Lampila erected a Catholic church at Turanga in 1850, but was based there only briefly, being relocated to Hawke's Bay. He was succeeded by Father Reignier, who made a number of visits to Turanga.

17. Population figures drawn from doc F10, pp25, 31. Mr Stirling suggested that the Turanga population in 1840 might have been as high as 7500 to 10,000: doc A23, p36.

18. The figure of 1500 noted by Governor Gore Browne in 1860 appears to reflect census estimates for 1858: doc F10, pp26–27.

19. Oliver and Thomson, p54 (doc A23, p37)



Fig 8: *Native Christian Church at Turanga, New Zealand.* Artist unknown.

Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (8-051-017).

that of the Turanga rangatira. There was the opportunity of securing Crown titles for the land they claimed; there was the prospect of a magistrate and the operation of British law instead of Maori law in Turanga. In 1844, JW Harris and others petitioned Governor FitzRoy about their claims to land in Turanga (which had been advertised for hearing in Tauranga in July but dismissed by the land claims commissioner because no one appeared in support of them).²⁰ In 1847, the settlers petitioned Sir George Grey, the new Governor, complaining about unfulfilled promises to investigate their land claims and about the 'outrages' they were subject to at the hands of local Maori.²¹ They sought either a visit from the Governor or a permanent (or visiting) Government official at Turanga. Grey did not, however, travel to Turanga in the next six years of his first term as Governor, but Donald McLean, the chief land purchase commissioner, visited in 1851, and again in 1855. McLean held the first magistrate's court in Turanga, hearing charges against a settler accused of selling gunpowder, and he was successful in sorting out some other minor disputes.

20. Document A10, p 49. It seems likely that Tauranga was confused with Turanga by Auckland officials, and the distant venue was a mistake.

21. Document A10, p 50. Archdeacon Williams, it may be noted, considered that the settlers had brought their difficulties on themselves.

In 1855, shortly after McLean's visit, the Government sent Herbert Wardell to Turanga as the resident magistrate. Wardell was instructed not to intervene in disputes among Maori unless specifically invited to do so. In 1856, he appointed several rangatira – Paratene Pototi, Kahutia, Raharuhi Rukupo, and Rawiri Te Eke – as native assessors to assist him in cases in which Maori were involved. Wardell acted as a mediator in his court, settling small cases such as assault and dog stealing. But the chiefs became disillusioned at the court's inability to deal successfully with offences that mattered to them, such as the trade in and supply of alcohol. Partly, this reflected a lack of unanimity among Maori themselves on the subject. Wardell felt in fact that he could exercise only 'moral influences' and that, in such circumstances, his effectiveness was very limited.²² He believed that, though Maori 'admitted the superiority of the law to their own customs', they 'did not recognise the authority of the law, and yielded obedience or refused it as suited their purposes'.²³ Privately, he wrote that it would have been better 'not to appear to interfere with a Native District' than to send a powerless magistrate.²⁴ Turanga Maori soon turned away from their brief experiment with Government alternatives and continued to manage their affairs through their own structures.

The attitude of the settlers to the resident magistrate's court did not assist Wardell; nor was it calculated to impress on Maori the significance of British legal processes. The settler community was in principle anxious for an assertion of British authority in Turanga, but the reality was that the resident magistrate lacked the power of enforcement. Consequently, the settlers protected their own interests, even if this led to the flouting of colonial law. Sometimes, they chose not to submit to Wardell's rulings when these rulings affected them personally. Wardell's perspective was that many settlers preferred to settle disputes 'the Maori way', since they were so well used to doing so by this time.²⁵ What is clear, nevertheless, is that the settlers, and Government officials, looked forward to a time when colonial law would operate in Turanga in the context of a strong British presence. To the settlers, 'the solution was wresting control of land and law away from Maori and their only possible ally . . . was the Crown'.²⁶ Harris, the unofficial spokesman for the settlers, wrote to McLean in June 1857: 'Either the Government must obtain the lands here or we must leave. Written agreements with the Natives here are useless except as binding the Europeans. The Natives appear to look on us as holding our property for their use and benefit.'²⁷

As early as 1852, the settlers had faced a movement, led locally by Kahutia, which attempted to reclaim or 'redeem' Maori land occupied by them. They called it the 'redemption movement'. Payments for land made by settlers (for instance, in stock animals) were returned to

22. Document F10, p135

23. Ibid, pp150–151

24. Wardell, diary, 10 July 1858, QMS-2121 (doc A10, p81)

25. Document A10, p82

26. Document A23, p54

27. Harris to McLean, 12 June 1851, McLean papers (doc A10, p67; and doc A23, pp60–61)

them.²⁸ Kahutia informed Harris that his land would be resumed because Harris 'had had it long enough'.²⁹

McLean agreed with the settlers that the ownership of the land should pass from Maori hands. On his 1851 visit, he wrote that 'misunderstandings will continually arise in this Bay, until the native title is fairly extinguished to such land as may be required for grazing or other European purposes'.³⁰ But the Crown was unable to buy land at Turanga, with the exception of Wardell's 1857 purchase of 57 acres (the 'Government paddock' at Makaraka), which he bought for £85 after long negotiations with Kahutia and Whanau a Iwi. Claimant historian Bruce Stirling commented that this 'must have been a record rate per acre for rural Maori land purchases'.³¹

Turanga Maori engaged with the new economy with enthusiasm. They rapidly increased their wheat production during the 1840s and were exporting wheat, maize, pork, onions, and potatoes to Auckland. Before long, they expanded their export trade to the Australian gold market.³²

With the advantages of extensive lands, large labour pools, and several schooners of their own operated in accordance with tribal strategies, Turanga Maori provided competition for settler producers. It was not until the arrival of individualised title in the 1870s that these advantages inherent in tribal economic enterprise came under threat. In the meantime, the settlers continued to do rather well, especially when acting as middlemen for Maori. But, as Turanga Maori's participation in the new economy grew at all levels, they began to resent Pakeha control over the shipping and marketing of produce.

Early in the 1850s, Turanga Maori had formed a runanga to develop policies for administering their affairs. Harris described them as meeting 'in committee'.³³ The runanga moved at once to assert control over the resources of the district. It decided to charge ships for entering the river at Turanganui, for fresh water taken from it per bucket, and for timber.³⁴ Harris complained that the 'committee' had written:

a letter to his Excellency for advice on the following items viz – What they are to charge per ton for all Vessels entering and leaving the river; What they are to charge for water – The price they ought obtain for Wheat and Pork (10s) a bushel is what they want, and lastly whether they ought to turn all the Europeans away nevertheless they say . . . they should be sorry to do so.³⁵

28. Document A23, pp 61–62

29. Harris to McLean, 10 September 1851, McLean papers, MS papers 0032–0327 (doc A23, p 60). Harris considered that he had purchased the land 20 years earlier, in 1831.

30. McLean to Colonial Secretary, 20 February 1851, BPP, vol 9, p 2 (doc A23, p 58)

31. Document A23, p 69

32. Document A23, p 48; doc A10, p 57

33. Harris to McLean, 10 September 1851, McLean papers, MS papers 0032–0327 (doc A10(a), vol 2, p 937)

34. Document A23, p 61

35. Harris to McLean, 10 September 1851 (doc A10(a), vol 2, pp 937–938)

Some settlers blamed the Church Missionary Society evangelist Thomas Grace for this state of affairs; for Grace – a believer in level playing fields – may have suggested to Turanga Maori that they could do better out of the terms of trade.³⁶ Grace wrote with enthusiasm of the economic development of Maori, noting their appreciation of its benefits. He reported Turanga Maori as saying: ‘Now is the beginning of our strength! This is the beginning of our Kingdom! Now we are beginning to live.’³⁷

In the late 1850s, Turanga Maori were continuing to assert their autonomy through the runanga, and through hui which the runanga organised. Mr Stirling described this body as ‘akin to a runanganui . . . a more centralised body . . . involving many rangatira as well as the official whakawa’.³⁸ At one large such hui in 1858, discussion ranged from falling wheat prices to independence. Wardell was invited along to ‘Te Ao Maori’ (‘the Maori world’), but only, he reported, to record the meeting. He wrote: ‘they unanimously & emphatically denied the Queen [had] any right in these Islands and declared they would never acknowledge Her any.’³⁹ Paratene Pototi, later one of the strongest supporters of the Government in the troubles of 1865, declared: ‘We are not the remnant of a people left by the Pakeha; we have not been conquered: the Queen has her Island, we have ours; the same language is not spoken in both.’⁴⁰

Turanga Maori present at the 1858 hui seemed particularly put out over the new Anglican prayer book. Claimant historian Vincent O’Malley noted that the earlier prayer books had contained prayers for the chiefs and their families. But the latest edition had dropped those intercessions, leaving only the prayers for the Queen. At the 1858 hui, Maori said they would not pray for the Queen unless they also prayed for ‘the Rangatira Maori’. Rutene Piwaka said: ‘Let the Pakeha pray for Queen Victoria if they like; but we will not call her our Queen and Governor: it is by this that the Pakeha is putting the Queen above us as a *potae* (cap).’⁴¹ The political overtones of this issue are very obvious. Clearly, Maori distinguished between the religion introduced by the Pakeha and their system of government. They welcomed the former but rejected the latter.

During 1859 to 1860, both Governor Gore Browne and land claims commissioner FD Bell would experience Turanga Maori’s insistence on their autonomy at first hand. In 1859, Bell made a fleeting visit to Turanga; in 1860, he was followed by the Governor. Neither Maori nor settlers got much satisfaction from these visits. Bell, appointed to try to settle hundreds of as

36. Grace suggested that Maori set higher rates for the grazing of settlers’ stock on their land for instance: doc A23, p50.

37. ‘Annual Report of the Turanga District to Year Ending 31 December 1852’, in TS Grace, *A Pioneer Missionary among the Maoris, 1850–1879: Being Letters and Journals of Thomas Samuel Grace*, edited by SJ Brittan et al (Palmerston North: GH Bennett and Company, 1928) (doc A10, p56; doc A23, p52)

38. Document A23, p71

39. Wardell diary, 21 May 1858, qms-2121, ATL (doc A10, p76)

40. Wardell to Native Secretary, 20 September 1861, AJHR, 1862, E-7, p31 (doc A10, pp76–77)

41. Wardell to Native Secretary, 20 September 1861, AJHR, 1862, E-7, p31 (doc A10, p77)

yet unresolved pre-Treaty and pre-emption waiver claims throughout the country, failed to finalise any land claims in Turanga. Though the claims there amounted to only about 2200 acres, and a number were for lands gifted for the support of dual-descent children, all the claims were rejected by one or more Turanga chiefs, and most were rejected by all.⁴² Faced with what Bell called the 'repudiation' of their transactions, most of the settlers withdrew their claims to wait for a more certain opportunity. And, as all but six of the settlers' private land claims were illegal, according to the Crown's provisions governing post-1840 land transactions, they could not have been enforced by the Crown even if the settler claimants had come forward. Bell made this clear to the settlers. But Governor Gore Browne unfortunately told Maori – as Bell had already done – that in accordance with English legal doctrine, land which settlers claimed to have purchased since Gipps's proclamation became the property of the Crown because the native title had been extinguished.⁴³ This, according to Mr Stirling, only increased Maori anxiety as to land sales because they felt that 'the continued presence of settlers gave the government a pretext to return to Turanga and seize their lands'.⁴⁴

Gore Browne was highly offended by the independent tone of Turanga Maori, and on his departure he recommended the withdrawal of resident magistrate Wardell. Wardell was not replaced, and Turanga Maori had little contact with the Crown again till 1865. The only exception was the journey that three Turanga chiefs made to Auckland in 1860 to attend the Kohimarama conference, which had been called by the Governor. In a prepared response to the Governor, these chiefs wrote politely of the Crown's kindness and goodwill towards them, recognised the Queen's authority over their 'temporal welfare', distanced themselves from the Kingitanga, and expressed some nervousness as to the Governor's intentions towards Turanga once the war in Taranaki was concluded.⁴⁵

By the late 1850s, Maori across the country were anxious as to the intentions of the Government. When war broke out in Taranaki in March 1860 and was followed by the invasion of Waikato in 1863, Turanga Maori were most anxious to avoid any such troubles spreading to their region.⁴⁶ Partly, this was because they did not wish to jeopardise their participation in the new economy, but it was also because they did not wish to put their land, which they had protected so successfully till now, at risk.⁴⁷

There was thus genuine apprehension by the late 1850s and early 1860s as to what the Government intended for Turanga Maori and their lands. The Turanga runanga wrote to the superintendent of the Hawke's Bay province in July 1861 asking why the Government had sent troops against Maori:

42. Document F2, pp25–26, 30

43. Document A10, pp87–88

44. Document A23, pp76–77

45. Document F10, pp159–161

46. Document A10, p99; see also doc A23, pp77–79

47. Document A23, p81

let the fighting cease at Taranaki and also at Waikato, and in all other places in this Island. It is good if what the Governor says is true that is ‘that he does not wish to fight’ to our knowledge it is not true, for who may know . . . for we are aware of the proper view of your word namely it has two sides, and within ourselves your word will not abide true, that he does not wish to fight, because we have the land in possession from which flows fatness, and from that fatness of our land we derive what we now are possessed of namely money. This will be the cause or the reason for which he will fight against us.⁴⁸

Turanga Maori kept a careful watch on events outside of Turanga, and watched for signs of Crown interest in their land. The widespread suspicions of Government intentions were noted at the time by Pakeha along the East Coast. Resident magistrate Baker (Waiapu district) said in 1862 that ‘the very word “whenua” used by an agent of the Government, seemed sufficient to arouse suspicion and distrust’.⁴⁹

Raharuhi Rukupo, a leading chief of Rongowhakaata, who was heavily involved both in the repudiation of early settler land transactions and in the Turanga runanga, expressed the runanga’s apprehension of a Government whose contradictory words and actions made it hard for Maori to get its measure. As he put it:

We do not understand the meaning of your flag, nor do we know the people who shall take this Island, New Zealand. What we do know is that you (the Europeans) protect, and you seize, you are kind, and you are ready to fight, you feed with soft food, and you feed with hard.⁵⁰

Turanga Maori attitudes towards the Government by the early 1860s remained tentative and wary; they did not feel it was a Government they knew.

3.2.1 The claimants’ case

Counsel for both Te Aitanga a Mahaki and Rongowhakaata presented the fullest claimant submissions on issues arising from Crown and Maori interaction in the period 1840 to 1865.⁵¹ For this, they relied on the evidence and arguments of Messrs O’Malley and Stirling.⁵²

Claimant counsel asserted that Turanga was a particularly independent Maori district and that Turanga Maori traded successfully and were managing their own affairs peacefully. Prior to 1865, Turanga was an autonomous and prosperous Maori district, in which tino

48. Contemporary translation of Raharuhi Rukupo and runanga of Turanga to superintendent, Hawke’s Bay Province, 26 July 1861, Hawke’s Bay 4/13/32, Archives NZ (doc A10, p99; doc A23, pp 81–82)

49. Baker to Native Secretary, 15 January 1862, AJHR, 1862, E-9, sec 5, p6 (doc A10, p101)

50. Raharuhi Rukupo and others to Bell, 25 March 1861 (doc A23, p78)

51. For Te Aitanga a Mahaki, see docs A61, B15, H1, and see doc H2, p11; for Rongowhakaata, see docs A67, D32, H3. Ngai Tamanuhiri’s closing submissions also addressed the topic: see doc H2.

52. Documents A10, A23

rangatiratanga was maintained in accordance with tikanga Maori.⁵³ The Maori population far outnumbered that of the Pakeha – by perhaps as much as 15 to one – and settlers lived on Maori terms.⁵⁴

Messrs O'Malley and Stirling agreed that Turanga Maori did not consider themselves to have given up any rights under the Treaty: 'Given the dominance of their position . . . it was probably of marginal significance to them.'⁵⁵ The Treaty, after all, was brought to them by Henry Williams, and it was discussed with them by their own missionary, William Williams (Henry's brother), not by a Government official. The link between the document and a new government must have been a tenuous one. In any case, the claimants argued that, until 1865, 'Turanga iwi retained authority over their lands and their lives'.⁵⁶ This was a very deliberate policy because the retention of their autonomy enabled Turanga Maori to obtain benefits from settlement through arrangements with settlers, 'without ceding large areas of land for wide-scale Crown-controlled settlement and the supposed promises it held'.⁵⁷

Despite their determination to control their own affairs, Turanga Maori still wanted a relationship both with the Crown and with the settlers, as long as this was on terms that suited them. The settlers, however, quickly grew resentful of runanga attempts to control trade at Turanga, and they complained about the kind of authority Turanga Maori were assuming in their relationship with the settlers and the Crown.

By the late 1850s, claimant witnesses argued, runanga were being deliberately used by Maori to assert their self-governance. As O'Malley noted, this happened across the country, as Maori reacted with alarm at their 'increasing marginalisation in colonial affairs':

And although this threat to Maori ascendancy was still a nascent one at Turanga, the revival of runanga there extended to an inter-tribal council of the leading chiefs of the district. This effectively was the government of Turanga – it set the price of wheat, decided the terms of trade, and agreed upon immigration and land policies.⁵⁸

The Turanga runanga seems to have been particularly significant to the everyday governance of the area.

The claimant historians accepted the Crown's attempt at providing a semblance of Government presence in Turanga with the appointment of Wardell but considered that he was not effective; moreover, he was removed in 1860 and was not replaced. Mr Stirling commented that Turanga Maori 'did not see Wardell as having any more authority over them than they

53. Document H1, p10

54. Document H3, p12

55. Document A10, p32

56. Document A23, p5

57. Ibid, p6

58. Document A10, p84

might be prepared to grant him, and that was not very much'. Instead, Maori continued to operate on their own terms, providing land for settlers as they chose and in accordance with their own understandings of land tenure.⁵⁹ These were years of nominal British rule at Turanga, with Turanga Maori governing their own affairs.⁶⁰

After the withdrawal of Wardell in 1860, there was to be no further Government presence in Turanga until 1865.

The claimants emphasised the significance that both Maori and Pakeha placed on land sales as being indicative of the power relationship with the Crown. After his departure from the area, Wardell remembered that Turanga Maori had told him that, because they had not sold their land to the Government, then the Government had no authority over them. Turanga Maori, Mr Stirling continued, 'saw clearly that large-scale land alienation would lead to the loss of the control and autonomy they still enjoyed'.⁶¹

The independence of Turanga Maori was also asserted not just against the Crown, the claimants noted, but against national Maori initiatives. The claimants suggested that Turanga Maori were concerned by the Taranaki and Waikato wars and were sympathetic to representatives from these areas who came to seek allies in their defence against the Crown. They had debated joining the Kingitanga but decided firmly against it because they did not want to be a part of 'foreign wars'.⁶² But, in Mr Stirling's words, 'their neutrality, like their strict control of their land and other resources, was not something that could long remain unchallenged'.⁶³

The Turanga runanga convened several large hui in the early 1860s to discuss the deteriorating state of relations between the Crown and Maori throughout the North Island. Each time, the runanga settled on neutrality, and, according to Mr Stirling, it even offered to act as a mediator in Crown–Maori disputes.⁶⁴

Contemplating the approaching end of Maori autonomy in Turanga, Messrs O'Malley and Stirling both argued that, unfortunately for Turanga's peace initiatives, conflict was to come into their area. This conflict would result not from Turanga actions but from the divisive impact that the Crown's war in Taranaki and Waikato would have on Turanga's northern neighbours, Ngati Porou. In Mr Stirling's words: 'Ultimately, it was interference from this quarter . . . which drove the "thin end of the wedge" into Turanga, ending the period of neutrality and forcing the peaceful prosperous district into a war its Maori occupants neither sought nor wanted'.⁶⁵

59. Document A23, p67; see also doc A10, p40

60. Document A10, p47

61. Document A23, p6

62. Document A10, pp95–97; doc A23, p80; doc H1, p11; Sanderson (1983), p175

63. Document A23, p80

64. Ibid, p83

65. Ibid, p85; doc A10, pp124–125

3.2.2 The Crown's case

In response to the claimants' assertions regarding the independence of Turanga Maori prior to 1865, Crown counsel accepted that Maori wished to preserve a degree of autonomy from the State and denied that the Crown was offended by Maori in Turanga asserting their 'regional autonomy'.⁶⁶

The Crown argued that the period 1840 to 1865 was a time of careful engagement between Turanga Maori and the Crown. The Crown was quite indifferent to land purchasing in the area, as it pursued options in other districts.⁶⁷ It was prepared for Turanga to be a native district longer than was the case in other parts of the colony. There was in fact no need or desire to enforce British rule in Turanga in the years after 1840; this was instead a time of courtship by the Crown. The Crown was drawn into more active involvement in the region than it wanted only in 1865 – its involvement from this point followed a 'more intense timetable' than intended earlier.⁶⁸ According to the Crown, Turanga Maori, for their part, wanted interaction with the Crown, though they also wanted to preserve a degree of their autonomy. Sources from the late 1850s suggest that Maori did not see themselves as directly subject to the Government's or the Queen's authority. But the relationship between the authority of the Crown and that of Turanga Maori was a complex one.⁶⁹

Crown historian Cecilia Edwards examined two key propositions in her report, which she saw arising from the claimants' evidence. These were that Turanga Maori were prosperous and that they were autonomous.⁷⁰ Ms Edwards suggested that many Turanga Maori initially welcomed the idea of a Government presence, which promised the lessening of tensions in their relations with the settlers on matters such as property, trade, and alcohol: 'They seemed to want to explore the benefits of Government presence, but on a "take it or leave it" basis'.⁷¹ Similarly, Turanga Maori were keen to participate in the colonial economy, and the Government attempted to encourage their participation by 'offering loans, goods, advice, and services'.⁷² Raharuhi Rukupo of Rongowhakaata was one chief who, in 1856, secured a substantial Government loan of £500 to assist him to buy a vessel, and he repaid most of it despite the boat being wrecked shortly after its purchase.⁷³ But few Turanga Maori were registered owners of vessels, though they had interests in some boats with 'East Cape' Maori and they skippered some vessels.⁷⁴ In the end, Ms Edwards would not concede that Turanga was a

66. Document H14(2), p 4

67. Ibid, p 22; see also doc F35, p 6

68. Document F35, p 7

69. Document H14(2), pp 7–8

70. Document F10, p 5

71. Ibid, pp 9, 12

72. Ibid, p 77

73. The *Adah* was totally wrecked in May 1856 in a storm. Subsequently, in 1859, the Government decided to release Raharuhi Rukupo from repayment of the outstanding debt of £109 3s 6d: see doc F10, pp 72–77.

74. Document F10, pp 63, 67

prosperous district. 'Prosperity,' she said, 'is a relative concept. I have not been able to measure the prosperity of Turanga Maori against other communities.'⁷⁵

Ms Edwards defined autonomy as 'the practical manifestation of day to day control'.⁷⁶ She agreed that Turanga Maori were generally in control of their own lives, but, although the runanga attempted to govern the area, it was not always successful in this. Turanga Maori did appear suspicious of the Government's attempt to establish a township (McLean's 1851 request), a suspicion which possibly arose out of a fear that Europeans would threaten their autonomy. But the Government was not committed to establishing a settlement in the area, and it did not give any particular encouragement to the settlers to do so either.⁷⁷

The Crown argued that a resident magistrate was sent to Turanga mainly to regulate the behaviour of Pakeha settlers, but Ms Edwards argued that Maori also showed some interest in the institution, as well as in other aspects of British law. Although the Government was willing to withdraw Wardell as soon as it became apparent that his presence was leading to the worsening of relations in the community, and perhaps a threat to the Queen's authority, Ms Edwards cautioned against reading too much into this:

This does not amount to evidence that the Government placed any priority on enforcing the Queen's writ in Turanga. Government recognised that Turanga was a 'native district'. It did not see that it had much responsibility in such districts. McLean had pointed out to Wardell on more than one occasion that the idea was gradual introduction. Wardell was only to intervene in cases between Maori when the parties sought his assistance. By gradual means and cultivating friendships, McLean may have hoped Wardell would win hearts and minds in Turanga.⁷⁸

Ms Edwards accepted that, by 1859, with the effective repudiation of most of the earlier transactions with settlers, 'many Maori linked the sale of land to yielding to another authority (the Queen)'. The repudiation of these transactions occurred when relations between settlers and Maori in Turanga were at their lowest ebb, and 'Maori felt that their ability to retain control over their lives was threatened by the idea of Government control'.⁷⁹

Crown counsel suggested that Turanga Maori did recognise a role for the Government, it being a new overarching role. The debate was over the extent of that role: it was not a complete rejection of Government. There was, counsel said: 'no real suggestion that Maori rejected the rule of law or the colony. Rather, it was the *mode* and *manner* of its reception to Turanganui a Kiwa that the sources show as topics rich in debate.' (Emphasis added.)⁸⁰

There was, Ms Edwards argued, considerably more interaction and interdependency

75. Document F10, p11

76. Ibid, p12

77. Document H14(2), pp11-15

78. Document F10, pp14-15

79. Ibid, p13

80. Document F35, p7

between Turanga Maori, settlers, and the Government than was acknowledged by the claimant historians. The settlers and Maori had 'domestic ties' and dual-descent children, and they also participated in trade relationships that did not always go smoothly. Both peoples had to adapt to new circumstances.⁸¹

The Crown considered whether the lack of direct Crown presence on the ground in Turanga prior to 1865 demonstrated some 'lack of Crown authority in this region'.⁸² The Crown's answer was that limited *de facto* (substantive) and complete *de jure* (legal) authority were not inconsistent ideas. Clearly, the Crown argued, Crown authority had extended over Turanga since 1840 and the proclamation of sovereignty. But a degree of 'practical autonomy' exercised by Maori in a region such as Turanga was consistent with the Treaty and with British expectations as to how the colony would develop. Such autonomy was not full independence, for no form of parallel sovereignty was envisaged by the Treaty, and neither could such autonomy displace or undermine the Crown's right and duty to maintain peace and order.⁸³ We understand the Crown's argument to be that, although it had acquired legal sovereignty in 1840, it realised that it would take some time for sovereignty to become substantive on the ground and it thus set about developing relationships to ensure that situation came to pass in Turanga. It was central to the Crown's argument that Maori autonomy would be a temporary phenomenon.

3.2.3 Tribunal's analysis and findings

Our purpose here is to consider the extent of the Crown presence and authority at a practical level in Turanga between 1840 and 1865. This is important, because it provides a crucial context within which to understand the Crown attack at Waerenga a Hika. The greater the level of Crown control before 1865, the more understandable it would be for the Crown to take offence at provocative Maori action immediately before Waerenga a Hika. We therefore begin by considering the nature of the relationships between Maori and the Crown in Turanga as they had evolved by the beginning of 1865. It seems to us that the basis for a political relationship between Maori and the Crown in Turanga may have been laid in 1840 but that it was barely developed during the 25 years that followed.

This appears to have been the result of two main factors: the Crown's lack of interest in Turanga and the determination of Maori to preserve their autonomy. The Taranaki Tribunal has defined autonomy as 'the right [of Maori] . . . to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State'.⁸⁴

81. Document H14(2), p4

82. Document H14(3), p12

83. Ibid, pp11–12

84. Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p5. The Taranaki Tribunal considered that equivalent Maori terms were 'tino rangatiratanga', as used in the Treaty, and 'mana motuhake', as used since the 1860s.

However, it seems to us that Turanga Maori, lacking any concept of the ‘proper operation of the State’, set few limitations on the exercise of their tino rangatiratanga, guaranteed in article 2 of the Treaty.

We gained some insight into Maori concepts of the function of kawanatanga from letters written by Turanga leaders to high-ranking Government officials in the late 1850s and early 1860s. Most, according to Cecilia Edwards, were about commercial matters. Turanga chiefs were seeking Government assistance, ‘availing themselves of access to capital, goods, and seeking advice’.⁸⁵ As Maori did elsewhere, they sought loans – for millstones, wheat bags, dinghies, even schooners – in order to enter into the new economy. They saw the Government, like the local settlers, as a source of the credit that they had to access if they were not to be left behind. By the early 1860s, their letters were raising other matters: there were numerous complaints about the liquor trade, redress sought against other Maori, and a handful on more general matters like the war. But the correspondence of Turanga Maori reveals above all an acceptance of a facilitative role for kawanatanga in respect of Maori economic development.

When it came to the functions of kawanatanga on the ground in Turanga, however, Maori leaders were very cautious. From the outset, they seem to have been determined to maintain their own law and to protect their land. It is clear from the evidence presented before us that contemporary settlers and officials alike were well aware of this determination. Leonard Williams, for instance, writing about Te Aitanga a Mahaki’s dilemmas about transferring land at Waerenga a Hika in trust to Archdeacon Williams, commented that these arose solely because title could be legally granted to the mission only by the Crown. Te Aitanga a Mahaki had therefore first to cede the land to the Crown, and this they objected to. ‘Nothing was further from the thoughts of the natives,’ wrote Williams, ‘than that the Crown should be allowed to get any footing in the district.’⁸⁶ The settlers held the missionary TS Grace responsible for the resistance that Maori showed to parting with their land. During his time in Turanga in the early 1850s, Grace certainly used what ‘little influence’ he had (in his own words) ‘against the principle of selling their land’.⁸⁷ He had little time for the tactics of Government land purchase agents.

It is certainly remarkable that Turanga Maori held at bay both the Crown and settler purchasers over this period with much success. Perhaps, as the Crown argued, it was because its purchase agent, McLean, did not try very hard. But the contrast with McLean’s purchases further south in Hawke’s Bay is marked. We conclude that Turanga Maori, like the Crown, saw a strong connection between Crown purchase and Crown authority in Turanga, and that, as a result, they regarded the purchase of land with apprehension.

85. Document F10, p77

86. WL Williams, comp, *East Coast (NZ) Historical Records* (Christchurch: Kiwi Publishers, 1998), p 22. The matter was settled in the end, but it took a great deal of discussion.

87. Grace, journal, 17 March 1851, pp10–11 (doc A10, p65)

Similarly, Maori were very cautious in their reception of the young magistrate Wardell (newly arrived from England), who represented the Government's main attempt to provide the functions of kawanatanga in Turanga. For five years, Wardell was a fixture there, and the evidence is both that he was less than effectual and that he himself felt that this was the case. Wardell's period in office also generated letters from Turanga Maori on British law and on the recruitment and payment of native assessors. The willingness of prominent leaders like Raharuhi Rukupo and Kahutia to act as assessors is itself interesting, and indicates a wish to understand Wardell's functions and his discharge of them. But if the purpose of appointing native assessors was to co-opt tribal leaders, with a view to the more rapid assimilation of their communities, then the appointments in Wardell's area were not a success.⁸⁸

The Crown was, moreover, unable to deliver on issues of concern to Turanga Maori which might have been seen as falling within the province of kawanatanga: for example, the enforcement of a ban on alcohol or the resolution of issues over land transactions. Paradoxically, this probably fed the drive among Maori for their own autonomous institution of government. To tackle these issues, they renewed their own efforts both through the runanga and through the influence of their chiefs. The versatility of Turanga Maori in adapting and using their traditional decision-making structures for a range of new purposes in their changing world is impressive – the more so as this adaptability came at the same time as introduced diseases (such as influenza and whooping cough) were taking a significant toll on the people. Mourning and tangihanga must have been a continuous part of the rhythm of community life at that time. In their 1970s study of the East Coast region, Oliver and Thomson also commented on the remarkable strength of Turanga institutions at a time of continuing loss among the people:

It is very probable that the Maori population of the 1840s and 1850s was in a state of continual decline. The surprising thing is that this decline appears to have been in numbers only, and not in morale. The almost total lack of [British] settlement, the retention of most of the land and the unrestricted authority of their own institutions are probably responsible for the fact that though the population is a remnant, it is, in spite of the inroads of disease and the impact of liquor, a flourishing rather than a declining remnant.⁸⁹

It seems to us that, given the more centralised runanga that evolved in Turanga, the Crown lost a very great opportunity to work with the leadership there when it failed to apply section 71 of the Constitution Act 1852 in this area. That Act, passed by the British Parliament to establish representative institutions in New Zealand, provided for the Governor to proclaim districts in which native 'Laws, Customs, and Usages' should be 'maintained for the Government of themselves'.

88. Richard S Hill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867*, 2 vols (Wellington: Department of Internal Affairs, 1986), vol 1, pt 2, pp 801–805

89. Oliver and Thomson, pp 54–55

It provided, in other words, a mechanism by which the Crown could have developed a positive relationship with rangatira in their respective regions, acknowledging the authority of runanga as expressed through their rangatira. The Colonial Office reminded Governor Grey when he returned to New Zealand in 1861 that he might create native districts, thus withdrawing such districts from the jurisdiction of the settler government. Grey and his Ministers should indeed consider whether ‘a distinct legislation and administration, in which the natives themselves should take a part, would not better promote the present harmony and future union of the two races, than the fictitious uniformity of law which now prevails’.⁹⁰

But Grey ignored the prompt to declare native districts, which Secretary of State Newcastle called ‘the most important of the Crown’s powers’. Instead, he set up Government-sponsored runanga (the ‘new institutions’) in parts of the country. No magistrate was sent to Turanga, and a magistrate sent to the East Coast at this time (W B Baker, the first official magistrate in the Waiapu district, north of Turanga) decided against experimenting with the new institutions at Turanga, as he had been instructed. The Maori-run runanga was, in his view, too strong in Turanga for the State-sponsored version to displace it. This seems to us to indicate that even Government officials recognised that the flaxroots decision-making structures in Turanga were more relevant and effective than those provided by the Crown.⁹¹

In light of the practical level of autonomy at Turanga, we see no reason why Turanga should not have been proclaimed a native district in accordance with the provisions of section 71 of the Constitution Act. This would have provided for Maori autonomy within a constitutional and Treaty framework. It would have delivered the tino rangatiratanga guaranteed by the Treaty; it would have been affirmed by declaration of the Crown as a Treaty partner; it would have been protected by the Constitution Act itself; and it would have been completely consistent with the Crown’s own sovereignty. Given the Crown’s failure to so declare Turanga, and given also Crown counsel’s argument that the Crown had a ‘timetable’ for the inclusion of Turanga in the colony, the question must arise: when, and on what basis, was that inclusion envisaged? The implication of the emphasis on the ‘inclusion’ of Turanga is that the Crown would tolerate autonomy for not a minute longer than was necessary. Turanga as an informal ‘native district’ was only ever, in the Crown’s strategy, a temporary phenomenon.

The Crown’s conduct of its relations with the leaders of Turanga, a fairly remote North Island region, raises important issues about the responsibilities of kawanatanga in a new colony, where a treaty relationship has been entered into with the chiefly leadership. We accept that the Government in New Zealand at this time was not a large enterprise, and that there were relatively few Government officials. Yet, in 25 years there had been only

90. Newcastle to Grey, 5 June 1861, AJHR, 1862, E-1, sec 3, p4

91. Document A23, p82. We note that the Governor in Council also had the power under the Native Districts Regulation Act 1858 to appoint districts and make regulations on a range of social and economic matters, ‘as far as possible with the general assent of the persons affected thereby’. But this seems to us a quite different option from that offered by section 71 of the 1852 Act.

one brief (and unsuccessful) visit to Turanga by a governor, and few by Government officials. Governor Grey did not venture there in his first term as governor, though he travelled widely throughout the country.⁹² The evident outcome of Governor Gore Browne's visit was the removal of Wardell. (Gore Browne publicly threatened Wardell's removal during his visit in January 1860, and Wardell left in May.)⁹³ How this departure must have been read in Turanga, at a time when war had broken out in Taranaki, we can only surmise: as an admission of defeat, or an unwillingness to continue any dialogue at all?

The lack of Government engagement with Turanga Maori at a significant political level and over such a long period seems to us to raise important questions about the tensions in Turanga in 1865. How were such tensions to be resolved in the absence of any established political channels or any foundation of trust? Governor Gore Browne's anger at the attitude of Turanga Maori, which he perceived when he became the first governor to visit them after 20 years of *kawanatanga* in New Zealand, demonstrates little understanding of Maori views of the nature of relationships among leaders of polities. He expected loyalty, though the Crown had made little attempt to earn it, or to demonstrate what its meaning might be. His own attempts at communication, according to the accounts we have, were minimal.

Raharuhi Rukupo, as we have noted above, expressed the anxieties and frustrations of Turanga Maori in respect of their relationship with the Crown in a letter to land claims commissioner FD Bell that was written after the Governor's visit: 'We believed the Governor to be the head to receive both good words and bad, on that account, we spoke to his face, right words and wrong. It was for him to make them clear to us, but before all the words were spoken he ran off.'⁹⁴

It is apparent that tensions were increasing throughout the 1850s over the question of who would ultimately control Turanga land. Maori, the settlers, and the Crown appear to have had different timetables for interaction. Turanga Maori wanted to control what interaction occurred and when. They wanted some contact, advice, and support from the Crown, and they wanted the benefits of Western society – which they saw as increasing the prosperity of their communities – but only on Maori terms. When the terms did not suit, then Turanga Maori strongly asserted their control. They were proudly autonomous, and they did not countenance being subject to the new Government. The settlers' position can generally be described as wanting substantial Government intervention to occur as soon as possible, in the belief that this would make their life more tolerable. Though many of them were married into Turanga communities, they clearly saw their future as tied to British progress.

The Crown, finally, was interested in establishing a relationship and eventually securing 'substantive sovereignty' (as Professor Belich has termed it) in Turanga; that is, making the

92. It is interesting that McLean refers to a possible visit by Grey: McLean, journal (typescript) 25 February 1851, vol3, 1850–1851, MS papers 1286, p611, ATL (doc A10(a), vol2, p611).

93. Document A23, pp76–77

94. Rukupo and others to Bell, 25 March 1861, OLC4/21, Archives NZ (doc A23, p78)

Maori ‘in reality what by a legal fiction they have long been in name, British subjects’.⁹⁵ In 1860, the Crown had other priorities and it was willing to wait. But within a few years, as war spread throughout the colony, that would change. Oliver and Thomson have commented that the very presence of the settlers presaged change; there was in fact no prospect of Turanga Maori maintaining the social pre-eminence and political authority that they had enjoyed in the immediate post-Treaty years:

Though the settlers of the pre-1870 period were few and scattered, often mere transients, primitive and vulnerable, they stood for a great deal more than they yet amounted to – for a new economy, a new relation to the land, a new set of beliefs, a whole new society. They were the very thin end of a very large imperial wedge, the advance agents of an implacable and irreversible process of change. Maori society, because of this, was transformed even as it remained dominant.⁹⁶

In 1865, the ‘imperial wedge’ would be driven much deeper into Turanga, in circumstances which highlighted the detriment caused by the lack of any established political relationship between Turanga Maori and the Crown.

Having reviewed the evidence, it is clear that, prior to 1856, Maori autonomy was almost total. The Crown had, therefore, a unique opportunity to protect Turanga Maori within its own kawanatanga framework. It chose, instead, to wait until it could assert its own authority and so defeat Maori autonomy. This, we find, was inconsistent with its Treaty obligations.

3.3 WAERENGA A HIKA

3.3.1 Introduction

At the siege of Waerenga a Hika, during six days in November 1865, the autonomy of Turanga Maori was challenged and finally overthrown. In this section, we consider the main factors which led to this crucial conflict. We start our analysis by separating out these strands, beginning with the context of war and confiscation across the central North Island and the consequent emergence of the Pai Marire faith.

The new faith arrived in Turanga in 1865 and had a marked impact on both Maori and settler communities throughout the Bay of Plenty and East Coast regions. The nature of the Government’s and the settlers’ response to Pai Marire is a crucial strand in understanding why the Crown would go to war.

We turn then to a group of interrelated elements: the fighting within Ngati Porou between June and October 1865 and its impact on Turanga Maori; the role of Donald McLean (the

95. James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986), p80; see also doc A10, p124; doc A23, p77.

96. Oliver and Thomson, p18

agent for the general government on the East Coast) and his interaction with both Ngati Porou and Turanga Maori; and McLean's introduction of Government forces into the East Coast region. The change of Government in Wellington in mid-October 1865, which saw the hard-line Edward Stafford return to power, is also crucial, for McLean gained Government support for his policies on the East Coast.

Finally, in Turanga itself, we examine the emerging role of Rongowhakaata rangatira Raharuhi Rukupo as a key negotiator with the settlers. We will consider each of these strands in turn to the beginning of November 1865, and then we will examine the way in which they converged in the last days before hostilities commenced at Waerenga a Hika.

(1) *War and confiscation across the North Island*

The first strand in the Waerenga a Hika story is the context of war between the Crown and Maori in the central North Island in the 1860s. In itself, the outbreak of war clearly signalled the Crown's failure to establish and maintain political relationships with key rangatira and with the Kingitanga (Maori King movement), which was based in the Waikato. War broke out first in Taranaki in 1860, where the Crown challenged the right of senior rangatira Wiremu Kingi Te Rangitake to protect the autonomy and land rights of his community at Waitara by resisting a disputed land purchase. Then, in July 1863, Governor Grey invaded the Waikato, Hauraki, and Tauranga to destroy the expanding authority of the Kingitanga.

At the end of 1863, as imperial troops (part of a force nearly 12,000 strong at its highest point)⁹⁷ occupied Ngaruawahia, home of the Maori King, the Government passed its confiscation legislation, the New Zealand Settlements Act 1863. In mid-1864, the military settlement of Waikato lands began, while the imperial troops had already moved on to Tauranga. From the end of 1864 to the latter part of 1865, the Crown undertook the process of implementing the confiscation legislation, proclaiming extensive areas to be taken in Taranaki, the Waikato, Hauraki, and Tauranga.

The impact of war, land confiscations, and the dispossession of whole communities would have a profound and lasting effect on relations between Maori and the Crown. In the central North Island, war was the means by which the Crown addressed the tensions between Maori autonomy (the tino rangatiratanga guaranteed in the Treaty) and Crown control (the sovereignty or kawanatanga transferred to the Crown by the Treaty). Inevitably, the decision had ramifications well beyond the areas of immediate hostility: Taranaki and Waikato were the crucibles of war, which would spread far across the island.

(2) *The Pai Marire faith and its arrival at Turanga*

A second factor in our understanding of Waerenga a Hika is the emergence of Pai Marire, and its arrival in Turanga in March 1865. Pai Marire is a faith that has been, in our view, much

97. Belich, pp 125–126, says 10,000 by January 1864, 11,355 plus the naval brigade by May, and 18,000 in total served at some point or other.

misunderstood. Professor Judith Binney explained to us that Pai Marire was scripturally based and that, in a context of colonial conflict, it was a religious faith ‘where people hope to regain control’.⁹⁸ Te Ua Haumene, the poropiti (prophet) of the faith, ‘emerged out of the long-standing political ferment in Taranaki’ in 1862. Te Ua’s vision from God led to his recording of his teachings in the Ua Rongopai (Ua Gospel), and to his adoption of the niu, or prophecy mast, ‘as the locus of worship’.⁹⁹ In those years, Pai Marire karakia were held at the niu poles, where the people gave thanks to God in waiata, hymns, and prayers.

Lyndsay Head has discussed some of the themes of Ua Rongopai: its basis in the Revelation of Saint John, its ‘statement of religious *mana motuhake*’ and rejection of British missionaries (whom Te Ua wished would go home), its message of peace and its warning that fighting would ‘destroy this island’, and its guidelines for the ethical behaviour of its community of believers. Maori were the covenanted people of the Old Testament. Pai Marire, Head concluded, was a ‘religion of the oppressed’ – it generated commitment and excitement because Te Ua Haumene ‘made the promises of the Bible a prospect that would be realised soon’.¹⁰⁰

In Professor Binney’s view, Pai Marire was a doctrine of peace, but one ‘born in a situation of war’.¹⁰¹ She suggested that inevitably people drew on the faith to defend themselves. We understand that the repetition in some Pai Marire karakia of phrases characteristic of the specialist language of the military, and of surveyors, was a means of appropriating the tokens of power of those key foreign groups who posed the greatest threat to the autonomy of Maori communities. Through the ritual use of their language, the spiritual power of those who assaulted the land would be subsumed. As Professor Binney explained it to us in questioning, Pai Marire converts were:

asking God to protect us, asking to have control of the situation, and to defeat the military who are occupying our lands, destroying our crops, being sent in under martial law, and then under martial law, proclamations of confiscation.

... it is a religion about defence, about control, and to some degree about trying to separate from war situations so that we can go on living peaceably on our own lands without confrontations, which then lead to confiscations’.¹⁰²

The missionary TS Grace, whose sadness at the events of the wars and their impact on the people permeates all his post-war writings, wrote to the Church Missionary Society in 1873 that: ‘It should always be remembered that Hauhauism was not intended by [Maori] to be a departing from the faith. It was organised to separate them from us whom they had, in too

98. Transcript 4.22, p109

99. L Head, ‘The Gospel of Te Ua Haumene’, *Journal of the Polynesian Society*, vol101 (1), March 1992, pp9–10

100. Ibid, pp11–12, 15, 19

101. Transcript 4.22(a), p16

102. Ibid

many cases, learned to hate.' On another occasion, he added that 'Hauhauism is clearly an attempt, under the bitterest feelings occasioned by war, to adapt Christianity to their changed circumstances, and to have their worship apart from us'.¹⁰³

We note here Grace's term 'Hauhauism', which was derived from 'Hauhau', a word used widely in the mid-nineteenth century for those who were Pai Marire believers. Professor Binney explained that 'Hauhau' was used by Maori themselves to refer to the 'breath of life' ('hau', in Pai Marire karakia) and 'the spirit within one that comes from God'.¹⁰⁴ But the term came to be used in other senses. Those who took a strongly political stance, and who came into conflict with the Crown and with other Maori communities, became known popularly as 'Hauhau'. And the term also came to be used by settlers as a purely perjorative term, variously denoting 'rebel', 'troublemaker', or 'pagan' (the latter because Pai Marire beliefs were often assumed at that time to be unchristian). Because of the perjorative connotations of the term, we have tended to prefer 'Pai Marire' in our discussion.¹⁰⁵ However, where we cite or directly paraphrase contemporary sources, we retain the term they used.

In March 1865, a group of Pai Marire teachers led by Patara Raukatauri of Taranaki and Kereopa Te Rau of Te Arawa arrived at Turanga. The party had been sent by Te Ua Haumene two months before to convey a tiwha, the head of a British soldier killed while engaged in a crop-destroying expedition in Taranaki, to one of the leading rangatira of Turanga, Hirini Te Kani, who was of Rongowhakaata and Te Aitanga a Hauiti descent.¹⁰⁶ Head suggested that, in times of war, such tiwha were perceived as 'an invitation to join the fight' or as 'symbols of victory'. The message of victory in such circumstances, in her view, 'could not be contained within the spiritual boundaries of Te Ua's vision'.¹⁰⁷

The path of the Pai Marire emissaries across the island had brought them to Opotiki, where Te Rau was to address the Whakatohea people. In the course of this gathering, on 2 March 1865, Völkner, who was suspected of spying for the Government, was ritually killed, though Grace, his fellow missionary, was spared. Völkner's murder and decapitation appears to have been instigated by Te Rau; some Whakatohea people took part in it. Many Ngati Awa were also present.¹⁰⁸ Te Rau's wife and daughter had been among non-combatants killed by British forces early in 1864 at the undefended settlement of Rangiaowhia in the Waikato – an event

103. TS Grace, *A Pioneer Missionary Among the Maoris, 1850–1879*, edited by SJ Brittan et al (Palmerston North: Bennett and Company Ltd, 1928), pp 251, 256

104. Transcript 4.22, pp 109–110

105. We acknowledge, however, that today Pai Marire and 'Hauhau' are not interchangeable terms. Within the Kingitanga, Pai Marire has its own history as a wholly peaceful faith, dating from King Tawhiao's conversion after the war in the Waikato had ended.

106. Document A23, p 85; doc A28, p 76

107. L Head, 'The Gospel of Te Ua Haumene', pp 10–11

108. For a discussion of Völkner's killing, the impact of Pai Marire, and the Crown's response, see *The Ngati Awa Raupatu Report, 1999* (Wellington: Legislation direct, 1999), pp 41–51. The Tribunal found that there was no conclusive evidence of the involvement of any Ngati Awa in the killing.

which has never been forgotten in the region.¹⁰⁹ Professor Binney noted that Te Ua Haumene and Raukatauri both dissociated themselves from Völkner's killing, which was seen by them as murder and 'not part of Pai Marire teachings'.¹¹⁰

The slaying of Völkner was a watershed in the history of the Bay of Plenty and the East Coast. The Pai Marire party arrived in Turanga in early March 1865, only days after news of Völkner's murder reached the district. By 11 March, Te Rau and his party had reached the Aitanga a Mahaki settlement of Waikohu, and by 13 March they had been welcomed at Taureka by some 600 Turanga Maori. The settlers, and Bishop Williams in particular, were very concerned by this turn of events. As many of his congregation turned to Pai Marire, the bishop and his family departed for Napier, shattered, like other missionaries, at what he saw as a rejection of his teachings and of his own well-established role in the Maori community. We do not think it surprising that the missionaries were in general shocked by the spread of Pai Marire. The indigenisation of the message of the scriptures seemed to point not only to the failure of the 'civilising mission' of the church but to a very particular failure in their own spiritual province. And the killing of one of their own, in circumstances which recalled traditional practices, encapsulated the worst fears long held by the missionaries: namely, that Maori would 'revert' to 'superstitious' practices. It was not an easy time for missionaries.

But it is clear that the teachings, the spiritual and self-determination messages of the Pai Marire, were compelling. As Anaru Matete explained to JW Harris in July, as he urged the settlers to stay: 'why leave your places, we have joined the Hau Hau because we think by so doing we shall save our land (Te Ao) and the remnant of our people'.¹¹¹ (The translation of 'Te Ao' given in the contemporary source is 'land', but our understanding is that the phrase has a broader meaning and conveys rather a sense of 'the Maori way of life'.) Most of Te Aitanga a Mahaki and a number of Rongowhakaata people quickly converted to Pai Marire.¹¹² William Williams, Mr Stirling stated, later wrote of the 'profound and spiritual effect of the karakia and lamentations uttered by the visitors, particularly for those lost in battle at Taranaki and Waikato, and noted the number of Turanga Maori who joined in'.¹¹³ 'There was a chord touched which vibrated in the native breast. It was that of aroha ki te iwi . . . and they could not resist it.'¹¹⁴

Yet, not all Maori in Turanga accepted the teachings of Pai Marire: there, as elsewhere, Maori communities became divided in their responses. In fact, the events of March appear to have been a catalyst for the emergence of a small kwanatanga party, in which leading

109. The theme of Rangiaowhia recurs in the writings of TS Grace, who travelled widely among the people in the post-war years, because people referred to it right across the island. 'Twice,' he wrote, 'I have nearly lost my life on account of the burning of the women at Rangia[o]whia. Often I have seen the Maoris as much excited at our cruelties as we now are at theirs': Grace, p 204.

110. Transcript 4.22(a), p 15

111. Ibid

112. Document A10, pp 106–113; doc A23, pp 85–89

113. Document A10, p 113

114. Williams, *Christianity among the New Zealanders*, p 369 (doc A23, p 88)

Turanga chief Hirini Te Kani would play a key role over the coming months.¹¹⁵ Ngai Te Kete of Rongowhakaata also emerged as aligning themselves with the kawanatanga. Clearly, some leaders contemplated the arrival of Pai Marire into their rohe with some apprehension. The association of the Pai Marire missionaries with the killing of Völkner – an act widely expected to provoke a strong Government response – meant that the political ramifications of accepting the movement's missionaries had to be weighed alongside their spiritual message. Te Kani, to whom Te Ua Haumene had sent his tiwha, appears to have grappled with this dilemma. He accepted the preserved head but made his disapproval of the Pai Marire visitors clear and did not accept their flags.¹¹⁶ Then, at the end of April, Te Kani and other Turanga chiefs went to visit McLean at Napier to stress their neutrality and to express alarm at rumours that soldiers were to be sent to Turanga.¹¹⁷ McLean, however, remained unconvinced that the chiefs were loyal to the Crown.¹¹⁸

A hui held at the Rongowhakaata settlement of Whakato on 4 May 1865 also indicates that some Turanga Maori were acutely aware of a growing predicament. It was not widely attended – only 100 men came – and both neutrality and support for the Government were discussed. Raharuhi Rukupo suggested that 'As long as there was war in New Zealand the Natives would sympathise with their countrymen'.¹¹⁹ But a number spoke in favour of neutrality. As Wiremu Kingi Te Paia put it, 'If I join the Hauhaus there is evil; if I join the Governor there would be evil; therefore I remain neutral'.¹²⁰

(3) *The response of the Government and the settler community to Pai Marire*

Throughout this period, Turanga Maori sought to reassure the settlers, some of whom withdrew to Auckland, despite Patara Raukauri himself having told them that they had nothing to fear. Raukauri told one settler that he was at Turanga to spread the religion of Te Ua, and to 'enlist men to aid him in his war against Governor Grey'. He said that the soldiers and the missionaries were his enemies but that the settlers could remain until a Maori kingdom was established.¹²¹ Clearly, there was no wish to expel the settlers, at least in the short term, and, once the 'kingdom' was established, they could either stay as subjects of the King or depart peacefully.¹²² Whether the settlers were valued as whanaunga, as traders, or even as possible

115. Te Kani attended the first synod of the Waiapu diocese at Waerenga a Hika in 1861, along with Anaru Matete, Wiremu Pere, and Ngati Porou clergy and laymen, including Mohi Turei, Rapata Wahawaha, and Henare Potae.

116. Document A23, p88

117. Document A10, pp114–116; doc A23, p90

118. Document A10, pp116–118

119. 'Notes of a Meeting Held at the Te Whakato', 4 May 1865, 'Further Papers Relative to The Affairs of New Zealand,' BPP, p419 (doc A10, p119)

120. Ibid

121. Document F16, pp19–20

122. King Matutaera had gone to Taranaki late in 1864, following the invasion and military occupation of the Waikato, and during that time was baptised by Te Ua Haumene, and was given the name Tawhiao. He remained committed to peace all his life.

guarantors of the status quo in Turanga (or as all three), Turanga Maori took care to keep the communication lines with them open.

The Government's and the settlers' response to Pai Marire was unequivocal. Early in April 1865, Governor Grey issued a proclamation which condemned the 'fanatical sect' in strong terms. Grey made it clear that he would 'resist and suppress' – by force of arms if necessary – any 'fanatical doctrines, rites and practices' committed in the name of the faith.¹²³ The Government was criticised in the *Daily Southern Cross* newspaper in April 1865 for not taking action to secure the area. The *Cross* also commented that, 'Although no very glaring outrage had been committed, the natives appeared to be preparing themselves for it.'¹²⁴ McLean had commented on 5 April that he believed that the bishop was right to leave the area and that his withdrawal 'sufficiently indicates the insecurity of the rest of the European Inhabitants'.¹²⁵ Following some controversy as to whether the bishop's departure had been a wise move, some Anglican Maori, including Wi Haronga (Williams' supporter at the Waerenga a Hika mission station), wrote to *Te Waka Maori* on 6 April to explain Williams' decision to leave his mission station. They cited the conversion of many to Pai Marire, the intimidation of store-keepers by Patara Raukauri, and the threats of Kereopa Te Rau against the bishop's life.¹²⁶

Despite the alarm felt by the settlers, they decided unanimously the same month to refuse the Government's offer of arms on the ground that any such move might complicate the situation.¹²⁷ Moreover, the 'natives' could easily take the arms away from them. Harris commented in a letter to McLean that 'isolated as we are there is no possible way in which we could materially assist each other without native concurrence'. He asked instead that the Government consider constructing a blockhouse and supplying a garrison to secure it, because 'There is no ignoring the matter. *We are in a very critical position.*' (Emphasis in original.)¹²⁸

Harris, who was to continue to be a very regular correspondent of McLean, wrote to him again on 10 April (as did Samuel Williams), stressing the instability of the situation. On that day (or possibly a day later), a hui took place at Turanga, where Pai Marire converts met to receive Wi Tako Ngatata (the Te Ati Awa chief of Wellington and an anti-Pai Marire ambassador for the Crown). Archdeacon Leonard Williams, Bishop William Williams' son, reported that the tone of the 'Hauhau' speeches was 'anything but reassuring'.¹²⁹ However, Samuel Williams later said that the meeting was something of a turning point and that the Pai Marire priests had lost influence by failing to meet several challenges, such as drawing a vessel

123. *New Zealand Gazette*, 29 April 1865 (doc A10, p118)

124. *Daily Southern Cross*, 7 April 1865 (doc F16, pp22–23)

125. McLean to Colonial Secretary, 5 April 1865, 1A65/856, Archives NZ (doc F16, p23)

126. Mohi Turei et al to *Te Waka Maori*, 6 April 1865, translation by Henry Williams, reprinted in the *Daily Southern Cross*, 10 April 1865 (as cited in doc F16, pp24–26). The Reverend Mohi Turei and other Ngati Porou from Waiapu had been based at the Waerenga a Hika school.

127. Harris drew up a list with two columns – advisable and not advisable – and all the settlers who put their names to it chose the second alternative.

128. Harris to McLean, 9 April 1865, MS papers 0032–327, ATL (doc F16, p27)

129. WL Williams, journal, 10 April 1865, MS papers 0628, ATL (doc F16, p29)

ashore. On 20 April, Samuel Williams wrote to McLean stating that he thought that the period of crisis had passed and noting that the Taranaki party of Te Rau and Raukatauri had left the area.¹³⁰

The settlers were also reassured to some extent by the outcome of two gatherings held in July. On 20 July, a second hui at Whakato, called by the kawanatanga party, was attended by about 100 supporters. Mr Stirling suggested that it was more concerned with maintaining independence than with actively backing the Crown. Concerns were expressed that Pai Marire itself undermined that independence because its believers were governed from 'outside'.¹³¹ Thus, those at the gathering again distanced themselves from Pai Marire. Three days later, a Pai Marire runanga was called in response (Raharuhi Rukupo and Anaru Matete had now turned to Pai Marire). Harris reported that the runanga 'decided to urge the settlers to stay', that the 'Hauhau' would not trouble the settlers, and that they would not fight unless the Government took the first step to war.¹³² On 25 July, Harris (the settlers' unofficial representative, given his many years' residence at Turanga) received a Pai Marire delegation, which told him that:

the Hau hau here will not molest you. We wish to remain at peace and protect our Pakeha friends, and trade with them as before. let every one remain on his own piece (place) the ground already sold is for them[;] they have fairly bought it. but I [Wiremu Kingi Te Paia] will not allow any more to be sold.¹³³

Tamati Hapimana, who had attended the Crown's Kohimarama conference in 1860, supported these words. Anaru Matete then added: 'We have no quarrel with the settlers. we are not bringing trouble on you . . . All our chiefs . . . say the settlers shall and will be protected. If trouble comes, let it be through the Governor.'¹³⁴ Harris replied to the delegation that the Pakeha were suspicious both because of the murder of Völkner and because of the influence of 'Hauhau' from outside Turanga.¹³⁵

(4) *The impact in Turanga of conflict among Ngati Porou*

At this point, the conflict among Ngati Porou also becomes a crucial element in the Turanga story. We are well aware that we are at a considerable disadvantage here because we have not heard the histories of Ngati Porou. For that reason, we are in no position to do justice to Ngati Porou interpretations of these events. We certainly do not think it appropriate to comment in

130. S Williams to McLean, 20 April 1865, *Hawke's Bay Herald*, 25 April 1865 (cited in doc F16, p31)

131. Document A23, pp 97– 98

132. Harris to McLean, 23 July 1865, McLean papers, ATL (doc A10, p127)

133. Appears to be a report from Harris on deputation, perhaps extracts from his diary, 25 July 1865. O'Malley gives the reference as Harris to McLean, 7 August 1865 (doc A10, p128), however the date is 25 July 1865 (as cited in doc A10(a), vol2, p981); see also doc A23, p98.

134. Ibid (p982)

135. Document F16, p60

any detail on the origin or nature of divisions within Ngati Porou, or on the nature of the conflict within their rohe.

It may be helpful, however, to note that Ngati Porou sources emphasise the commitment to the Crown and the suspicion of nationalism (as represented by the Kingitanga) present among the ‘conservative’ element within the tribe. There was a fear that a pan-Maori authority might lead to the ‘weakening of tribalism and in turn a forfeiture of tribal autonomy’, which the leadership was most anxious to preserve.¹³⁶ We are aware nevertheless that both the Kingitanga and, subsequently, Pai Marire enjoyed considerable support among those Ngati Porou who were attracted by the challenge that each embodied to Pakeha domination and their promise of Maori strength and unity. The long-term goals of both sides – namely, ‘retention of land, autonomy, resistance of assimilation by the western colonising wave’ – have been stated to be very similar.¹³⁷ These underlying tensions may well come to be explored more fully during the East Coast inquiry of the Tribunal, which, at the time of writing, was due to commence soon.

But, at that time, divisions within the iwi led to fighting. It appears that some Ngati Porou rangatira decided strongly against the new Pai Marire faith and asked the Government for arms and soldiers to fight it. Among them were Mokena Kohere, Henare Potae, and Rapata Wahawaha, who would each assume importance in the history of Turanga. Kohere, a high-profile chief of Rangitukia, who was also a Government assessor, came to Turanga in early May, having earlier been invited by his Rongowhakaata relative Paratene Pototi (Turangi).¹³⁸ Kohere had strongly resisted the Kingitanga. On 1 May, he had hosted Governor Grey’s representative, Captain Luce, who had been sent to visit the ‘principal friendly chiefs’ between Te Kaha and Turanga to confirm and reinforce their allegiance.¹³⁹ On 4 May, Kohere and other chiefs went to Turanga with Luce aboard the man-of-war HMS *Esk*, and they attended Luce’s conferences with several rangatira of Rongowhakaata, encouraging them to support the Governor.¹⁴⁰ Dr Battersby, the Crown’s leading historian with respect to the 1865 campaign, noted that, on 6 May, Kohere proposed blockading the Pai Marire and declaring war on them if they resisted.¹⁴¹ Leonard Williams persuaded Kohere against this move, and noted that Rongowhakaata told Kohere ‘to go back to his own district & not stir up any raruraru here’.¹⁴² But after discussions with Ngai Te Kete of Rongowhakaata, Kohere ‘took unilateral action’ (as Ngai Te Kete were not yet convinced the time was right to hoist a British flag), and raised

136. M Soutar, ‘Ngati Porou Leadership: Rapata Wahawaha and the Politics of Conflict’, PhD thesis, Massey University, Palmerston North, 2000, p181

137. Ibid, p247

138. Paratene Pototi of Rongowhakaata is also referred to, especially in earlier sources as Paratene Turangi. On Kohere, see ‘Mokena Kohere’ in *The Dictionary of New Zealand Biography*, 4 vols (Wellington: Allen and Unwin and Department of Internal Affairs, 1990–98), vol1, p230.

139. Soutar, pp229–232

140. Soutar, p234

141. Document F16, p34

142. W L Williams, journal, 10 May 1865, ms copy micro 0628, ATL (doc F16, p35)

a flagstaff on land at Titirangi (Kaiti), which was disputed between Ngai Te Kete, Te Aitanga a Hauiti, and Te Aitanga a Mahaki.¹⁴³ On 20 May, Kohere flew the Union Jack from this flagstaff.¹⁴⁴ In a letter to McLean, he explained that he raised the flag over his own relatives to protect them.¹⁴⁵ But this act caused much tension for Turanga Maori, regardless of their political allegiances. Hirini Te Kani, for instance, who had recently travelled to Napier to talk with McLean, was outraged because his father was buried on the land, and he opposed the flag strenuously.

Leonard Williams noted that Turanga Maori did not wish this to be the cause of fighting: 'They do not like the flagstaff & they are afraid to bring on a disturbance for fear of embroiling themselves with the Govt & after firing their shots took horse & rode home . . . & finding that there is not much probability of a row we rode home likewise.'¹⁴⁶ Indeed, the flagstaff remained standing, despite Harris's expressed alarm. Harris thought that Raharuhi Rukupo might take down the pole and added: 'I firmly believe his intention is to get this district in a blaze.' He urged McLean to come to Turanga, saying, 'It is time a decided course was pursued here' and 'temporising with these fellows will not do'.¹⁴⁷

A small party led by Paratene Pototi and Te Waaka Puakanga, which was now aligning itself with the kwanatanga, also wrote to McLean seeking the Government's support in defending the flag.¹⁴⁸ Government agent Donald McLean in fact quickly arrived from Napier. We will return to McLean's decisive involvement in East Coast affairs below. But we note here that he heard the views of the opposing parties and made his own suggestions for a settlement but was unsuccessful in achieving one. In his official report of the hui, McLean referred to the importance of calling on the services of mediating chiefs from outside the region.¹⁴⁹ He advised the Colonial Secretary that the best thing the Government could do in the circumstances was not to interfere in the dispute. Clearly, McLean did not think at this point that interference was warranted. Before he left, 40 to 50 people at the pa took the oath of allegiance to the Queen.

Meanwhile, tensions in Ngati Porou territory were rising. Among Ngati Porou, mass conversions to Pai Marire followed the arrival of Pai Marire missionary Patara Raukauri. On 8 June 1865, McLean, together with kwanatanga chief Mokena Kohere, travelled from Turanga to the northern East Coast, where he met with the chiefs of Ngati Porou. Conflict was significantly greater there than at Turanga. The very next day, fighting broke out near

143. Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press and Bridget Williams Books, 1995), p 44. Soutar suggests, however, that the flag pole was on 'the opposite side of the Turanganui River': Soutar, pp 234–235N.

144. Document A10, pp 121–122; doc A23, pp 93–94

145. Soutar, p 236

146. W L Williams, journal, 24 May 1865, MS copy micro 0628, ATL (doc F16, p 36)

147. Harris to McLean, 24 May 1865, MS copy micro 535-060, fldr 327 (doc F16, p 37)

148. Document A23, p 95

149. Document F16, pp 38–40

Pukemaire, a large pa near the present township of Tikitiki.¹⁵⁰ The nature of this conflict, which would last for four months, was interpreted differently by the Crown and the claimants in this inquiry.

McLean decided at this point that the Government should intervene. He supplied arms and ammunition from his base at Napier, and also sent Lieutenant Reginald Biggs with 30 volunteers. Biggs was to play a significant role in Turanga from 1865 to 1868. Unable to secure a favourable Government response to his requests for military intervention, McLean went to Wellington to attempt to persuade the Government to commit more troops than the few that had already been sent to deal with the 'critical situation on the East Coast'. He succeeded in convincing the Government to change its mind, and Captain Fraser and 90 military settlers and Hawke's Bay Volunteers were sent to Waiapu from Napier on 13 July.¹⁵¹ A number of engagements followed in the Waiapu valley. Mokena Kohere's party was said to be short of arms and fewer in number than its opponents.¹⁵² And Henare Potae, a kwanatanga chief of Tokomaru, requested assistance from the Turanga kwanatanga party for his fight against Ngati Porou Pai Marire.¹⁵³

It was reported that Patara Raukauri wanted to make peace with Ngati Porou kwanatanga forces, so that he might have only the Europeans to contend with.¹⁵⁴ On 29 July, it was also reported in a letter from a military settler that the 'Hauhau' wanted to make peace.¹⁵⁵ However, fighting continued intermittently at Kakariki, Pakairomiromi, and Rangitukia until October. According to Battersby, it was when sufficient colonial forces were assembled on the East Coast that new assaults were mounted against the 'Hauhau'.¹⁵⁶

By mid-October 1865, the Pai Marire pa of Pukemaire and Hungahungatoroa at Waiapu had fallen to the Ngati Porou kwanatanga and colonial forces.¹⁵⁷ In the course of this fighting, a Turanga chief named Pita Tamaturi, a protégé of Raharuhi Rukupo, was captured by Rapata Wahawaha, a leader of Ngati Porou's kwanatanga forces.¹⁵⁸ According to Wahawaha's account, Biggs had asked him who the man was, and on being informed that Tamaturi was an important Turanga Pai Marire chief, Biggs shot him with his revolver.¹⁵⁹ This action of Biggs' would return to haunt him three years later.

In Turanga, the impact of continued fighting among Ngati Porou could not be evaded. Inevitably, it affected Turanga communities, both indirectly, in terms of its unnerving effect

150. Document A10, p125; doc A23, p96; Oliver cites W L Williams as stating that McLean suggested this initial attack on the Pai Marire people: Oliver and Thomson, p91.

151. Document F16, pp49–50

152. Ibid, pp45, 47

153. Ibid, p53

154. Deighton to McLean, 10 July 1865, 65/221 HB4/6, Archives NZ (doc F16, p49)

155. Letter printed in *Hawke's Bay Herald*, 29 July 1865 (as cited in doc F16, p50)

156. Document F16, p51

157. Document A23, p100; Soutar, p290

158. Document F16, pp51, 137

159. Document A10, p134; doc A23, p100

on the settlers, and directly, in that some among the Turanga participants were killed. Yet, though rumours abounded at this time and settler fears increased and decreased in turn, there was no sense of panic among them. On 10 August, a large Pai Marire runanga was held at which it was decided, after canvassing the options, to send 200 armed men to 'make peace between Henare [Potae] & the Tokomaru Hauhaus'. Potae's village at Te Mawhai had been fortified and a Pai Marire pa constructed at Tokomaru.¹⁶⁰ Hirini Te Kani, who had returned from Potae's pa, tried to dissuade this party from setting off, but, though he was unsuccessful, the party was turned back at Puatai anyway. Two Rongowhakaata chiefs had been killed in recent fighting, and in early September the Rongowhakaata party decided to make another attempt to go to Uawa to avenge these deaths. (On 1 September, Mokena Kohere had declared that any Pai Marire Turanga Maori involvement in the Ngati Porou conflict would 'ensure he returned to the district to destroy its Pai Marire inhabitants'.¹⁶¹)

In mid-September, the impact of the Ngati Porou conflict was further evident, as Ngati Porou people attempting to escape the conflict began to arrive in Turanga. Some 200 Pai Marire Ngati Porou, whom Oliver describes as 'refugees' from Uawa and Tokomaru, came at this time.

On 25 September, Leonard Williams learned that letters had arrived in Turanga from Henare Potae in which he threatened to come down to get those of his people (Whanau a Rua of Tokomaru) who supported Pai Marire and who had fled.¹⁶² Williams reported that the 'fugitives' were in 'great dread' of Potae and that two pa were being constructed: a large one in part of an older pa near to his mission station at Waerenga a Hika and one on the path to Opotiki.¹⁶³ Williams also noted in late September that part of the mission fence had been pulled down for material for the pa (though Raharuhi Rukupo later had the fence mended).¹⁶⁴

Potae arrived at Turanga on 28 September. The following day, Anaru Matete, one of the Rongowhakaata Pai Marire supporters, advised the refugees to leave. Meanwhile, because of their anxiety over Potae's arrival, some of this group sent south to Wairoa for assistance. That same day, news arrived that Potae's pa, Te Mawhai, had been attacked. Potae was 'exasperated' and, according to Battersby, talked of seeking revenge among prisoners he held.¹⁶⁵ By 2 October, some (but probably not all) of the Ngati Porou Pai Marire people at Waerenga a Hika had left.¹⁶⁶

The fall of the Ngati Porou Pai Marire pa of Pukemaire and Hungahungatoroa by mid-October, led to the arrival in Turanga of further 'refugees'. Some 170 more Ngati Porou Pai Marire who had avoided capture arrived to join their kin.¹⁶⁷ Some had been involved in

160. W L Williams, journal, 11 August 1865, MS copy micro 0628, ATL (doc F16, p 65)

161. Document A10, p133

162. Document F16, pp74-77

163. W L Williams, journal, 27 September 1865, MS copy micro 0628, ATL (doc F16, p78)

164. Transcript 4.11 p 5; doc F16, p80n, p82

165. Document F16, pp78-79

166. Ibid, p82

167. Ibid, p83

the attack on Potae's pa at Te Mawhai. According to Williams, Potae then appealed to other kawanatanga Ngati Porou for assistance to chase these people. Williams wrote: 'I suppose therefore that the commencement of hostilities now depends on the arrival of Henare Potae, as come he will as soon as he can get assistance from Ngatiporou.'¹⁶⁸ But Te Kani was told by Turanga Pai Marire that they still desired peace and would not start any conflict.¹⁶⁹ They did not wish, however, to tell those Ngati Porou staying with them to leave. Some, it is clear, did stay; a number of Whanau a Rua chiefs identified themselves by name when they added their signatures to Rukupo's response to McLean's terms of 10 November (see below).

A crucial turning point in Turanga was the return of Henare Potae on 30 October with 30 men. There had been nervousness about Ngati Porou intervention for some time; it is clearly linked in the sources to the fortifying of pa at Waerenga a Hika and on the Waipaoa River in September.¹⁷⁰ Potae's return at this time is said to have caused a 'great stir' among the Turanga Pai Marire party.¹⁷¹ Hirini Te Kani had, in the meantime, chosen sides – he was now committed to and leading the kawanatanga party in Turanga – and he wrote to Potae urging him not to come to Turanga. Some of the Rongowhakaata kawanatanga party came to visit Potae the day after his arrival to ask him to leave, and 'not bring fighting and bloodshed into this district.'¹⁷² Potae's reply was that he was there to follow up the fighting, not to begin it. If they did not want fighting, they should send away those he chased.¹⁷³ On 2 November, Potae wrote to McLean to ask for more guns, because he had only 50 rifles for his men, whose number had swelled to 120.¹⁷⁴

(5) *The role of McLean in East Coast–Turanga affairs, and the arrival of colonial forces*

A further important strand leading to Waerenga a Hika was the involvement of Donald McLean, the general government agent for the East Coast, who was based at Napier. McLean had long been a man of huge influence in determining Government policies towards Maori. Bilingual and certainly not monocultural (he was a Highland Scot¹⁷⁵), McLean had long guarded his reputation as the most knowledgeable man in the Government when it came to 'managing' Maori.¹⁷⁶ He remained convinced that firm dealing with Maori in Taranaki and the Waikato was necessary. McLean, in Professor Ward's view, had favoured a hard line with Maori from the outset of the wars, in Taranaki and in Waikato in the early 1860s, and again on

168. WL Williams, journal, 18 October 1865 (doc F16, p86)

169. Document F16, p86

170. Ibid, p88; see also pp76–78

171. Ibid, p88

172. WL Williams, journal, 31 October 1865, MS copy micro 0628, ATL (doc F16, p89)

173. Document A10, pp136–137

174. Document F16, p93

175. McLean's home was Tiree, one of the Inner Hebridean Islands, an isolated Gaelic-speaking community with its own strong oral traditions.

176. The public dispute following the outbreak of war in Taranaki, as to whether the Government should have persisted with the Waitara purchase, had however been difficult for him as chief land purchase commissioner.

the East Coast in the mid-1860s. 'I am not bloodthirsty but I hope our enemies will now begin to feel our power and soon see the necessity of yielding to British prowess and skill,' he wrote.¹⁷⁷ From 1865, he had secured a new appointment in Hawke's Bay and 'adjacent districts' as the general government agent.¹⁷⁸ This was a position which gave him wide powers during 'the present crisis'. His instructions exhorted him to court 'friendly chiefs' by promising them 'substantial rewards'. He was to supply them with arms, call out the militia, and, in case of emergency, forcibly detain seditious or 'disloyal' Maori.¹⁷⁹ He was also superintendent of Hawke's Bay Province, where he had substantial runholding interests. It is clear that, in the events of 1865, McLean played a crucial role.

We have noted that McLean first arrived in Turanga on 5 June 1865. He was not expecting the friendly response that he received when he met with Turanga kawanatanga rangatira at Te Kani's pa to discuss the matter of Kohere's flagstaff. After hearing their concerns, McLean recommended that the Government should not intervene in the flagstaff issue. Immediately afterwards, as we have seen, McLean went further north to Ngati Porou territory, and, when fighting broke out there, he sought Government military intervention.

Crucial to our understanding of Waerenga a Hika, however, is McLean's intervention in Turanga in early September. On 4 September, McLean received a request from Hirini Te Kani for arms, ammunition, and soldiers. This followed an earlier request by Te Kani for arms while he was at Potae's pa, Te Mawhai. On this occasion, Te Kani again requested arms only; it was Williams who suggested to him, after Te Kani sought his advice, that he should also ask for soldiers. Williams added in his journal: 'This will commit him [Te Kani] I hope irrevocably to the side of the Govt and a small body of troops stationed here *at his request* will confer a much greater feeling of security upon the pakehas under present circumstances' (emphasis in original).¹⁸⁰ The fact that Williams clearly had his own agenda in making this suggestion to Te Kani should not diminish the significance of Te Kani's request to the Government. In increasingly difficult political circumstances, Te Kani was trying to 'hold a balance of power and to sustain the chiefs' authority in the district'.¹⁸¹ He, like the Pai Marire leaders, was working to protect Turanga autonomy, and to avert hostilities.

McLean was doubtless also aware of repeated settler calls for the construction of a blockhouse at Turanga. He responded by sending a small colonial force before receiving Government authorisation to do so. The timing of McLean's action was crucial, because the Government had itself decided not to intervene; it had, in fact, already decided on a major

177. McLean to Susan Strang, 17 June 1863, MS papers 0032-0999, ATL

178. The term 'general government' is used to distinguish the New Zealand Government from the provincial governments, then established in nine provinces.

179. Weld to McLean, 15 March 1865, AGG-HB1/1, Archives NZ. McLean was thus appointed following Völkner's murder, and the news of further movements of the Pai Marire missionaries.

180. W L Williams, journal, 4 September 1865, MS copy micro 0628, ATL (doc F16, p 69). Hirini Te Kani's letter may be found in doc F33, vol 10, pp 03679-03681. The postscript is written on a separate page.

181. Binney, p 46

peace initiative.¹⁸² On 2 September 1865, the Governor issued an important peace proclamation that announced the end of war in the North Island.¹⁸³ All Maori who had been in arms against the Queen were pardoned, with the exception of those who had been involved in a small number of murders of individuals.¹⁸⁴ The Governor would take no more lands on account of the war, and he called on all the chiefs and tribes to assist him in preserving the peace of the colony.

After the proclamation had been issued, the Government learned of McLean's move at Turanga. McLean, it must be remembered, had huge authority on the coast, from his own seat of power in Hawke's Bay. He knew that the Ministers were preoccupied with the military activities on the west coast of the North Island, where the imperial troops were still occupying the open country, while Maori had taken to the bush.¹⁸⁵ He could be fairly certain that, if he wrote to Wellington for permission to send troops, he would be turned down, just as he had been turned down before.¹⁸⁶ He had available to him, however, various settler military forces from Hawke's Bay, a region where such forces had been pioneered.¹⁸⁷ McLean thus seems to have gambled early in September that there would be either relief or resignation within the Government that he had taken the initiative, especially since he could also point to the request for troops that he had received from Hirini Te Kani. He therefore took the initiative.

Events proved McLean right. On 10 September, the Native Minister, FitzGerald, wrote to him noting that his actions had modified the course that the Government had wished to take:

The Govt had determined not under any circumstances to extend military operations beyond those at Opotiki, and those carried on under Captain Fraser at Waiapu . . .

I learn however from your recent despatch that the whole East Coast is now in a blaze . . .¹⁸⁸

182. Document F16, pp 69–72

183. *New Zealand Gazette*, 1865, p 267

184. These victims' names were stated explicitly; they included Völkner and Government agent James Fulloon. Fulloon, who was of both Ngati Awa and Pakeha descent, was a captain in the militia. He and three crew members on board the *Kate* were killed at Whakatane in July 1865 after they entered the harbour in defiance of an aukati: Fulloon had come to recruit Ngati Awa to counter Pai Marire influence in the Bay of Plenty.

Martial law was simultaneously declared in Opotiki and Whakatane, so that those responsible for the last two killings might be captured and tried summarily.

185. Grey had instructed Brigadier Waddy to refrain from aggressive action for 10 days after his receipt of the peace proclamation; during this time, two emissaries sent to explain the peace terms to Maori disappeared, presumed murdered, and fighting soon resumed: BJ Dalton, *War and Politics in New Zealand 1855–1870* (Sydney: Sydney University Press, 1967), pp 240–241.

186. Weld had advised McLean when offering him appointment as agent for the general government that, given the country's financial position, he could not hope for a reinforcement of regular troops: Weld to McLean, 15 March 1865, AGG-HB1/1, Archives NZ.

187. RHill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867*, 2 vols (Wellington: Department of Internal Affairs, 1986), pp 888–892

188. FitzGerald to McLean, 10 September 1865, MA4/7, Archives NZ (doc F16, pp 72–73)

FitzGerald was pointedly suspicious of McLean's intervention. 'I am unable to form any satisfactory opinion as to the necessity for these steps,' wrote FitzGerald:

because I cannot accurately judge how far your influence has been used to induce those who are friendly to engage in active operations against the Hauhaus, nor how far it was wise or necessary to stimulate our friends to engage in hostilities, nor whether such a course had become inevitable by the violence of the fanatics. Nor again have I any sufficient information as to what extent you have pledged the Government to support and protect those who are fighting on our side.¹⁸⁹

He reiterated that the Government had decided to temporarily abandon areas it could not defend, such as Turanga, rather than 'weaken efforts in other quarters'. But, ultimately, the Government handed McLean the power to choose how best to proceed:

The Govt feels that the whole conduct of these most critical affairs having been left in your hands and having great reliance on your sagacity and judgement it would not now be right to fetter you with any positive instructions. The responsibility for the result must lie in great measure with yourself.¹⁹⁰

FitzGerald thus reiterated the Government's determination not to extend military operations on the East Coast. But, having said as much, he in effect approved McLean's actions in having done exactly the opposite. McLean was given a free hand, and FitzGerald very carefully washed his hands of responsibility if the campaign should fail.

The result of McLean's initiative was the beginning of a build-up of colonial forces in Turanga. On 15 September, a 30-strong contingent under Lieutenant Wilson arrived there and was located on the kawanatanga side of the Turanganui River by Hirini Te Kani, initially in the whare runanga Te Poho o Rawiri. Then, on 18 September, a Colonial Defence Force unit arrived and, with Maori assistance, began building a redoubt.¹⁹¹

(6) *The Stafford Ministry assumes power*

Closely entwined with McLean's intervention on the East Coast is a further development: the change in government that took place in when the Weld Ministry fell on 12 October 1865 and Edward Stafford became Premier. This change of government took place in the context of very considerable tension over the cost of defence expenditure among the small group of parliamentarians from whom governments in those days were formed. Quite simply, the New Zealand wars had been 'most expensive'.¹⁹² The imperial government, filled with 'mounting

189. Ibid (p73)

190. Ibid (pp72-74)

191. It is not clear how many men were in this force, but it cannot have been large; Read thought that it should be 'bought up' to 50 men: doc F16, p75.

192. Stafford memo, 27 October 1865, AJHR, 1866, A-1, p7

misgivings about the purpose, conduct, and expense of the war',¹⁹³ was determined to withdraw its troops from New Zealand, and the Weld Government's 'self-reliance' policy, which committed it to sending the troops back to Britain, had been warmly received by the Colonial Office.¹⁹⁴ But, in the end, Weld proved unable to give effect to his much-vaunted policy. Governor Grey had his own agenda of delaying the departure of the imperial troops as long as possible (since their presence allowed him to retain control over military policy). Stafford managed to achieve this. The Colonial Ministry was happy for the imperial troops to stay so that 'pacification of the west coast' might be achieved, as long as the imperial government, not the colony, paid.¹⁹⁵

During 1865, Stafford had been very vocally critical in Parliament of Weld's war, confiscation, and financial policies.¹⁹⁶ Stafford's own defence policies, which he outlined on 19 October, were to allow the withdrawal of the imperial troops to proceed and to keep a small mobile force, which, 'in conjunction with the friendly Natives', would repress 'outrages'. 'We do not propose,' he said, 'to meddle with the Natives so as to irritate or provoke them to outrages, but we do mean to repress outrages whenever they occur.'¹⁹⁷ McLean now had a more sympathetic ear for his policies in Wellington.

In these circumstances, McLean proceeded with renewed confidence. This was not just because the Stafford Ministry had come to power but also because of the success of colonial and kawanatanga forces on the East Coast and in the Bay of Plenty, where colonial forces were moving in pursuit of the murderers of Völkner and Fulloon. While FitzGerald was still Native Minister, McLean had written to Wellington indicating that he thought that peace might still be preserved at Turanga.¹⁹⁸ By the end of October, he wrote to Stafford to the opposite effect, and indicated that he was standing by to concentrate his forces there.

McLean's thinking on the path that he thought Government policy in the East Coast–Turanga region should take is evident in a group of four letters which he wrote to Stafford on 26 October 1865 from Napier (three were official letters; one was private). Taken together, these letters clearly indicate his strategy. The first letter contained the official announcement of the success of military operations at Waiapu, and the 'unconditional surrender' of the 'Hauhaus' and 'rebel natives' at Pukemaire and at Hungahungatoroa. Five hundred prisoners had been taken and the principal 'ringleaders' brought to Napier, where they had been put in jail. The military success at Waiapu, in McLean's view, would be 'the means of enabling the

193. Peter Burroughs, 'Defence and Imperial Disunity' in *The Oxford History of the British Empire: the Nineteenth Century*, 5 vols, edited by Andrew Porter (Oxford: Oxford University Press, 1999), vol 3, p 329

194. By the late 1850s and early 1860s, there was a growing feeling in official circles in Britain that the imperial power's costly responsibility for defence must be reduced, and that in colonies proper – as opposed to imperial bases – such responsibilities must be borne by the colonists.

195. Dalton, *War and Politics*, pp 220–221, 244–248

196. Weld had hoped to introduce a new stamp duty in order to finance the colonial force intended to replace imperial troops, but it was the extent of opposition to it in the House which led him to resign.

197. NZPD, 19 October 1865, p 685

198. Document F16, p 85N

Government in conjunction with our Native Allies to establish British Authority along the whole line of coast from Hicks Bay on the East to Uawa or Tolaga Bay on the South'. McLean also enclosed a translation of a letter from Ngati Porou chief Mokena Kohere in which he offered his services to the Government at Turanga.¹⁹⁹

In McLean's second letter to the Colonial Secretary, he reported officially that 'it is more than probable that war will break out at Poverty Bay', and he sought an 'exhibition of power' there, in the form of a 'ship of war' on the East Coast. (McLean hoped to have the opportunity of visiting the different East Coast tribes in such a ship.²⁰⁰) In his private letter to Stafford, McLean described Poverty Bay as 'troublesome' and the 'greatest nest of disaffection on this side of the Island'.²⁰¹

McLean was also aware of a letter written on the same day by his colleague JD Ormond, the deputy superintendant of the Hawke's Bay province.²⁰² Ormond announced to Stafford that the 'rebellion' between East Cape and Poverty Bay (Turanga) could be said to have been 'effectually crushed'. He went on to suggest that McLean be given 'more latitude' with respect to Poverty Bay and that, in that case, 'no submission other than an actual & complete one should be allowed to be accepted'.²⁰³

By then, the Government considered its work finished both on the East Coast north of Turanga and in the Bay of Plenty. As McLean knew, colonial and kawanatanga forces had also been active in the latter region. After martial law was declared on 5 September 1865 in the Opotiki and Whakatane districts, two campaigns had been launched in pursuit of the murderers of Völkner and Fulloon. A force of 500 men at Opotiki had fought major engagements in early October, when a number of Whakatohea people were killed and their villages destroyed or looted and four men were taken prisoner on suspicion of murder. And, on 20 October, the second operation, conducted by Major Mair and some 500 Te Arawa who had been in the area since August, secured the surrender at Te Teko of Te Hura and his people. All those named in a warrant who were alleged to have been involved in the murder of Fulloon and three ship's crew, joined the surrender. Ngati Awa were recorded to have been 'fairly crushed'.²⁰⁴ The Government was now ready to continue operations further south.

On 1 November, Stafford sent instructions to McLean making it clear that he wanted an end to the 'troubles' on the East Coast. He instructed McLean that 'peace must be enforced' in the Poverty Bay district, by expelling from the district all who had come there 'as emissaries of the Hauhaus'. Those emissaries who were not expelled were to be taken prisoner, any adult males not accused of a specific crime were to take the oath of allegiance, and any persons who were involved in the murders of Völkner and Fulloon were to be tried. Stafford continued:

199. McLean to Colonial Secretary, 26 October 1865 (doc A10(a), vol1, pp335–339)

200. Ibid (pp323–324)

201. McLean to Stafford, 26 October 1865 (as cited in doc A10(a), vol1, p329)

202. Ormond succeeded McLean in 1869 as superintendant: DNZB, vol1, p324.

203. Ormond to Stafford, 26 October 1865 (as cited in doc A10(a), vol1, pp330–331)

204. Waitangi Tribunal, *Ngati Awa Raupatu Report*, p62

that, if they do not for the future preserve the peace, so surely will part of their land be taken from them for the purpose of defraying the cost of repressing outrage and maintaining order, and that if, after this, they should break the peace, the Government will establish Military Settlements on their lands to maintain the Queen's authority.²⁰⁵

Thus, Turanga Maori were to be threatened with the confiscation of, and establishment of military settlements on, their land, apparently on the grounds that there were Pai Marire believers in Turanga from outside the region and that they might in future fail to 'preserve the peace'. Stafford also instructed that the force at Waiapu be diverted to Turanga.

It is clear that Stafford was anxious to bring some closure to the Government's military policies, if for no other reason than to bring some control to its spiralling debt. 'Seriously at the rate we are expending at present we shan't have a farthing to borrow or spend after February,' Stafford wrote to McLean on 3 December 1865, after Waerenga a Hika. 'Do you think that the "Native difficulty" in New Zd will be finished by that time? If not what is to be done?'²⁰⁶ This plaintive plea encapsulates the sense of colonial Ministers that the wars had never been intended to last so long and that Maori had not played the part assigned to them. Their resistance had been expected to be short-lived.

On receipt of the Premier's instructions of 1 November, McLean began to assemble all available forces for Turanga.

(7) *The emerging role of Raharuhi Rukupo*

Finally, in Turanga itself a crucial factor was the emerging leadership of Raharuhi Rukupo. As a deepening sense of impending crisis became evident in the area during October 1865, Rukupo, a senior rangatira of Rongowhakaata (and, it should be remembered, an artist, one of the greatest master carvers of his time), emerged to play the leading role as a negotiator on behalf of the great majority of Turanga Maori who were not of the kwanatanga party. In early November, the Ngati Kahungunu leader Tareha Te Moananui arrived from Hawke's Bay to act as a mediator.²⁰⁷ It seemed as if this would strengthen Rukupo's chances of reaching a settlement with the Government.

During October, the settlers and the press recorded Rukupo's evident commitment to peace. Early that month, Williams, the *Daily Southern Cross*, and the *Hawke's Bay Herald* all reported that an attack on the Turanga kwanatanga side had been planned by a large number of Ngati Porou Pai Marire, who had recently arrived in Turanga after the fall of Pukemaire. However, Rukupo had overruled this plan. The *Cross* also noted that Rukupo had expressed his 'desire for peace' and had announced that 'so long as his people remain

205. Stafford to McLean, 1 November 1865, McLean papers, agent for the general government – Hawke's Bay, official letterbook, qms 12–13, ATL (doc A10, pp138–139; doc A23, p104)

206. E Bohan, *Edward Stafford: New Zealand Statesman* (Christchurch: Hazard Press Ltd, 1994), p 216

207. Tareha Te Moananui won the Eastern Maori seat in 1867, and was the first Maori to speak in Parliament in August 1868. Tareha took the name Te Moananui from his his elder relative Kurupo, after he passed away in 1861.

unmolested he would not interfere with [Ngati Porou]'.²⁰⁸ A Pai Marire individual named Harawira was also proposing peace, though Williams commented that he had 'no faith in such speeches from the Hauhaus'.²⁰⁹ However, at the beginning of October 1865, the situation at Turanga seemed relatively calm – 'pretty safe', in Williams' words.²¹⁰ Pai Marire leaders in fact appeared anxious to keep the situation calm. Rukupo, who had exchanged letters with McLean since the 1850s, wrote to him in September to assure him of his pacific intentions. He added, however, that he did not believe that 'McLean's friends' – the Ngati Porou kawana-tanga – wanted peace.²¹¹

By the last week of October, Rukupo was also making repeated attempts to open discussions with the colonial officers. On 24 October, he invited Lieutenant Wilson and Captain La Serre to meet him, but they declined. The younger Rongowhakaata Pai Marire leader Anaru Matete was also present, and he and Rukupo made 'the usual friendly protestations & [said] that they did not approve of Henare Potae & Mokena coming here'.²¹² On 25 October, a Turanga runanga expressed friendliness to the Government, though remaining firmly opposed to Kohere and Potae.²¹³ For a second time, Rukupo tried to arrange a meeting with Wilson and La Serre, but they again declined his invitation.

At this time, too, relations between Rukupo and the Turanga kawanatanga party assume importance. On 31 October, Williams wrote that Rukupo and other Pai Marire chiefs were reported to be hoping for a reconciliation with Hirini Te Kani. The colonial officers seem to have found this dialogue between Turanga rangatira of both political allegiances difficult to deal with. It was about this time that Lieutenant Wilson was driven by frustration to issue a notice to 'the loyal natives of Turanga' requesting that they be true in their declarations either for or against the Government. Wilson would no longer tolerate 'Government men' carrying on amicable relations with the 'Hau Hau', saying 'let them either be cold or hot, and not remain as sources of trouble and perplexity to both parties'.²¹⁴ Wilson's notice points to the fact that kawanatanga–Pai Marire divisions among Turanga Maori were hardly rigid; whanaunga conducted their relations with one another as normal.

From the beginning of November, Rukupo faced a difficult situation as he sought to chart a course through increasingly choppy waters. We note that, at this crucial and tense time, there was no authorised Government representative on the spot with whom Turanga leaders could communicate. That circumstance, itself a product of the somewhat strained history of kawana–rangatira relations in Turanga, contributed to the unfolding of events in Turanga in

208. *Daily Southern Cross*, 10, 24 October 1865, *Hawke's Bay Herald*, 28 October 1865 (as cited in doc F16, pp 84–85)

209. Leonard Williams to Bishop Williams, 11 October 1865, MS copy micro 0677, ATL (doc F16, pp 84–85)

210. W L Williams to McLean, 2 October 1865, McLean papers, MS papers 0032–0641, ATL (doc A10, p 136)

211. This appears a clear reference to Ngati Porou: doc A10, p 136; doc A23, p 100.

212. W L Williams, journal, 25 October 1865, MS copy micro 0628, ATL (doc F16, p 87)

213. Document A23, p 101

214. Notice to the loyal Natives of Turanga, undated, Williams family papers, MS papers 0069–049, ATL (doc A10, p 140; doc A23, p 102)

late October and early November. It left Rukupo with no one to talk to. This was especially awkward because of the arrival from Hawke's Bay of kawatanga chief Tareha Te Moananui on 4 November. Te Moananui would intensify efforts to keep the peace. His correspondence to McLean and Biggs conveyed both his anxiety that McLean and Rukupo should meet and his belief that he was acting in accordance with McLean's wishes. On 5 November, he wrote urgently to McLean at Waiapu asking him to come to Turanga at once and to leave his forces in Waiapu. Te Moananui also wrote to McLean and Biggs to inform them of his meeting with Rukupo and of his success in securing Rukupo's agreement to meet Te Kani and Potae at Turanganui and to travel with McLean to Napier.²¹⁵

Historians agree that from this time Rukupo did his best to ensure that the peace would be kept. To that end, he offered restitution for the damage done to outlying settler properties abandoned at the beginning of November and he sought to discuss peace. But in McLean's absence, the military officers took no initiative, saying that 'they had no authority to arrange anything'.²¹⁶ Their daily advice to Rukupo was to await McLean. On 6 November, Biggs reported to McLean that the 'Hauhau' were trying to induce a fight.²¹⁷ But, the same day, Lieutenant St George wrote that he had heard that 'Raharuhi intended to come in & that the hauhau were collecting the goods stolen from the settlers & were going to return them & make up for what was lost'. However, he doubted that this would be accepted by the Government.²¹⁸

On 7 November, though his invitation to Te Kani, Potae, and the officers to cross the river and visit him to arrange peace terms had been refused, Rukupo decided to go across to them. In the hope of negotiating peace with La Serre, he arrived in town, bringing a canoe load of food with him, but St George said, 'we would not even meet him'. La Serre was reported as saying 'there was no peace now and . . . he must abide the consequences'.²¹⁹ Te Moananui had also 'tried hard' to persuade the officers to meet with Rukupo, but they continued to refuse to do so, saying that McLean would come to sort out the situation.²²⁰

That same day, kawatanga Turanga Maori did meet with Rukupo, who undertook to compensate for looting. But he was not well received and he left, reportedly saying that he would 'fight at once'.²²¹

On 8 November, it was recorded that Rukupo made Wyllie, whose house had suffered considerable damage, an offer of payment of horses, cattle, and cash amounting to £300 or £400,

215. Te Moana kia Te Makarini (McLean), 5 Noema 1865, and translation by Te Ao Marama Research (as cited in doc F33, vol10, pp03694-03698), also Te Moananui kia Piki (Biggs), 5 Noema 1865, and translation by Te Ao Marama Research (as cited in doc F33, vol10, pp3691-3693)

216. W L Williams, journal, 7 November (doc A10(a), vol2, p734)

217. Biggs to McLean, 6 November 1865, 65/203, HB4/6, Archives NZ (doc F16, p96)

218. J C St George, diaries, 6 November 1865, MS papers 1842, ATL (doc F16, pp96-97)

219. *New Zealand Herald*, 10 November 1865; J C St George, diaries, 7-8 November 1865, MS papers 1842 (doc F16, p98)

220. W L Williams, journal, 7 November 1865, MS copy micro 0628, ATL

221. J C St George, diaries, 7-8 November 1865, MS papers 1842, ATL (doc F16, p99)

to 'indemnify him for the loss which he has now sustained'. Wyllie said he could not accept the offer without communicating with the officer in command.²²² In the event, Wyllie did not accept the compensation Rukupo offered.²²³ It was about this time, too, that Leonard Williams wrote sardonically to his father that, since Te Moananui had made a 'convert' of Rukupo, 'all is now going to be peace . . . The settlers can then return immediately to their dilapidated houses, patch up their Lares and Penates [household gods] and live with the Hauhaus a happy family as in times gone by'.²²⁴

3.3.2 The final days before Waerenga a Hika, 9–16 November 1865

(1) *Crown forces arrive*

We come finally to the events of 9 to 16 November 1865, which culminated in the siege of Waerenga a Hika. From this point, the strands in the story may be drawn together to shape our understanding of the events of the final days before the siege. From the beginning of November 1865, it is clear that the whole atmosphere in Turanga changed. There seems a clear feeling, from the historical sources, that a showdown was imminent.

It is not surprising that there was very considerable tension by this time. In a situation where there had been numbers of military engagements along the East Coast and in the Bay of Plenty, and many prisoners taken; and with rumours and counter-rumours about the intentions of various rangatira circulating in Turanga every day, how could it have been otherwise? In quick succession, Potae and his men had arrived, the Makaraka settlers had taken fright and removed to the redoubt at Titirangi, and the men from the Pai Marire pa had looted the abandoned properties, taking away everything useful.²²⁵

The key event was the arrival at Turanga, on 9 November, of Government agent Donald McLean. He brought with him Mokena Kohere and a 260-strong Ngati Porou kawanatanga contingent. That same afternoon, reinforcements of the colonial forces, Forest Rangers, and Hawke's Bay Military Settlers arrived under Major Fraser, Biggs, and Westrup from Napier. There was by then a very substantial military presence in Turanga.

On 10 November, Rukupo arranged a meeting with a Ngati Porou chief, Paraone, and told him that Ngati Kaipoho and Ngati Te Aweawe of Rongowhakaata would come in under the Government, though Ngati Maru were silent.²²⁶ Also that day, settler Hervey wrote that some apparently agreed with Rukupo to 'turn to the Queen's side'.²²⁷ It seems, however, that McLean had his own view of Rukupo. Williams noted in his journal in deprecating terms

222. WL Williams Journal, 8 November 1865, MS copy micro 628-1 (doc A10(a), vol2, p737)

223. Document A10, p143

224. Leonard Williams to Bishop Williams, 7 November 1865, MS copy micro 0677, ATL (doc F16, p97)

225. Only Robert Read remained at Manutuke under the protection of his wife's Rongowhakaata people: doc A23, p102.

226. Document F16, pp99–101

227. Hervey to McLean, 10 November 1865, McLean papers (doc A10, p145)

that he was glad to find, when McLean arrived with his forces, that he had a ‘tolerably just appreciation of Lazarus’ [Raharuhi’s] character’.²²⁸ Williams also recorded his impression of an interchange between McLean and Tareha Te Moananui the same evening, when Te Moananui ‘tried hard’ to persuade him to promise to see Rukupo the following day. ‘It was amusing’, Williams wrote, ‘to witness the way in [which] he declined the honour without stroking Tareha the wrong way’.²²⁹

(2) *The offer of terms by McLean*

On the evening of 10 November, McLean met with Kohere, Potae, Te Moananui, and kawana-tanga chiefs to decide what terms would be offered to Turanga Maori. His terms, based on Stafford’s instructions of 1 November, were sent by messenger to Rongowhakaata and Te Aitanga a Mahaki.

The terms were preceded by a statement of the grounds on which the Crown issued such terms:

He maha nga mahi he a etahi o nga tangata o Turanga. Kua karangatia kua atawhaitia hoki e ratou nga Hauhau nana i kohuru kino a te Wakana, a me te awahi tonu ratou i nga kai hapai i tana mahi kohuru, tae noa ki tenei takiwa.

E tino mohio ana hoki nga tangata katoa ko te tikanga a te Hauhau he kohuru, he muru. He tini a ratou peneitanga, me te pa ano te whiu ki a ratou i etahi atu mahi mo a ratou he.

I manawanui te Kawanatanga. I puta nga kupu o te pai i roto i nga wa o te pouritanga ki nga tangata o Turanga – takahia ana, utua ana aua kupu o te pai ki nga mahi kino.

Kua murua nga hanga a nga pakeha, kua tukitukia o ratou whare, a kua puta te kupu hatepe mo te tangata, ahakoa pakeha, ahakoa Maori, e piri ana ki te Kawanatanga, a, kua kore e ahei te tangata e hiahia ana ki te noho pai, ki te mahi i aua mahi o te ata noho.

E mohio ana nga tangata whakaaro katoa, e kore e roa tenei [te?] tikanga e kawea ana.

Ko nga tangata o Waiapu o Tokomaru kua hapai i te pu hei tiaki hei whakarauora i a ratou i nga whakamate me nga whakawehiwhi a te Hauhau.

E kore e taea te ata noho i te tohe a te taha Hauhau kia panaia te taha Kawanatanga ki te moana.

Ko nga tikanga e kore ai te riri ki Turanga, koia tenei—

1. Kia tukua mai ki te Kawanatanga nga tangata katoa e noho nei i konei kua uru ki te kohuru ranei, ki tetahi atu hara nui ranei, kia whakawakia ratou, a, ki te pono a ratou

²²⁸ W L Williams, journal, 8 November 1865, p 738. Note that though Williams’ journal says 8 November, this seems to be a mistake, because other sources place McLean’s arrival on 9 November. McLean had in fact recorded his own dislike of Rukupo the first time they met, in 1851, when Rukupo spoke ‘evasively’ if ‘fairly’ about the proposed sale of land for a township. McLean added ‘He has a bad countenance’: McLean, journal (typescript), 11 February 1851 (doc A10(a), vol 2, p 633).

²²⁹ W L Williams, journal, 9 November 1865 (doc A10(a), vol 2, p 739)

he, kia whiua ratou ki te ritenga o te ture: a, kia tukua mai ano hoki nga tangata kua whawhai ki te Kawanatanga i Waiapu, i Opotiki ranei, i etahi atu wahi ranei.

2. Kia panaia atu, inaianei ano, nga tangata katoa i haere mai i tawhiti hei whakahaere i nga tikanga kino a te Hauhau.
3. Kia oati pono nga tangata katoa i waho o te kawanatanga kia noho tonu ratou i raro i te mana me nga ture o te Kuini o Ingarangi ake tonu atu.
4. Ko nga hanga katoa a nga pakeha me o ratou mea katoa kua murua, kua pakarutia, kua whakakinongia ranei, kia utua.
5. Ko nga pu kia homai.²³⁰

Na, kia tino mohio nga tangata katoa, ka kore enei mea katoa e whakaaetia, ka tangohia te whenua o nga tangata e whakatupu ana i te kino, hei utu i nga hoia, Pakeha, Maori hoki, ko mauria mai ki te *pehi* i te he, hei whakahaere hoki i te ture mo muri ake nei. A, ki te takahia e ratou te noho pai a muri ake nei, ka whakanohia tuturutia e te Kawanatanga he hoia hei hapai i te mana o te Kuini ki te whenua nei.²³¹

In English, the terms read:

The majority of the Natives of Turanga have been guilty of many wrong acts.

They have invited and entertained the Hauhaus after they had in cold blood murdered the Revd Mr Volkner, and have continued to support the Votaries of that superstition ever since.

It is well known to all that the aim of the Hauhaus is to murder and destroy; they have done this in many instances and have been punished.

The Government have shewn great forbearance. They gave good advice to the Natives of Turanga in the days of darkness, but this good advice has been trampled upon and rewarded by bad deeds.

European property has been plundered, houses destroyed and threats used to kill without distinction, both the Europeans and the Natives who support the Government, and those who wish to live in peace and follow their usual avocations are prevented from doing so.

All thoughtful men must know that this state of things cannot last.

The Natives of Waiapu and Tokomaru have been compelled to take up arms in their own defence to protect their lives which were threatened by the Hauhaus.

It is impossible to preserve peace when the Hauhau party determine to drive the supporters of the Government into the sea.

The terms upon which war may be averted at Turanga are as follows—

230. We note that the number '5' is in the same handwriting as the rest of the document but that the terms of number 5 are in different handwriting, and were seemingly inserted at a later time. However, in the English version, translated from the Maori original, the clause appears in the same handwriting as the rest of the text. As well, a 'copy' of the terms in Maori which we have sighted has a blank after the number 5: doc A10(a), vol1, p475. We discuss the significance of this below.

231. 'Terms of Surrender', AGG-HB7 2E, Archives NZ

3.3.2(2)

- 1st. The surrender to the Government of all Natives now in the District who have been concerned in any murder or other serious crime, that they may be tried for their offences, and, if found guilty, punished according to Law, also of all Natives who have fought against the Government at Waiapu, Opotiki, or elsewhere
- 2nd. The immediate expulsion from this District of all Natives who have come from a distance as emissaries of the Hauhaus.
- 3rd. Taking the Oath of allegiance to Her Majesty and undertaking in future to live in obedience to the Law.
- 4th. All losses sustained by Europeans to be paid for.
- 5th. The Arms to be surrendered.

It must be distinctly understood that If the above terms are not complied with the lands of the promoters of disturbance will be taken for the purpose of defraying the expenses of the European and Maori Soldiers who will have to be employed to secure peace, and of maintaining order here-after. And if after this, they break the peace the Government will establish Military Settlements on their lands to maintain the Queens authority.²³²

Turanganui

Nov 10th 1865

As the conclusion of the letter made clear, land would be taken for non-compliance with these terms in order to pay the cost of colonial and Maori forces securing the peace. And, if there were further troubles, military settlers would be brought in.

After the offer of the terms, there was a pause. Over the next day and a half, the Turanga Pai Marire chiefs were engaged in deep discussion of the communication they had received from McLean. Finally, they replied on 12 November, in a letter transcribed by Paora Kate, Rukupo's brother:

Noema 12 [1865]

Ki a Te Makarini,

E hoa tena ra koe.

Kei whanga roa mai koe ki to tamaiti.

Tenei kei te romiromi marie ahau kia rite te maoka a, kua rite nei ano te maokatanga.

Katahi ano ka tukua atu ia kia haere atu no te mea kua huri te iwi Hauhau kua huri nga rangatira katoa o te Hauhau o Patutahi o Waerenga a hika o Orakaiapu.

Kotahi te mea ka taria atu nei e matou, ko koe kia haere mai ki konei tatou whakau ai.

Puritia mai tera o te riri kia kitea te henga katahi ka tuku mai ai. Ki te pai koe ki [te] haere mai, kia tere mai.

Ka huri nga korero.

232. 'A True Copy' of the terms of surrender, copied by FE Hamlin, 'Clerk & Interpreter', Turanganui, 10 November, 1865, AGG-HB2/1, Archives NZ

Na tou hoa
 Na Raharuhi Rukupo
 Horomona Tutaki
 Wiremu Kingi Paia
 Tamati Te Rangi
 Ihaia Te Noti [?]
 Pehimana Taihuka
 Hare Taurimarima [?]
 Eraihia Te Kotuku
 Arapeta Kipatu
 Paora Kokako
 Te Waka Kurei
 Me nga Rangatira o Te Whanau a Rua
 Raharuhi Paia
 Paora Tutu
 Hohaia
 Peta Taiepa
 Matenga Ruta Kerekere
 Ka huri
 P Kate (te kaituhi)²³³

Our interpretation of this letter follows:

November 12, 1865

To McLean,

Greetings Friend,

I pray that you will be patient with your humble child. I have given careful thought to the matter and it is now clearly understood.

I have only just responded because all the Hauhau and all of the chiefs of the Hauhau of Patutahi, Waerenga a hika and Orakaiapu have now turned from their earlier path.

There remains just one thing that we await and that is for you to come here and let us all make final arrangements [to settle the matter].

Let any conflict be withheld until it is established where the fault lies, [and it is proven] only then may fighting be justified. If you accept this proposal to come then please do it with urgency.

233. Letter from Raharuhi Rukupo and others to McLean in response to McLean's terms of surrender, 12 November 1865, which we give in orthographic form, AGG-HB2/1, Archives NZ; Paora Kate, who transcribed the letter, took and oath of allegiance on 14 November 1865: AGG-HB2/1 (as cited in doc A10(a), vol1, p386(a))

We await your reply.

From your friend

Raharuhi Rukupo [and other signatories, as above]

The sense of this letter is very clear. Rukupo indicated that the other 'Hauhau' chiefs had all turned and now supported Rukupo's stance. All wanted peace. All that remained, they all said, was for McLean to meet them and the matter would be finalised (whakau). The letter ended with an urgent plea to McLean to come across the river quickly so that a matter of such importance could be discussed 'kanohi ki te kanohi' (face to face). McLean was well aware of what was being asked of him. He visited Williams on 13 November to ask his opinion, and he told Williams of the letter that he had received. It was, he said, signed by nearly all the leading Pai Marire chiefs, who stated that they were 'willing to come to terms' but were 'very anxious that he should go and see them'. Williams told McLean that he believed that the leaders were only buying time, and he recorded that 'I was glad to hear him [McLean] say that he had no intention of going to see them'.²³⁴ Nor did McLean go; he stayed on his side of the river.

McLean's written response to the Turanga leadership came on 13 November. After soliciting Williams' advice, he declined to meet them. According to Williams', McLean wrote that, 'if they were coming in, they had better do so today' (ie, 13 November).²³⁵ Te Moananui, wrote Williams, received the news of McLean's refusal to meet Rukupo with disgust.²³⁶ That evening, Rukupo and Wi Kingi Te Paia crossed the river to visit McLean, and they assured him that 270 of their people would 'come in' the next day, as per his ultimatum.²³⁷ However, nobody did. McLean then extended his deadline till noon on 16 November; he would wait till then, he said, 'but no longer'.²³⁸

On 15 November, Rukupo wrote to McLean and Te Moananui:

Orakaiapu Noema 15 1865

Ki a te Makarini ki a Tareha

E hoa ma tena to matou tangata ka haere atu hei haere ki Nepia hei tukunga mai ma korua.

Mana e tiaki i te kaipuke i nga pu i korerotia e Hemara raua ko Raharuhi.

Erangi kia rite katoa mai nga mea mo aua pu me tetahi hoari kia kotahi, me tetahi kai hoki ma matou. Ki ta matou whakaaro me tapoko mai te kaipuke ki Kopututea nei.

Ka huri

Na Raharuhi Rukupo

234. W L Williams, journal, 13 November 1865, MS copy micro 0628, ATL (doc A10(a), vol 2, p745)

235. Ibid (doc A10, p147; doc A23, pp105-106)

236. Ibid (doc F16, pp104-105). This was also the day on which Leonard Williams took ship for Auckland.

237. W L Williams, journal, 27 November 1865 (doc A10(a), vol2, p749). Note that Williams in fact referred, on 27 November 1865, to comments that Harris had made at the earlier date.

238. Ibid

Translated, it read:

To McLean and Tareha

Friends, we have arranged for our representative to travel to Napier in order that he may take delivery of the firearms that you will give to him. He will wait at the boat for the firearms that had been arranged between Hemara (Hamlin) and Raharuhi.

However, this deal concerning the firearms must be satisfactorily concluded, and there should also be one sword and food provisions for us. In our opinion, the ship should berth at Kopututea.

I await your reply

From Raharuhi Rukupo

This also is an important letter because it confirms that Rukupo considered that an agreement had been reached and that Te Moananui had brokered it. Rukupo had sent a representative – perhaps Hemara (Hamlin, the interpreter), though this is not clear – back to Napier. The representative was to return with firearms and a sword, as he had arranged with Hamlin. McLean and Te Moananui were to make the arrangements for the arms to be collected. It seems that in exchange Rukupo would guarantee either his neutrality or, more probably, his acceptance of the Government's terms. But he needed time, and time was running out.²³⁹

McLean proceeded to draft instructions to Major Fraser in the event that the deadline passed without result. These instructions stated:

having used my utmost exertions to avert hostilities in this District, I find the Natives so obstinate in their determination to resist the establishment of order and British Law, that I have resolved to withdraw from further interference.

I have communicated to them the intentions of the Govt as an ultimatum and have given them until noon tomorrow, the 16th instant to accept those terms in full . . .

If by the hour above named a full and complete acceptance of the enclosed terms is not made, you will be good enough to consider that the charge of the District is from that hour handed over to you, and it will become your duty to enforce to the full the conditions insisted upon by me on behalf of the Government.²⁴⁰

McLean's ultimatum was still not met by the appointed hour on 16 November. He then handed control to Major Fraser, the senior military officer at Turanga. Te Aitanga a Mahaki were to be specifically targeted. McLean's instructions to Fraser stated that:

239. Rukupo kia Te Makarini ki a Tareha, 15 Noema 1865 (amended to conform to modern conventions of orthography), and our translation, MS copy micro 0535-110, ATL (cited in doc F33, vol10, p03701)

240. McLean to Fraser, 15 November 1865, AGG-HB4/8, Archives NZ (doc F16, p106)



Fig 9: Waerenga-a-Hika Mission Station, cms, circa 1858, by A M Sommervell.
 Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (A-263-026).

The tribe that more particularly requires to be chastised is the Aitanga Mahaki residing at Waerengahika. This tribe has fostered and encouraged the Hauhau murderers from the first appearance of Kereopa & Patara at Turanga immediately after Mr Volkner[']s murder up to the present time.

... It is evident that no peace can exist until those Natives are compelled to submit to British law and authority.²⁴¹

The forces were already preparing on 15 November for the march against the 'enemy' – settlers were sworn in and armed and guns and ammunition were also given out to 'native allies'. The men expected to march at daylight the following morning but their departure was delayed till after the expiration of the ultimatum; they eventually left 'for the enemy quarters' at 3.15 in the afternoon. After marching seven miles, they camped for the night. At about the same time, McLean departed from Turanga by ship for Napier.²⁴²

241. McLean to Fraser, 15 November 1865, AGG-HB4/8, Archives NZ (doc A10, pp150–151); see also doc F16, pp106–107

242. J C St George, diaries, 15–16 November 1865, MS papers 1842, ATL

3.3.3 The attack on Waerenga a Hika Pa

On 17 November, Fraser started his attack on Waerenga a Hika Pa. His force comprised 24 CDF (cavalry), 130 settler infantry, and 'about 500 native infantry'.²⁴³ The colonial units therefore constituted less than a third of the Crown forces. The 'native infantry' included Henare Potae's men, a force from Tuparoa, and 'Native allies' of Turanga under Te Kani and Pototi (about whose commitment Fraser would complain).²⁴⁴ Fraser had first headed towards Pukeamionga Pa (where Anaru Matete was based), near Patutahi, but changed his mind and turned instead to the pa at Waerenga a Hika, heading for Bishop Williams' station. It was a short march of 1½ hours. Near Williams' house, Fraser's forces saw 'some Hauhaus' and fired upon them, then they took possession of the only remaining house on the property and opened fire on the pa from the hedges and windows of the house.²⁴⁵ Inside the pa were 800 people, 300 of whom were women and children over 12.²⁴⁶ For most of the week that followed, the colonial and kawanatanga forces maintained their siege of Waerenga a Hika Pa. Throughout, there appears to have been heavy firing by both sides – sometimes all night – with occasional engagements outside the pa. The siege ended on the sixth day.

The major engagement took place on 19 November, when Anaru Matete's 200 reinforcements arrived.²⁴⁷ According to Saint George, they advanced towards the Government troops 'in their companies' and 'with flags flying'.²⁴⁸ What kind of flags – whether flags of truce or 'Hauhau' flags – became a matter of controversy after the engagement.²⁴⁹ Fraser wrote later that the Maori advanced in three bodies:

under a flag of truce, their intention being to take us off our guard, and then fire at us. We however, providentially, did not pay any attention to their flag, as no flag of truce should be respected carried by such a large body of armed men, and I ordered them to be fired on before they could come up with us.²⁵⁰

243. Ibid, 16 November 1865

244. Fraser to McLean, 21 November 1865, AJHR, 1866, A-6, p3

245. J C St George, diaries, 17 November 1865, MS papers 1842, ATL

246. Ibid, 22 November 1865

247. Ibid, 19 November 1865

248. Ibid

249. Document A10, pp151–152; doc A23, p107.

250. Fraser to McLean, 21 November 1865, AJHR, 1866, A-6, p4 (doc F16, p109). We note that, despite this apparently cavalier wording of Fraser's, we have not found evidence which indicates that the flags were in fact flags of truce. In particular, there do not seem to be tribal traditions, or contemporary statements from Maori sources, that suggest the abuse of flags of truce at Waerenga a Hika was the source of a grievance against the Crown. We find it hard to believe (from what we know of him) that Anaru Matete came to Waerenga a Hika to surrender; and we note also that three bodies 'of armed men' (no women are mentioned, in contrast to the surrender a couple of days later) advanced towards the opposing forces, and fired back as soon as they were fired upon. Again, we tend to think that a surrendering group would not have moved forward in this way. We note that Fraser's reference in his dispatch to a Maori flag of truce, was followed up by the Government at the time. The acting Defence Minister asked for an explanation of the circumstances detailed in this passage, and statements from every officer. Fraser sent four such statements on 30 January, which agreed that the colonial forces initially supposed that one of the three 'Hauhau' bodies approaching their lines carried a flag of truce, that they were ordered not to fire, and that as they got closer, within a

Heavy fire was exchanged, the 'Hauhau' rushing forwards with their palms held up against the bullets in accordance with their belief that God would protect them. Thirty-four were killed and, according to Fraser, a similar number were wounded. The Crown forces sustained only one slight injury. The remainder of the defenders retired to the pa, and the siege continued. Fraser thought then that it might well last a long time. A sap dug towards the pa was vigorously resisted.

On 20 November, St George went into Turanganui, where he received an offer of unconditional surrender from two men. He accepted the offer and told the men to return to Waerenga a Hika, whereupon Fraser would tell them how to proceed.²⁵¹ It is not clear whether they did return to the pa or how Fraser reacted. But Fraser recorded on 21 November that he had received an offer of unconditional surrender from the occupants of 'Pa Rarera' (probably Kohanga Karearea Pa) and was about to act on it. On 21 November, Fraser wrote that 'the aspect of affairs remains unchanged, the Hau Haus being too dispirited to attack us, and their pa being too strong to be taken without a little time'.²⁵² St George also commented that the pa was 'wonderfully strong', with double palisading and deep rifle pits and whare built underground, their roofs covered in earth. But there were weaknesses, which had already been exposed.²⁵³ The apparent decision of the defenders not to destroy Bishop Williams' house had given the colonial forces a prime firing position on the roof, from where bullets had penetrated even the whare in the pa. Biggs had commented earlier that those inside the pa were 'indifferently armed', and St George recorded as early as 18 November that the 'Hauhaus' were firing the attacking forces' own bullets back at them.²⁵⁴

On 22 November, Fraser brought his artillery – such as it was – to bear. This consisted of a single six-pound howitzer with no carriage that had been brought up from a naval vessel. He fired several rounds, but not without difficulty, because the gun had to be righted after every round. According to the historical accounts of the battle, this brief assault led to the surrender

Footnote 250 continued

range of 50 to 60 yards, and it became apparent that the flag had a red cross in the corner, the order was given to open fire, and the 'enemy' promptly responded. Biggs added that a crucial factor in his view was the 'treachery' of the 'Hauhau' the previous day, when they had worn the white armbands that distinguished kawanatanga Maori and thus surprised Lieutenant Wilson, who lost five killed and six wounded. Biggs stated that in light of this deception, it would have been irresponsible to allow such a large body of the enemy to come close to their lines with taking action, even if the flag had been a flag of truce ('which it was not', in his words): Fraser to under-secretary, Colonial Defence Office, 30 January 1866, AJHR, 1866, A-6, p5; Biggs to Fraser, 15 December 1865, AJHR, 1866, A-6, p5; see also JA Mackay, *Historic Poverty Bay and the East Coast, NI, NZ: A Centennial Memorial* (Gisborne: The Poverty Bay East Coast Centennial Council, 1973), p224. 'After the siege, WA Graham complained that the Crown troops should have accepted the rebels' white flags as tokens of surrender. In a letter to Mr McLean, Captain JW Harris said: "The natives tell me that three distinct parties were sent out to the attack under Hauhau flags, which were simply strips of white calico, with a red or black cross and, perhaps, a couple of Cs (crescents) in the corner . . . So much for flags of truce! I was glad to see that rap you gave that confirmed meddler, Graham".

251. St George states that the offer was 'from – and his people', ie he leaves a blank, which implies that the name of the leader was not well known to him: JC St George, diaries, 20 November 1865, MS papers 1842, ATL.

252. Fraser to McLean, 21 November 1865, AJHR, 1866, A-6, p4 (doc A10, p153)

253. JC St George, diaries, 22 November 1865, MS papers 1842, ATL

254. Ibid, 18 November 1865



Fig 10: The remains of Waerenga a Hika Pa after its capture and destruction in 1865. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (F-8137-½). The house in the background was the mission house where William Williams lived.

of those inside. Those surrendering requested that their lives be spared and that they not be sent to jail. The reply was that the Government would send the 'worst characters' to Napier but that most of the people would not be sent out of the district. Four hundred men, women, and children then came out of the pa, with more coming in over the following days, including, on 30 November, Raharuhi Rukupo and Wi Kingi Te Paia.²⁵⁵

As the majority surrendered on 21 and 22 November, Anaru Matete led another group – perhaps several hundred strong – out of the back of the pa, and they escaped into the hills. The Turanga kawanatanga forces present on the Government side at Waerenga a Hika did not give chase. Seventy-one dead were left in the pa, but it is not clear whether this figure included those killed at the breakout a few days earlier. The pa was then looted by colonial and kawanatanga forces, who, according to St George, rushed 'from whare to whare turning up the ground when they saw it was fresh very frequently turning up dead bodies looking for buried loot – a good many greenstones Guns & native [illegible] were found'.²⁵⁶

3.3.4 The aftermath of the battle: the arrest and detention of Turanga Maori

At dawn on the day after the 400 Turanga Maori surrendered at Waerenga a Hika, Mokena Kohere paraded the prisoners and commenced a haka. Fraser intervened, telling Kohere that the prisoners belonged to the Crown, not to Ngati Porou. But the Crown did not stop Kohere from exacting other traditional fruits of victory. In the days after Waerenga a Hika, Kohere

255. Document A10, p108; doc F16, pp110, 112

256. JC St George, diaries, 22 November 1865, MS papers 1842, ATL; see also doc A10, pp152–154; doc A23, pp108–110

and his men looted the area, removing and destroying the property not only of Maori communities and the other pa nearby but of settlers too. Harris wrote to McLean that ‘the Pai Marire have not done us one tenth part of the damage inflicted by Morgan [Mokena] and his men’.²⁵⁷ Settler stock had been killed and cultivations destroyed. Battersby concluded that ‘This behaviour seems to have resulted from Fraser’s dispute with Mokena over the prisoners’.²⁵⁸

The prisoners from Waerenga a Hika were initially taken to the Kohanga Karearea redoubt or placed under the care of leading kawanatanga chief Tamihana Ruatapu at Oweta while the Government decided their fate.²⁵⁹ By 24 February 1866, the Government had determined to send the prisoners into detention on Wharekauri. We return to a discussion of this decision and its implementation in chapter 5.

3.4 CROWN AND CLAIMANT CASES

The causes and the significance of the battle at Waerenga a Hika in November 1865 remain highly contested matters. The Crown maintained that Turanga Maori who refused to submit to McLean’s terms were in rebellion. The claimants maintained that no rebellion occurred and that the Crown was the aggressor. The claimants therefore contended that the Crown’s subsequent actions in sending prisoners to Wharekauri and in trying to confiscate their lands were unjustifiable. The Crown maintained, however, that punishment and pacification were legitimate means of a government concerned to enforce law and order.

3.4.1 The claimants’ case

The Te Aitanga a Mahaki and Rongowhakaata claimants made the fullest submissions on the events of 1865, and counsel for Ngai Tamanuhiri also presented submissions.²⁶⁰

(1) *The role of the Crown in Turanga hostilities*

The claimants argued that the events of 1865 destroyed Turanga Maori autonomy, culminating in the attack at Waerenga a Hika – and that the attack was designed by the Crown to achieve this. Counsel argued that the Crown’s real reason for its involvement at Turanga was because it wanted land there. And, more than that, it wanted all that the acquisition of land represented – that is, an end to Maori resistance to settlement and the beginning of substantive Crown sovereignty, which tended to accompany the significant alienation of land. War

257. Harris to McLean, 25 November 1865, McLean papers, ATL (doc A10, p157); see also doc A23, p110.

258. Document F16, p111

259. Document A10, p160. A number of Ruatapu’s party had signed or put their names to the oath of allegiance (on one of the Government’s printed forms) on 14 November 1865: see AGG-HB2-1, Archives NZ.

260. Documents A61, B15, H1, H2, p11; docs A67, D32, H2, H3

raged throughout the North Island over the same issues: authority, mana, and sovereignty.²⁶¹ The leading witness for Te Aitanga a Mahaki, Vincent O'Malley, put it this way:

This was indeed a fundamental factor behind the momentous events of 1865, or at least the Crown's role in them – that the Queen's supremacy, never previously asserted at Turanga, was now being advanced by a regime anxious to finally tame its native inhabitants and open up the district to European settlement and control.²⁶²

Thus, the claimants asserted that it was the Crown, not Maori, that destabilised Turanga – Turanga Maori, whether kawanatanga or Pai Marire, enjoyed stable relationships with one another. It was the arrival of Crown troops that caused settlers to leave the area, as they knew this signalled imminent war.²⁶³

The claimants agreed that any hostile action by Turanga Pai Marire that took place in Turanga prior to Waerenga a Hika (such as looting) should have been classified only as criminal offences and should have been dealt with as such, not as rebellion. Counsel acknowledged that the Crown had the right to suppress breaches of the peace, but only to the extent necessary for the purpose. That right was not a licence to wage war.²⁶⁴

(2) *Crown intervention in respect of Ngati Porou*

Mr Stirling argued that Ngati Porou's intervention in Turanga affairs in 1865 dated from Mokena Kohere's action of raising the flagstaff at Titirangi. This was 'deliberately provocative', but, even so, it 'did not immediately provoke a response from Turanga Maori'.²⁶⁵ O'Malley noted that Kohere's action put Turanga Maori into a position from which, if they opposed the flagstaff for whatever reason, they 'bought themselves a fight with the Crown'.²⁶⁶ But Turanga Maori tried to let the matter lie because they did not want to hasten any conflict with the Government. Even though Hirini Te Kani threatened to join the Pai Marire party (since the flagstaff threatened his control over the area containing the grave of his father) and Raharuhi Rukupo allegedly said that he would attack the flagstaff, no physical response to the serious challenge by Kohere was made by Turanga Maori.²⁶⁷

The claimants characterised the conflict that broke out amongst various Ngati Porou factions as a Ngati Porou 'civil war'. The Crown supplied kawanatanga Ngati Porou with guns and ammunition, intervened with troops, and made no attempt to stop them from shooting Ngati Porou Pai Marire prisoners. Lieutenant Biggs, as he then was, himself shot Pita Tamaturi, the protégée of Raharuhi Rukupo. The Ngati Porou Pai Marire losses suffered

261. Document A67, pp 5–6; doc H2, p 22; doc H3, pp 26–28

262. Document A10, p 124

263. Document H2, p 18

264. Document H1, pp 19–20, 26; doc H2, p 17

265. Document A23, p 94

266. Document A10, pp 121–122

267. Ibid, pp 123–124; doc A23, pp 94–95

by 1865 changed the balance of power in Turanga, causing severe tension there. Mr Stirling observed that the arrival in September of several hundred Pai Marire Ngati Porou refugees seeking Te Aitanga a Mahaki protection at Waerenga a Hika placed Hirini Te Kani and the Turanga kawanatanga party in a bind:

Walking a strategic tightrope, Hirini invited McLean to despatch the first government forces to Turanga, 26 military settlers under Lieutenant Wilson, as well as some arms to be distributed amongst Kawanatanga Maori should that prove necessary. Despite this apparent show of support, he seemed to be trying to maintain a ‘balance of power’ rather than bring the Crown into the district.²⁶⁸

Mr Stirling suggested that Te Kani and Rukupo had little wish to fight each other. In other words, they ‘shared a far greater desire to sustain Maori authority in Turanga, and also to prevent an invasion by outside aggressors. The Pai Marire even asked the kawanatanga forces, their supposed enemies, to remain quiet, lest Ngati Porou have a reason to bring their fight to Turanga’.²⁶⁹ O’Malley suggested that Te Kani saw a ‘community of interests for all Turanga Maori in seeking to prevent the invasion of the district by Mokena and his people’. Hirini’s loyalties, he argued, lay not so much with either the Crown or the Pai Marire as with his people.²⁷⁰

The claimants argued that what had started as a civil war between Pai Marire and anti-Pai Marire Ngati Porou factions now ‘rapidly escalated – by virtue of the Crown’s decision to involve itself – into a conflict between “rebel” subjects and the Crown’. This conflict between the Crown and ‘rebels’ was to draw in ‘loyals’ along the East Coast.²⁷¹ Despite that conflict among Ngati Porou, the ‘rebels’ among them were never punished by the Crown and lost no land.²⁷² Seen in this light, the claimants argued, the Crown’s law and order rationale for attacking at Waerenga a Hika was not convincing, for the Crown was not at all consistent in enforcing law and order.

The claimants pointed to the arrival of Henare Potae in Turanga as a crucial turning point. Turanga Maori interpreted it as a declaration of war. Some Turanga Pai Marire took up Potae’s challenge and dared him to come and take those at Waerenga a Hika, clearly seeing Ngati Porou, according to Mr Stirling, as ‘the foremost enemy at this time’.²⁷³ From July to November 1865, according to claimant witnesses, it was the very Turanga Maori who were labelled ‘rebels’ who tried the hardest to keep the peace.²⁷⁴

²⁶⁸. Document A23, p99

²⁶⁹. Ibid, p99; see also doc A10, pp130–131

²⁷⁰. Document A10, p132

²⁷¹. Ibid, p126

²⁷². Document H1, pp23, 27; doc H3, p26; doc D32, p8

²⁷³. Document A23, p101

²⁷⁴. See doc A10, pp127–128; doc A23, pp97–98, regarding the attempts of the Turanga Pai Marire runanga, for example, to reconcile all factions to peace.

(3) *Did the Crown try to avoid war?*

O'Malley's evidence was that Turanga Maori were the only people trying to avoid war. The claimants argued that the Crown, its Ngati Porou allies, and the settlers all eagerly awaited the prospect of war and that the Crown gave Turanga Maori no room to negotiate.²⁷⁵ It was unfortunate, they argued, that no Crown officer was willing in the early days of November to take responsibility for suing for peace, because Raharuhi Rukupo was very close to Stafford's terms for ensuring peace.²⁷⁶

McLean, who did have such responsibility, did not arrive in Turanga until 9 November. Mr Stirling says that it was obvious, once he disembarked with his forces, why the officers of the colonial forces had waited for McLean: 'Clearly he was there to impress upon Turanga Maori his military supremacy, not to discuss peace terms'.²⁷⁷

The claimants argued that the main reason for the Ngati Porou presence in Turanga was removed two days later. The day after McLean's terms were sent, the Tokomaru refugees left Turanga for home – followed by Henare Potae. O'Malley says that, whether they left on their own initiative or because Te Aitanga a Mahaki had asked them to go, 'their departure was clearly designed to help defuse the situation. The occupants of Waerenga a Hika pa would have been unlikely to welcome the loss of fighting men if their intention was indeed to fight'.²⁷⁸ Despite their departure, however, the majority of the Ngati Porou force remained at Turanga.

The claimants were critical of the terms that the Crown sent to Rukupo and the Turanga leadership. O'Malley asked whether, however, Pai Marire were being asked to surrender:

The Pai Marire might well have asked, 'surrender from what'? The fugitives from Tokomaru had already gone home, and restitution had been offered for the damages done to settler property. Although some Maori from the district had, in strict legal terms, participated in 'rebellion' in other districts, Turanga itself could not be said to be in such a state.²⁷⁹

The claimants highlighted the genuine attempts that Rukupo, supported by other Pai Marire chiefs, had made to negotiate with McLean in the last days before Waerenga a Hika. But McLean would not go and see Rukupo. McLean and the Crown wanted peace on their own terms. The price that Turanga Maori paid for their neutrality and independence was, according to the claimants, the very autonomy that they were trying to preserve.²⁸⁰

Mr Stirling argued that:

275. Document A10, p139; doc A23, p101

276. Document A10, p143

277. Document A23, p104

278. Document A10, p146; see also doc A23, p105

279. Document A10, pp147–148

280. Document H1, pp20–24; doc H3, pp17–18

3.4.1(4)

the [Crown's] terms for peace were . . . arbitrary and unilateral, and almost impossible for Turanga rangatira to countenance without any further discussion. They were, in effect, 'being treated as rebels before they had become so.' Clearly, they were not to be allowed to make a peace that left them with any power or future capacity to create any disturbance; 'their power was to be broken'.²⁸¹

(4) *Were Turanga Maori in rebellion?*

Claimant historians maintained that there was no rebellion by Turanga Maori; rather, they were acting in self-defence. The fight had never been one between the Pai Marire and kawanatanga factions in Turanga, they said, 'but was instead a war of conquest in which the Crown, cleverly exploiting its Ngati Porou allies, sought to assert its dominance over a people who had long defied and denied its authority'.²⁸² The real issue for the Crown was establishing the Queen's authority in Turanga.

Turanga Maori, the claimants suggested, had nothing to gain from fighting; they did not profit from the hostilities with the Crown in any way. But the Crown profited by acquiring a new district for settlement, and the settlers profited by securing their invalidly acquired properties by the terms of the deed of cession imposed by the Crown in the wake of the hostilities. There is an obvious link between the refusal to sell land and the question of authority, which Turanga Maori themselves observed at the time. The Crown's lack of authority in Turanga before Waerenga a Hika, symbolised by its inability to buy land, creates a direct link to its attack at Waerenga a Hika. The exiling of those who surrendered after the siege was thus about facilitating the confiscation of land.

Turanga Maori, the claimants argued, had no choice but to resist:

This is not to say that Turanga Pai Marire were meekly innocent, but rather than being aggressive 'rebels' they were 'insurgent leaders,' defending their land and their autonomy against alien aggressors – the Crown and Ngati Porou. The end result was to make the long threatened full-scale settlement of Turanga and the imposition of government authority a reality.²⁸³

Rutene Irwin, a Te Aitanga a Mahaki kaumatua, gave evidence in the hearings that nearly all his family were involved in the fighting at Waerenga a Hika, because they all 'supported the retention of our whenua, the mana whenua, the mana tangata, and they were imprisoned for fighting for their rights [on Wharekauri] and some of them died for it'.²⁸⁴

In short, the claimants argued that it was not Turanga Maori who were in rebellion – it was the Crown. Waerenga a Hika represented the Crown's rebellion against the Treaty; it set aside

281. Oliver and Thomson, p94 (doc A23, p106)

282. Document A23, p109

283. Ibid, p109

284. Tape 3, 10 December 2001

its kawanatanga obligations and breached articles 2 and 3, both then and later. Because Turanga Maori were the victims of rebellion by the Crown, no punishment of Turanga Maori was required or justifiable.²⁸⁵

Counsel for Rongowhakaata rehearsed the four criteria for serious breaches of the Treaty set out in Professor Alan Ward's *National Overview*, which was prepared for the Tribunal's Rangahaua Whanui research project.²⁸⁶ Counsel argued that the Crown's actions at Waerenga a Hika fell into the worst category: the needless waging of war upon Maori and the seizure of land under military control or occupation. Counsel cited Professor Ward's argument that, in events leading to the New Zealand Wars, the Government seized on the actions of Maori individuals as a pretext and penalised entire communities for their alleged activities. Thus, according to counsel, the punishment was far in excess of the crime, even by nineteenth-century standards. Moreover, Turanga Maori were doubly punished, through exile and then confiscation of their land.²⁸⁷

3.4.2 The Crown's case

The essence of the Crown's argument is that those at Waerenga a Hika and other armed Turanga pa in November 1865 were in rebellion, 'holding forts and keeping together numbers of armed men against the Queen's command'.²⁸⁸ Fault lay on both Turanga Maori and the Crown, but the Crown was anxious to avoid war during much of 1865, and took action only after a serious breakdown in order had occurred. The Crown's immediate aim was the resolution of the crisis and the restoration of order, within its ongoing goal of an amicable relationship with Turanga Maori.

(1) *Significance of Pai Marire on the East Coast*

The question that presents itself to the Crown is why Turanga, a previously stable region, descended into conflict in 1865. The Crown argued that conflict came to Turanga in ways that neither it nor Maori wanted, and it asserted that it did not initiate the conflict to undermine autonomy but was drawn in through fighting breaking out in the region.²⁸⁹ The Crown's historian, Dr John Battersby, suggested that the events of 1865 could be explained only by the advent of a new phenomenon on the East Coast. He therefore saw no reason to trace the causes of conflict beyond 1865 or to consider tribal disputes, issues over the Kingitanga or the sale of land, or other long-standing grievances: 'these things had long existed, and had not provoked a conflict of the nature exhibited during 1865'. The cause of conflict that year must

285. Document H3, pp 23–25, 27–28

286. Ibid, p14

287. Ibid, pp 14–15

288. Document H14(3), p8

289. Document H14(2), p5

3.4.2(2)

therefore have stemmed from ‘something new and strong and particular, quite different from what had come before’. Battersby argued that this phenomenon was a particular, and violent, strain of Pai Marire.²⁹⁰

The Crown reaction to Pai Marire was, Battersby contended, measured – unless adherents of the faith were actually involved in hostilities or actively propagated violence. Although Grey’s proclamation of April 1865 expressed official abhorrence and concern at certain aspects of Pai Marire and stated that the Crown would take firm and decisive action to suppress customs ‘subversive of all order and morality’ and ‘repugnant to all humanity’, the Crown did not seek to suppress Pai Marire where its adherents were peaceful.²⁹¹ Belief in Pai Marire did not, in itself, constitute rebellion; nor did the Crown treat it as so doing. But the actions and intent of Kereopa Te Rau in inciting and effecting the murder of Völkner, and of Patara Raukauri in his recruiting for a war against the Governor, ‘raised the spectre of rebellion as early as March 1865’. These events, Battersby argued, ‘posed a threat to the peace and normality of the Eastern Bay of Plenty and East Coast districts’. Moreover, most, ‘if not all’, of the ‘rebels’ on the East Coast were converts to Pai Marire.²⁹²

The Crown tried to avoid hostilities, but once Raukauri had gone up the East Coast in June 1865 and Ngati Porou chiefs had perceived a threat in his presence, a series of events were put in train. These events were to cause six months of conflict along the coast. Then, in July 1865, Fulloon was murdered by Pai Marire at Whakatane. ‘By this time,’ Battersby stated, ‘a rebellion – a situation in which an armed group within a state levies war against it, in order to overthrow, or resist the application of, state authority – was in train.’²⁹³ Colonial forces were sent to stabilise the situation, though Battersby acknowledged that the presence of the forces may not have been seen as a stabilising factor by Turanga Maori and may instead have alarmed them.²⁹⁴

Unlike O’Malley, Battersby considered that Bishop William Williams was wise to leave Turanga when he did. Völkner, he says, was warned to stay away from Opotiki, did not heed the warning, and was murdered. Williams did listen to the warnings he received and ‘stayed alive’. Insecurity was widespread at Turanga in April 1865; settler women and children were also leaving the district.²⁹⁵

(2) *Significance of conflict among Ngati Porou*

The Crown also considered the significance of the contemporary conflict among Ngati Porou, arguing that the conflict was serious and amounted to rebellion. Battersby also disagreed with the claimant historians, and with Oliver and Thomson, that the Ngati Porou war

290. Document F16, pp3, 12–13, 135, 143

291. *New Zealand Gazette*, 29 April 1865; doc F16, pp7–8, 32

292. Document F16, pp9–11

293. *Ibid*, p10

294. *Ibid*, p118

295. *Ibid*, p21

was a 'civil war', saying that a civil war is 'an armed contest within a state, in which, in most cases, both sides claim to be sovereign and seek a military decision on the issue'. 'This is not what occurred at Waiapu.'²⁹⁶

Battersby argued that defining the conflict within Ngati Porou as a civil war is to downplay the role that McLean played from the beginning. McLean took Mokena Kohere to Waiapu in June 1865 because Kohere was anxious to head off Raukatauri. He then met with the chiefs there and decided that it was crucial that the kawanatanga Ngati Porou be given assistance by the Government, including arms and ammunition and, later, Crown troops. These events, he suggested, 'better explain the situation at Waiapu as resulting from an attempt to enforce the law and prevent Patarā's presence from creating a likely hostile situation'.²⁹⁷ In his view, 'The outbreak of a rebellion at Turanga was brought about by events further north at Waiapu.'²⁹⁸

(3) *Crown intervention in Turanga*

Battersby argued that, by early September, the situation as it was seen from Wellington had reached crisis point: 'the uncertainty at Poverty Bay did not inspire confidence that the peace would be maintained, and there were no military resources, at that point, able to be moved to secure it.' McLean was informed that no troops would be sent to Turanga and that he should be prepared to evacuate the area if it became necessary. 'The Government had decided to temporarily abandon Poverty Bay in the event of hostilities there, and to make no attempt to defend it.'

Te Kani's letter in early September was, however, a significant turning point.²⁹⁹ Troops were sent to Turanga at Te Kani's request, rather than as a Crown initiative. Te Kani's request was indicative of the tension within Turanga Maori that existed in late 1865.³⁰⁰

The Crown considered that the change of Ministries in mid-October 1865 was important. Battersby commented that it was 'quite clear that Stafford intended maintaining general Government control over operations on the East Coast, and unlike Weld, saw no advantage from temporarily abandoning Poverty Bay'.³⁰¹ The fall of the Ngati Porou pa at Pukemairi and Hungahungatoroa, however, was a watershed. Before this, the Government had reacted 'very cautiously' to the unrest at Poverty Bay because it lacked the military reserves to do more. Afterwards, Government policy firmed, and a decision was taken to finally confront the situation in Poverty Bay head on.³⁰²

By 26 October, McLean had decided that conflict at Turanga was 'more than probable'.³⁰³ By then, 'continuing insecurity and on going association between local Hauhau and those

296. Ibid, pp 44, 136

297. Ibid, p 45

298. Ibid, pp 42-43

299. Ibid, p 68

300. Document H14(3), pp 7, 9, 16

301. Document F16, p 89

302. Ibid, p 91

303. Ibid, p 87

3.4.2(4)

in rebellion to the north, created a situation in Poverty Bay that the Government could no longer ignore'. The timing worked because there were now enough military forces available for McLean to act.³⁰⁴ Battersby suggested that, removed in time as we are, it is easy to play down the seriousness of the situation that faced the Government in 1865 and the abounding sense of insecurity among by settlers. 'How,' he asked, 'could anyone know for sure what was going to happen?'

Crown counsel noted that, although there was no armed conflict before McLean's arrival, there had been serious incidents involving the plundering and destruction of property at Turanga that made the Crown perceive an urgent need for action. Given that, 'it was reasonable for McLean to insist on a "coming in" of the Hauhau. The legitimacy of the Crown action did not depend upon armed conflict having already occurred.'³⁰⁵

The Crown focused in its arguments on the significance of the arrival of Ngati Porou Pai Marire adherents at Turanga. Battersby argued that they were not 'refugees' and that they were more aggressive than local Pai Marire adherents. Further, association with people perceived to be in rebellion is rebellion itself. These Ngati Porou Pai Marire did not leave before McLean's arrival in Turanga on 9 November 1865. McLean's terms included the expulsion from Turanga of Ngati Porou Pai Marire people. The Crown was not convinced that all Ngati Porou Pai Marire had left the area by Waerenga a Hika, and it was not unreasonable for the Crown to have assumed that the departure of some Ngati Porou was not of great significance. Battersby suggested that those who did leave did so less in compliance with McLean's terms and more because they intended to attack Potae's pa in his absence. Whatever their motives for leaving, Battersby says that, by then, the crisis had gone too far for their departure to make a significant difference.³⁰⁶ The Crown assumed, reasonably, that those remaining were still resisting it and were preparing to fight.

(4) *McLean's offer of terms*

In Battersby's view, Turanga Maori must not only have known the consequences of not meeting McLean's terms and ultimatum but also have accepted those consequences. Though armed, both the Crown and Turanga Maori maintained policies that they wanted to accomplish peacefully, but neither side was prepared to sacrifice its objectives for the sake of avoiding conflict:

To have issued an ultimatum, and given a time period for compliance, signalled a direct intent to use force in the event that compliance was not effected; to have remained in arms against a state's request to give them up, is equally a decision to rely on a contest of arms. It

304. Document F16,, pp118–119

305. Document H14(3), p20

306. Document F16, pp102–103

was not one side, but both, that drew lines around what behaviour they would accept of the other – it was not one side, but both, whose policies were followed despite the clear discomfort of the other, and it was not one side, but both that were prepared to pursue their objectives, regardless that conflict would be, and was, the result. Ultimately, the state can legitimate its actions in defeating a rebel group; a rebel group has no such comfort in purs[u]ing armed confrontation with the state, and the penalties for so doing have always been among the severest of state retributions.³⁰⁷

The Crown argued that McLean was obviously pursuing options for peace. He brought in Te Moananui to mediate. Counsel suggested that McLean perhaps should have listened to Tareha and met with Rukupo, but McLean had by this time decided that action was required, not words. Thus, the Crown had made it clear that it would take military action. The rebels had to 'come in' to signify their acceptance of peace, and they did not do so, despite McLean's extension of the deadline. Rukupo probably did have genuinely peaceful intentions, and he made a serious attempt to resolve the situation, but his influence was not sufficient to convince the majority of 'rebels'. In Battersby's words: 'The problem for Tareha was, that, while he had Raharuhi on board, he didn't seem to have anyone else, and clearly Raharuhi did not have [a] united group behind him.'³⁰⁸

(5) *Was there rebellion in Turanga?*

The Crown considered at length the legality of the Crown's military action in Turanga. Crucial to this consideration was the question of whether there was rebellion there. The Crown asserts that those at Waerenga a Hika were in rebellion – they were holding a fort against the Queen's authority, they were armed, they looted settler properties, and they sheltered people who had been involved in serious incidents along the East Coast.

The Crown argued that rebellion occurred in Turanga in November 1865 after the Governor's peace proclamation of 2 September, so Turanga Maori were not covered by the terms of that proclamation. Maori were asked to surrender from their rebellious position, but the Crown did not require submission to the extent that would justify self-defence.³⁰⁹ There was no justification for rebellion in terms of the test of intolerable exploitation or oppression, there was no context of controversial Crown acquisition of land, there had been no murders or arrests by the Crown, and there were no circumstances of 'unlawful armed invasion' by Crown forces which might be argued to justify a right of 'collective self-defence'.³¹⁰

307. Ibid, p120

308. Referring to two letters from Tareha Te Moananui to McLean, 5 November 1865 (cited in doc F16, p95n).

309. Document H14(3), pp7–11

310. Tony Honare, 'The Right to Rebel', *Oxford Journal of Legal Studies*, vol8, no1, pp51–52, 1988; doc H14(3), pp9, 13–14, 27

(6) *The Crown's argument on the application of the Treaty principles*

The Crown argued that Treaty principles are based on an assessment of the reasonableness of Crown acts and omissions. In this case, the questions that arise are whether it was reasonable for the Crown to have perceived a real threat to lives and property in the region and whether the threat was real to the extent that the Crown was justified in taking such action as was necessary to defend law and order and citizens and their property.

The Treaty authorised the Crown's acquisition of sovereignty and governance over New Zealand. Under article 1, the unqualified tino rangatiratanga exercised by Maori before the Treaty can be 'legitimately regulated'. Defence, for example, is clearly the preserve of the sovereign State, and law and order are essential to effective and workable laws and to the maintenance of constitutional government. And under article 3, Maori were also promised law and order, a right of all citizens.³¹¹

In the case of Turanga, there was a breakdown of law and order, and challenges were made to the nation state's authority. These challenges threatened the constitutional government of the State. The State thus acted, as it was bound to by the Treaty, to make *de facto* that which was *de jure* since 1840.³¹²

Crown counsel stressed that Maori also had and have responsibilities under the Treaty. The Crown believes Treaty discussions in the past have not stressed Maori responsibilities sufficiently. Maori were responsible for the decisions they consciously made – decisions for rebellion or for allegiance to the Crown or for neutrality.³¹³

The Crown did acknowledge that Lieutenant Biggs' execution of Pita Tamaturi (a Turanga rangatira taken prisoner in the Ngati Porou conflict on the East Coast), was in breach of article 3 of the Treaty of Waitangi.³¹⁴

3.5 TRIBUNAL ANALYSIS AND FINDINGS**3.5.1 Drawing the threads together – our findings of fact**

The course of Turanga history, we have suggested, changed forever during the week of 17 to 22 November 1865, when the battle at Waerenga a Hika was fought. To demonstrate why it changed, and how, we return to the seven strands or elements that we outlined above, which converge in the days leading up to the seige, and we assess the key historical facts as we see them.

311. Document H14(3), pp11–12

312. Ibid, p12

313. Ibid, pp 9–10

314. Ibid, pp13–14

(1) *War and confiscation across the North Island*

While the Crown, by article 1 of the Treaty of Waitangi, had negotiated with Turanga Maori in 1840 for the cession of kawanatanga or sovereignty,³¹⁵ neither was asserted in fact in Turanga prior to the battle at Waerenga a Hika. As perceived by Maori, the Crown was to fulfil three limited roles: first, to control the settlers; secondly, to extend their knowledge of British political and legal systems; and thirdly, to facilitate the entry of Turanga into the new economy. None of the usual incidents of sovereignty – in particular, the ability to impose the will of a central authority through the actual or implicit threat of force – were understood by Turanga Maori to be vested in the Crown. All relevant political authority remained in every practical sense with the Turanga tribes and was exercised through their leaders. The Crown knew and accepted this reality. As Crown counsel accepted before us, Turanga was expected to remain an autonomous native district for a good while longer than other regions in the North Island.

Pivotal to an understanding of the events leading up to Waerenga a Hika is the national context of war between the colonial State and Maori who fought for self-determination. Three elements of that wider story of conflict from Taranaki to Waikato, and then on to Tauranga, need emphasis in the context of Turanga. First, the conflict provided the environment which led in 1862 to the rise of the Pai Marire faith. The arrival of that faith on the East Coast in 1865 polarised the coast's Maori communities, panicked the settlers, and provided a political basis for later Crown action. Secondly, at least in Taranaki and Waikato (the Tribunal is still to report in Tauranga), it is clear that the Crown was the aggressor; the modern Crown has itself acknowledged that its wars against Waikato and Taranaki were unjust. Thirdly, the corollary of war in the North Island was confiscation. By 1865, the Crown had commenced the implementation of a policy of confiscation in Taranaki, Waikato, Hauraki, and Tauranga. It is very probable that Turanga Maori were aware of this when Pai Marire arrived in the district.

(2) *The Pai Marire faith and its arrival at Turanga*

Pai Marire arrived in Turanga in March 1865 following news of the murder of Völkner. The faith was brought by a party led by Kereopa Te Rau and Patara Raukauri. Te Rau was subsequently hanged for Völkner's murder. It was central to the Crown's case that the version of Pai Marire that was brought into Turanga was a 'particularly violent' strain. It was on the basis of this analysis that the Crown felt able to argue that it was entitled to take pre-emptive and decisive action in Turanga at Waerenga a Hika.

We do not agree that Te Rau and Raukauri were emissaries for a 'particularly violent' strain of Pai Marire. No evidence was adduced to show that the Pai Marire message brought by them was in any way different to that delivered by Te Ua Haumene on the other side of the island. What is clear, however, and what must be accepted is that Kereopa Te Rau the individual was capable of murdering a missionary. There is no equivalent evidence in respect of

315. See the Maori and English texts respectively.

Raukatauri. And it ought to be remembered that Te Rau's wife and daughter had been killed in a Crown attack on an unarmed community at Rangiaowhia during the Waikato, Tauranga, and Hauraki wars the year before. But whatever Te Rau's justification, he had demonstrated an ability to commit extreme acts of violence and to involve a disaffected community in them. It is also true that he and Raukatauri carried the head of a Pakeha soldier from Taranaki to the East Coast. The carrying of a soldier's head, while grisly in today's terms, does not appear to us to have been extraordinary during the war period of the mid-nineteenth century. Indeed, the Crown on occasion offered bounties for heads of Maori deemed enemies (see ch5). It cannot be said, however, that the entire doctrine of Pai Marire was inherently violent. We have found no evidence for that. It was the man who proved violent.

While the majority of Turanga Maori converted to Pai Marire in the hope that it would support the autonomy they had so carefully guarded for the past 25 years, a smaller number appear to have come to the view that the best way to retain that autonomy was to continue to remain neutral or to offer their support to the Crown. A similar division seems to have occurred among Ngati Porou. In both areas, Pai Marire attracted chiefly support and large numbers, while some rangatira led smaller kwanatanga parties instead.

(3) The response of the Government and the settler community to Pai Marire

The arrival of Raukatauri and Te Rau in the aftermath of Völkner's killing would initially have generated tension in Turanga. The settlers were entitled to feel considerable concern at their arrival and to fear their potential to set the district alight, and the Crown may well have been entitled to be concerned for public order. Clearly, the next few weeks were to be a crucial period in determining whether those fears were well founded.

Where the Crown's analysis of the significance of Pai Marire breaks down, in our view, is that, in the eight months between March, when Te Rau arrived, and November, when Waerenga a Hika was attacked, there is no evidence that the alleged violence of Pai Marire was in fact manifest in Turanga. In short, the facts disclose no causal link between the arrival of Pai Marire and the Crown's attack on Waerenga a Hika. The panic among the settlers created by Te Rau's arrival had long subsided by November 1865, and the widespread conversion to Pai Marire in Turanga, and the following months of peace, demonstrated that Pai Marire had not been transformed into a militant faith. The district had not been set alight; the killing of Völkner had been an aberration. As we shall indicate below, there was an overriding intervening event which was the direct cause of the Crown's initiation of hostilities – an event that had little to do with the Pai Marire faith or its emissaries.

(4) The impact in Turanga of conflict among Ngati Porou

In May 1865, Ngati Porou chief Mokena Kohere erected a flagstaff on disputed land at Titi-rangi and flew the Union Jack. His decision to merge a land issue with an issue of autonomy made Turanga Maori of all allegiances uncomfortable.

In June 1865, fighting broke out among Ngati Porou in the wake of the arrival of Raukatauri and the rapid spread of Pai Marire. McLean travelled to Waiapu, and in July returned there with 90 military settlers and volunteers to assist kawanatanga Ngati Porou. The arrival of the colonial forces appears to have tipped the balance in favour of the kawanatanga side. The success of McLean and Ngati Porou kawanatanga leaders by mid-October appears to have rendered it inevitable that Turanga would be attacked. We take this view for the following reasons:

- (a) McLean and kawanatanga Ngati Porou had brought the internal Ngati Porou campaign on the East Coast to a triumphant conclusion.
- (b) McLean saw the invasion of Turanga as an opportunity to address within a single campaign Pai Marire and Maori self-determination sentiments along the entire East Coast as far as Turanga. The new Premier, Stafford, took the same view, advising McLean in private correspondence on 3 November 1865 that it appeared to be 'the best thing to do to put down hauhauism in Poverty Bay while our forces are flushed with success, & the rebels correspondingly dispirited'.³¹⁶
- (c) Ngati Porou kawanatanga saw opportunities for enhancement of mana and gains in land by allying themselves with Crown forces.
- (d) In any event, Ngati Porou kawanatanga leaders owed McLean and the Crown a debt of gratitude for providing what became crucial assistance in the Ngati Porou fighting.

In the end, it was simply the case that, if the Crown were going to break the independent mindset of Turanga Maori, that was the perfect time to do it.

(5) *The role of Donald McLean in East Coast–Turanga affairs, and the arrival of colonial forces*

In mid-September 1865, Lieutenant Wilson and Captain La Serre arrived in Turanga from Hawke's Bay with 30 colonial troops, and a further small Colonial Defence Unit arrived subsequently. McLean himself made the decision to send troops after Te Kani requested them. In our view, Te Kani's request reflected his deepening concern over hostilities on the East Coast. Like other Turanga leaders, Te Kani was committed to the survival of Turanga autonomy, and, it seems to us that he was also contemplating the military and political developments within Ngati Porou and the undoubted ramifications these would have for Turanga. To bring a small body of troops to Turanga under his protection was to increase the (perhaps inevitable) possibility of some Crown involvement in Turanga affairs, but on terms which he himself might be in a position to shape.

It is telling that over the next two months the presence of Crown forces did not cause a disturbance. Leonard Williams reported at the time that Turanga had quietened down considerably. This may be contrasted with the reaction in the district when the Ngati Porou

316. Stafford to McLean, 3 November 1865, McLean papers, ATL (doc A10, p171)

forces arrived. Nor, however, did the arrival of the Government forces assist the situation. La Serre and Wilson had no discretion to engage in negotiations or discussions with Turanga Pai Marire, and several overtures made by Pai Marire leaders in late October and early November were rebuffed or ignored by the Crown officers.

On 30 October, Henare Potae of Te Whanau a Rua hapu of Ngati Porou arrived with a force of 30 Ngati Porou. The effect was immediate. The remaining settlers in the district evacuated. Tensions rose significantly between the Ngati Porou forces on the one hand and both the pro-kawangatanga and the Pai Marire communities in Turanga on the other. Hirini Te Kani had already written to Potae urging him not to come to Turanga. Rongowhakaata kawangatanga leaders visited Potae the day after his arrival to request that he leave, in order that he ‘not bring fighting and bloodshed into this district’. The tension was not between the Crown and Turanga, or even between Pai Marire and kawangatanga; it was instead between Ngati Porou and Turanga Maori. Potae’s contingent increased a few days later from 30 to 120. The perception was clearly that matters were being brought unavoidably to a head, and that this was being done not by the Turanga Pai Marire leadership but by McLean and Ngati Porou.

In the meantime, Turanga Maori on all sides made professions of peace to settlers in the hope that they would not leave. Evacuated homes at Makaraka were looted by some Turanga Maori, but Rukupo and others offered to restore the stolen items or make reparations in some other way. The offer was rejected.

There was still a chance for peace. Tareha Te Moananui of Ngati Kahungunu arrived from Hawke’s Bay on 4 November and began negotiations with Rukupo, evidently in the belief that McLean wanted a peaceful solution. He wrote to McLean the following day to ask him to come urgently and to leave his forces behind in Ngati Porou territory.

McLean arrived on 9 November with 100 colonial troops and 260 Ngati Porou, thereby conveying a strong message of his intentions to Turanga Maori. It was the first time a kawangatanga force this large had been concentrated in Turanga. By the second week in November, the dynamics of the situation on the ground had been profoundly altered. McLean, with his experience over many years, knew that communication with Maori leaders took place on many levels. He understood what the impact would be of arriving with Ngati Porou forces, who, we were told, were Rongowhakaata’s traditional enemies.

On 10 November, McLean issued terms of surrender. The official version of the terms required that Turanga Maori should:

- ▶ surrender to the Government all Maori in Turanga concerned in murder or in fighting against the Government at Waiapu, Opotiki, or elsewhere;
- ▶ expel immediately those Maori who had come to Turanga as ‘Hauhau’ emissaries;
- ▶ take the oath of allegiance to the Queen;
- ▶ pay for all the losses sustained by the settlers; and
- ▶ surrender their arms.

The terms began with a statement of 'nga mahi he' (the wrong acts) of 'the majority of the Natives of Turanga'. They did not state that Turanga Maori were in rebellion against the Queen. While we note that there is no direct term for 'rebellion' in te reo Maori, the phrase 'nga mahi he' can be contrasted with the stronger language used, for instance, in Colonel Murray's 22 February 1860 proclamation of martial law in Taranaki against 'Natives . . . in arms against her Majesty's Sovereign Authority' (expressed in Maori as 'nga Maori i Taranaki . . . e whawhai ana ki [sic] to te Kuini mana').³¹⁷ Official translations of section 5 of the New Zealand Settlements Act 1863, detailing offences of 'rebellious' tribes, rendered 'who shall . . . have been engaged in levying or making war or carrying arms against Her Majesty the Queen, or Her Majesty's forces in New Zealand' as 'kua whawhai ki Te Kuini . . . kua mau patu ranei ki Te Kuini, ki nga hoia ranei o Te Kuini'.³¹⁸ Finally, we may contrast the phrase 'nga mahi he' with the very different term used for 'rebellion' in the 1868 deed of cession, after Te Kooti's assault on the settlers at Matawhero (see ch6). There, the words used to convey the gravity of rebellion, as opposed to civil or criminal offences, were 'te riringa' (the Maori term for engaging in full-blown war).

The two allegations levelled against Turanga Maori by McLean were that they harboured and supported the emissaries of a faith with violent and destructive aims and that they had threatened Government supporters and plundered and destroyed settler property.

As to the first allegation, it was cast in general terms and was to the effect that the aims of the 'Hauhau' were violent and destructive. As we have said, we do not accept that there is any evidence to support this. In any event, this allegation suggests that it cannot be argued (as the Crown did before us) that Turanga Maori were free to pursue the Pai Marire faith if they chose. They were not. McLean's charge was against all Hauhau, not just those Hauhau who had committed crimes. He alleged that the entire purpose of those who followed the faith was to 'murder and destroy', and it is therefore obvious that the allegation was ultimately against the faith itself.

As to the allegation of plundering and making threats, it is clear that there was unrest after Te Rau and Raukatauri arrived in Turanga. They themselves were evidently involved in intimidation; Raukatauri touring the stores of Turanga threatening shopkeepers and Te Rau making threats against the lives of Bishop Williams and the settlers. In the first week of April, some settlers sent their families away and Williams left Turanga. Despite all this, however, and despite the known presence of Te Rau and Raukatauri in the area, what is most telling is the lack of any Government intervention. McLean decided against erecting a blockhouse because of a lack of forces to defend it; the settlers decided against accepting an offer of arms because they thought they would be safer without them. In other words, in the aftermath of the killing of Völkner, the Government did not send a force to Turanga either to make arrests

317. 'Proclamation of Martial Law in the Province of Taranaki', *Government Gazette*, 5 March 1860

318. See, for instance, Notifications to Claimants for Compensation: 5 April 1865, *New Zealand Gazette*, 8 April 1865; 'Proclamation', *New Zealand Gazette*, 7 April 1865.

or to protect the settlers. The evidence of civil disorder was clearly not compelling enough for the Government to intervene.

It was not until early November, after the decisive battles within the Ngati Porou rohe had occurred and Henare Potae and his armed men had arrived at Turanga, that unrest surfaced again. Settlers' cattle were killed, their sheep were driven inland, and their abandoned houses were plundered for useful items (such as zinc for making bullets). The Makaraka settlers sent their families to Turanganui. We have referred above to the determination of the Pai Marire leadership to compensate the settlers for their losses. But the main point, it seems to us, is that in such circumstances the Crown had a clear case for intervention. It could and should have intervened, and on a scale appropriate to the evident civil disorder. Arrests might have been made; those who had plundered might have been tried; the offers of compensation might, in the course of such a process, have been accepted. The question is, Did this level of disorder entitle the Crown to consider that the entire Turanga district was in rebellion? We deal with this crucial question below.

We note finally that McLean's message to Turanga Maori lay not just in the text but in the manner in which the terms were drafted. Kawanatanga leaders, including those of Ngati Porou, were present at the drafting of the terms. McLean's approach was not designed to strengthen the hand of the Turanga leadership trying to negotiate peace.

(6) *The Stafford Ministry assumes power*

We consider, as we noted above, that McLean proceeded with his military policies in Turanga with greater confidence once he knew he had the backing of the Stafford Ministry. Stafford had a clear idea of what he wanted to achieve on the East Coast, and his 1 November instructions to McLean gave the latter renewed impetus. Stafford could not have expressed his thinking to McLean more clearly than he did on 3 November, when he wrote in a private letter that it appeared to be 'the best thing to do to put down Hauhauism in Poverty Bay while our forces are flushed with success, & the rebels correspondingly dispirited'.³¹⁹

(7) *The emerging role of Raharuhi Rukupo*

On 12 November, Rukupo and other leaders identified by McLean himself as 'most of the leading men of the [Hauhaus]', replied to his terms, seeking to negotiate with him.³²⁰ The metaphorical language of their letter conveyed both the careful consideration they had given to McLean's charges and their readiness in light of those charges to settle the matter peacefully. They were now ready to talk to McLean, and their expectation was that he would respond by coming to talk with them. They asked that he not act on the allegations in his terms until there had been a discussion about whether those allegations were well founded.

319. Stafford to McLean, 3 November 1865, McLean papers, ATL (doc A10(a), vol1, p171)

320. WL Williams, journal, 13 November 1865, MS copy micro 0628, ATL (doc F16, p104)

There were strong reasons, given the presence of Ngati Porou, why Turanga Maori would want a meeting with McLean to take place on their own turf, without his forces at his back. They wanted to negotiate, not be forced into submission. McLean read the message of Turanga Maori, and chose not to respond to it. His reply was to wait for them to 'come in', to submit. He knew exactly what he was doing when he decided not to go.

Rukupo appeared to capitulate and, on 13 November, he crossed the river and promised McLean that he would deliver 270 people the next day. Not surprisingly, Rukupo could not get his people to come. The chances of getting an armed Turanga Pai Marire force to lay down those arms at the feet of a large armed Ngati Porou force must have been slight indeed. The ignominy – and the dangers – for Turanga Pai Marire would have been too great. Whether the presence of Whanau a Rua among them (several of whose rangatira had signed the response of 12 November to McLean's terms) would have increased or reduced Turanga Maori apprehension in these circumstances is hard to say. They would have been aware of the fate of the 500 Ngati Porou Pai Marire who had surrendered only the previous month to colonial and kawanatanga Ngati Porou leaders and had been taken prisoner and shipped to Napier. How, then, would their own fate be weighed? We suspect that McLean was fully aware of the Turanga dilemma. The fact that the final condition in McLean's offer of terms, requiring the surrender of arms, was written in the Maori text in a different hand is telling. It was not written out as part of the 'original text'. In our view, this indicates that careful thought was given as to how the condition would be perceived by Maori reading it in Maori. We think that it was added later, probably after considerable contention between McLean and his close advisers. McLean would have known how unlikely it was that Turanga Maori of any political allegiance would be willing to lay down their arms before a sizeable armed Ngati Porou force. Yet, he had brought this force to Turanga himself, and it constituted the bulk of the Crown force.

In our view, the inability of Rukupo to get his people to come in was not evidence of failing support for his leadership, as the Crown argued before us. The terms in which the letter sent to McLean on 12 November was couched and the number of Turanga chiefs who, despite their earlier misgivings, signed along with Rukupo show clearly that he spoke for all Turanga Pai Marire. The offer to negotiate contained within that letter, with Rukupo's name as the first signatory, also explains why Te Moananui chose to conduct his discussion with Rukupo rather than with anybody else. In Te Moananui's view, Rukupo was the key to a peaceful outcome in Turanga.

Rukupo's inability to deliver adherence to the terms reflected the impracticality of the terms themselves, the impact of McLean's refusal to discuss those terms with the Turanga leadership, and the inability of the chiefs to proceed when there were no guarantees of their people's safety.

Rukupo's letter of 15 November showed that he had reached satisfactory terms with Te Moananui; it was just a matter of bringing McLean to their agreement. But McLean refused. Te Moananui's anger at McLean's inflexible approach throughout is evident. He had come

to Turanga believing that he had a mandate from McLean to negotiate, but once there he suffered the ignominy of being revealed to have had no such mandate at all.

(8) *The attack on Waerenga a Hika Pa*

As the deadline for acceptance of the Crown's terms approached, McLean drafted instructions to the senior military officer to proceed. There were to be no further discussions.

The Crown did not make a determined effort to keep the peace at Turanga in November 1865 because that was not its preoccupation. The Crown wanted a lasting solution to the issue of Turanga autonomy and, more recently, unrest. The settlers wanted a lasting solution, and urged as much on McLean. The missionaries wanted a lasting solution – that much is evident from their letters and diaries. McLean wanted a quick end, on Crown terms, to the troubles along the East Coast. At a time of considerable uncertainty for the future of British forces in New Zealand, and thus for the whole colonial policy of 'pacification', McLean wanted to secure the coast for British settlement. Turanga Maori were to be backed into a corner, until there was no choice left to them but to submit.

At the time when the assault on Waerenga a Hika began on 17 November, 300 of the 800 people inside were women and older children.³²¹ This indicates that the pa was a defensive pa, not an aggressive one. It also indicates to us that Turanga Pai Marire saw the conflict as being between themselves and the substantial Ngati Porou force, rather than just between themselves and the Crown; for they clearly expected the worst from a Ngati Porou attack. Accordingly, as in traditional hostilities, they brought the women into the pa to protect them and sent the younger children away to safety to ensure their future. Turanga Maori, whether Pai Marire or kawanatanga, had not wanted to fight at the outset. Those of the kawanatanga party (led by Hirini Te Kani and Paratene Turangi (Pototi)) who were with the colonial forces earned the censure of the colonial officers for their unwillingness to actively assist in military duties (such as digging trenches), and for firing blanks. After only five days of siege, those inside either surrendered to the colonial forces or evacuated the pa. They did not seek to prolong the hostilities – on the contrary, they clearly had no stomach for war.

3.5.2 Crown authority and Maori authority

We begin our analysis of the Crown's obligations in Turanga in the latter part of 1865 by recapitulating our views on the limited nature of the Crown–Maori relationship between 1840 and 1865. As we have said, Turanga Maori had no concept of the reality of practical Crown authority and, given their lack of experience, were understandably threatened by attempts to usurp their pre-existing tribal autonomy.

321. J C St George, diaries, 22 November 1865, MS papers 1842, ATL

By the terms of the Treaty, tribal autonomy was the only basis for a quality Treaty relationship. That is as true today as it was then. It is now axiomatic that the sovereignty or *kawana-tanga* of the Crown was and remains subject to the guarantee to protect *tino rangatiratanga* or, in English, tribal autonomy. This was confirmed by the Court of Appeal in the *Lands* case, and this is why a Crown–Maori relationship which did not properly limit the sovereignty of the Crown so as properly to protect the autonomy of Maori could not have been consistent with the Treaty.³²² By Maori autonomy, we mean no more than the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants. That is not to say that Maori rejected a role for the Crown at the national level. Clearly, the alacrity with which Maori leaders engaged with the Government showed that they desired to negotiate and foster a relationship with the colonial State. But the idea that the Crown was entitled in 1865 to appropriate to itself the powers and prerogatives exercised by tribes through their *rangatira* must have seemed ludicrous to Turanga Maori, whether *Pai Marire* or *kawana-tanga*. Indeed, until the various elements we have described converged in the spring of 1865, it was not in the Crown's contemplation either. Thus, in accordance with the Treaty principle of active protection, it was incumbent on the Crown positively to foster Maori autonomy in Turanga, not to conspire to defeat it. Having been largely absent from Turanga for the entire post-Treaty period, the Crown ought not to have considered it appropriate to move in and coerce its Treaty partner into submitting to Crown authority as a primary strategy. If *kawana-tanga* did not exist in any effective form in Turanga prior to 1865, that could have only increased the obligation on the Crown to negotiate with Turanga Maori, and to fight only when peace and order were under threat (and even then only as an absolute last resort where no reasonable alternative remained). We are not convinced that the Crown made any effort, when such a threat seemed to emerge in early November, to explore reasonable alternatives to military action.

The Crown's leading witness in respect of the Waerenga a Hika conflict accepted that the Crown's actions were not consistent with that exacting standard. Instead, the Crown sought at Waerenga a Hika to subdue the independent state of mind of Turanga Maori:

Tribunal: What you said here about a lasting peace/security for removal of these sorts of problems for the future really require the Crown by diplomacy or war to effectively remove the independent mindset of these people?

Battersby: Yes. I will take back the comment about the way things were before because they are never going to be the same. You are absolutely right. What they have to take away is only so much independence as may be there in a war fighting capacity or in a capacity that can seriously disrupt, so in terms of say, submission to the law, the colonial government is going

322. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

to see the observation of the law and the practice of the law and so on as the way to keep the peace in the district.

Tribunal: I suppose the *realpolitik* of any situation like this . . . would be that having an independently minded group as a significant sub-set within the state such as it was at the time would always involve some tension?

Battersby: Yes that's probably right.

Tribunal: Weren't they really trying to remove that tension?

Battersby: Yes.

Tribunal: Didn't that mean that you had to break the back of the independent state of mind, in order to be sure that this was never going to arise again?

Battersby: You're probably right. Leading up to it they're happy to leave well alone, so, as long as that threat doesn't emerge these sort of things don't need to be enforced. Now that it has, you're probably right.

Tribunal: [In your view] in breaking that independence of mind – is that going to be an element in the lasting peace that would give security to all?

Battersby: Yes.³²³

As we have said, the Treaty specifically contemplated a Crown–Maori relationship which not only tolerated but fostered the very autonomy which McLean sought to subdue. We therefore find that the objectives pursued by the Crown at Waerenga a Hika were in breach of the principles of the Treaty.

We conclude further that, at Waerenga a Hika, McLean in particular, acting on behalf of the Crown, was not interested in negotiation. He was, contrary to the Crown's Treaty obligations, interested only in the destruction of Turanga independence which would result from a military victory. His refusal to pursue a negotiated settlement and his actions in pursuit of war as a primary strategic objective were inconsistent with the Crown's obligation of reasonableness and active protection.

3.5.3 The law on rebellion

We turn now to consider the underlying question of whether Turanga Maori were in rebellion in the latter part of 1865. Our primary task is to interpret and apply the principles of the Treaty of Waitangi to the claims before us. On this most important of matters, however, we would be remiss if we did not first explore the applicable legal principles. Counsel for the various claimant groups and for the Crown provided helpful submissions on the subject, and we also referred to a careful and thorough legal opinion from New Zealand's pre-eminent expert on the subject, Professor Frederic M Brookfield. This opinion was commissioned by

323. Transcript 4.11, pp 7–8; Mahaki hearing, 17 April 2002, tape 6, VHS, supplied by the Crown Forestry Rental Trust.

the Taranaki and Ngati Awa raupatu Tribunals, but it has broader application and, with the consent of the parties, we have considered it in the context of Turanga. We will discuss this in more detail below.

The Crown focused on the question of what was 'reasonable' at the time. Counsel posited two questions in this respect:

Was it reasonable for the Crown to perceive a threat to law and order in the period leading up to the fighting in November 1865?

Was the action taken at Waerenga a Hika to suppress the perceived threat reasonable in the circumstances?³²⁴

The Crown accepted the general thrust of the definition of rebellion provided by Professor Brookfield.³²⁵ The Crown, however, sought to sharpen the edge of the definition by reference to Hawkins and Leach's text on the pleas of the Crown:

Under 18th century law, levying war against the Crown includes not only direct armed rebellion but also applied to 'those who in a violent and forcible manner withstand [the Crown's] lawful authority' and 'those that hold a fort . . . against the king's forces, or keep together armed numbers of men against the king's express command.' Even where there is a real or pretended public grievance, those who attempt with force to address it are said to levy war against the Crown 'inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion.'³²⁶

Thus, the Crown argued that, by building Waerenga a Hika and other pa, Turanga Maori were holding forts and keeping together numbers of armed men against the Queen's command. The Crown asserted that this, combined with the looting of property and the knowledge that those in the pa included some refugees from the Ngati Porou East Coast fighting, all provided a sound justification for the Crown's actions. The essence of the Crown's argument was as follows:

Were some people in Turanga withstanding the Crown's lawful authority? The answer can only be yes. Some Turanga Maori held a fort against the Queen's command, others supported them. An invitation to come in was extended (an offer that did not require either the sale of land or the abandonment of Rangatiratanga) but was not taken up. Those Turanga Maori who did not come in were clearly in rebellion. The Crown was required to assert its authority in a direct way as law and order had broken down.³²⁷

324. William Hawkins, *A Treatise of the Pleas of the Crown: Or a System of the Principal Matters Relating to that Subject*, edited by Thomas Leach, 7th ed, 4 vols (London: Butterworth, 1795), p 90

325. Document F35, p 11

326. Document H14(3), p 28

327. Ibid, pp 10-11

The claimants argued on the other hand that any rebellion was a rebellion by the Crown, not by Turanga Maori, and that Turanga Maori were acting defensively at all times. They posited that the law protected the right of citizens to defend themselves against unlawful attacks by the Crown – if necessary, by having recourse to arms.

(1) *Dicey, martial law, and rebellion*

The seminal work in the area of martial law and rebellion is that of the pre-eminent English constitutional lawyer Professor Albert V Dicey.³²⁸ According to Dicey, there is strictly speaking no such thing as martial law in the British constitution. There is, however, a clear recognition of the right vested in the sovereign to repel invasion and to put down riots or rebellion where these amount to a serious threat to the existing legal order (including the Crown's legal, if not substantive, sovereignty): 'the occasion on which force can be employed, and the kind and degree of force which it is lawful to use in order to put down a riot, it is determined by nothing else than the necessity of the case.'³²⁹

To this is added the rider that it is not for the sovereign to decide the level of necessity or force to be applied to any particular situation:

one should always bear in mind that the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury and that the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ considerably from a judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment a riot may become a formidable rebellion, and a rebellion if unchecked become a successful revolution.³³⁰

The test therefore is not a simple reasonableness test. Dicey imposes a higher standard; namely, whether the Crown's actions were reasonably *necessary*. It seems to us that the higher standard is entirely appropriate. After all, the issue is the circumstances in which the Crown is entitled, according to law, to turn its guns on its own citizens.

(2) *Brookfield, the definition of rebellion, and the right to self-defence*

Professor Brookfield defined rebellion in this indirect but none the less comprehensive manner:

Counsel for Tuwharetoa, pointing to the absence of any formal definition of 'rebellion' in the New Zealand Settlements Act, in effect infers (quoting) from the two Acts that for their

328. Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: MacMillan and Company Ltd, 1915)

329. Ibid, p286

330. Ibid, pp286–287

purposes 'rebellion' ought to be interpreted as 'concerted action against the Crown, engaged in for the purpose of "subverting", or overthrowing, *by armed force or the threat of armed force*, "the authority of Her Majesty or Her Majesty's Government"'. I largely agree with that definition; though I would add the [underlined words] (perhaps implied anyway) and possibly omit the reference to 'subverting' as appropriate to a pre rebellion stage in the course of events. *The definition, at least as so adjusted, may be taken as a general one applicable in the martial law context as well as in relation to the legislation.* [Emphasis added.]³³¹

There was no serious challenge to that definition. As we have indicated, the Crown sought to supplement or sharpen the definition, but in our view the reference to the Crown pleas text serves merely to particularise the broad propositions provided by Professor Brookfield. It is our view, for example, that resisting the Crown through the erection and operation of a pa or fort is evidence of rebellion only if designed for the purposes described by Professor Brookfield. A pa erected for the purpose of self-defence, as described below, would not be evidence of rebellion.

There is, therefore, a significant rider on the extent of the Crown's right to suppress rebellion, and this rider relates to the countervailing right of the citizen to resist unnecessary or excessive force by the Crown. Thus, Professor Brookfield provided:

It will follow, subject to the fuller discussion below, that if and where Maori in fact were not in rebellion, neither the Suppression of Rebellion Act nor martial law outside that Act could lawfully be used against them . . . Faced by unlawful armed invasion by the forces of the Crown if and where that occurred, Maori were themselves entitled to meet force with force, by applicable standards of reasonableness (in self defence) or necessity (in defence of their dwellings).³³²

Similarly, the countervailing right of the citizen to self-defence is tightly constrained:

[The right of self-defence] must be limited to immediate actual defence by Maori to the aggression of the Crown's armed forces in any cases where that is shown to have occurred; but not to counter-attacks (except where these occurred as part of the immediate Maori response in, and as part of, the situation created by a particular attack by the Crown) or to Maori attacks launched quite independently of the Crown's original aggression, even if ultimately consequential on it.³³³

The Crown argued that Professor Brookfield's self-defence formulation was 'somewhat misconceived', but it offered no argument in support of that proposition and none was obvious

331. Brookfield, 'Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)', report commissioned by the Waitangi Tribunal, 1996 (Wai 143 RO1, doc M19(a)), p11

332. Ibid, p11

333. Ibid, p12

3.5.3(3)

to us.³³⁴ Accordingly, we adopt and apply the tests formulated by Dicey and Brookfield. The standards to be applied to the Crown are high, but in our view that is appropriate given the gravity of the subject. The Crown must reasonably apprehend that there is an intent to overturn the existing legal order, and that apprehension must be so clear as to render it necessary for the Crown to turn its guns on its own citizens. As a corollary, and again appropriately in our view, the right of the citizen to bear arms against unlawful State action is also tightly circumscribed.

(3) *Did the Crown act lawfully?*

From our view of the facts and the foregoing largely uncontested legal principles, it follows that the Crown acted unlawfully in attacking and subduing Waerenga a Hika Pa between 17 and 22 November 1865.

The proximate cause of tension in Turanga was not the arrival on the Maori side of a ‘particularly violent’ strain of Pai Marire in March but the arrival of Ngati Porou kawanatanga forces at the end of October, as encouraged directly by McLean. Leonard Williams had indicated at the beginning of October that the Turanga district had gone quiet, and McLean himself had held out the prospect of peace. Further, Turanga Maori leaders had amply demonstrated their willingness to make good such losses as had occurred through looting after the settlers evacuated Makaraka in response to the Ngati Porou arrival. Of itself, therefore, looting could not be evidence of the widespread breakdown of law and order; it may have warranted a firm police intervention by the Crown to bring the population to justice, but it could provide no basis for concluding that the Turanga district was in the throes of rebellion.

Clearly, Turanga Maori were not engaging in an attempt to overthrow the sovereign, nor was there evidence upon which the Crown could reasonably have concluded that this was the case. The Crown’s leading witness on Waerenga a Hika, Dr Battersby, clearly accepted this:

Mr Harvey: You would agree with me, wouldn’t you that those Turanga Maori in Waerenga a Hika were not conspiring to overthrow the government by force of arms?

Dr Battersby: I would agree with that but I would have to say the but, you did not ask if I accepted that definition . . .³³⁵

If the Crown had truly perceived a threat to the existing legal order (and by this we mean a threat to the Crown’s legal, as opposed to substantive, sovereignty) we believe that it would have declared a state of martial law in the district before proceeding. The Crown had done just this six weeks earlier in Opotiki as it moved against those who had murdered Völkner. It is true that such a proclamation was not a legal requirement, and we do not refer to it for that reason. But it is important, because the existence of such a proclamation is evidence of the state of mind of the Governor and relevant Crown officials prior to engaging in any conflict.

334. Document H14(3), p 27

335. Transcript 4.11, p 31

Though certainly not conclusive, it is evidence tending to support an argument that the Crown had carefully considered whether a state of rebellion existed and had chosen to formally invoke its right to preserve the peace. Again, though not conclusive, the absence of such a proclamation must also indicate the absence of such a state of mind. There was no proclamation in Turanga.

We also view it as significant that the 12 November reply of Rukupo and other Pai Marire chiefs to McLean indicated a clear wish to discuss the nature of the Crown's allegations. They had heard these allegations for the first time two days before, and it was proper that they reply to them. It is significant also that, even after McLean's failure to talk to Turanga Maori, Tareha Te Moananui, who was acting as the Crown's ostensible emissary, brokered a deal with Rukupo, who spoke for the Turanga Pai Marire leadership. Even if there was doubt about Rukupo's ability to deliver his constituency to the agreement (and the long list of signatories to the letter of 12 November shows that there is no room for such doubt on reasonable grounds), the least that can be said was that there was, in the agreement, a reasonable chance of resolving the issues between the parties without the Government having to shoot and kill its own citizens. The letter asked that the Turanga leaders be given the opportunity to put their perspective in response to the charges laid against them. Ought not a reasonable Crown have responded to that request, and engaged in discussion before sending in the military? It is obvious that the answer to this question is yes.

Rather than pursuing that possibility, McLean simply refused to engage except on terms of complete capitulation to the Crown and, perhaps more importantly, to at least 380 armed Ngati Porou. By McLean's terms, the surrender had to involve the disarming of Turanga Pai Marire. This would have been seen by the latter as out of the question – it would have left them defenceless against the Ngati Porou forces. The inability of colonial commanders to control the Ngati Porou force after the fall of the pa – and again later, after the fall of Ngatapa Pa (see ch5) – suggests that this fear was justified.

In addition, the circumstances of the pa during the siege demonstrate that the stand of Turanga Pai Marire was defensive only. Of the 800 inhabitants of the pa, 300 were women and children. Clearly, the Pai Marire portion of the population (and this must have amounted to about two-thirds of the district) had gathered to protect themselves and their families. They had not gathered to deal a fatal blow to the Crown's authority; that is, they had not gathered to rebel at all. We are aware of no other pa battle during the New Zealand wars where so many women and children were present.

In the result, it is clear in our view that the evidence does not demonstrate that Turanga Pai Marire sought to overthrow the authority of Her Majesty or Her Majesty's Government in Turanga. Waerenga a Hika was not a fort being held against the Queen's command; it was a defensive position established according to the legal principles articulated by Professor Brookfield. The evidence does not come close to showing that it was necessary on 16 November for the Crown to take the terrible step of attacking its own citizens in order to preserve the

3.5.3(4)

existing legal order. Waerenga a Hika was not fought by the colonial Government to preserve the ‘existing legal order’: it was fought to overturn the long-established Maori legal order and replace it with the new British legal order. As McLean said on 15 November 1865, ‘having used my utmost exertions to avert hostilities in this District, I find the Natives so obstinate in their determination to resist the *establishment of order and British Law*, that I have resolved to withdraw from further interference’ (emphasis added).³³⁶

The evidence is that at the time the attack on Waerenga a Hika was not necessary, merely convenient. The Crown had sufficient troops on the ground to defeat the Turanga Pai Marire, and the Ngati Porou and colonial forces were flushed with the success of the East Coast campaign. As Dr Battersby accepted, the time was right for the Crown to break the attitude of independence exhibited by Turanga Maori of all sides. Waerenga a Hika was no more than the pretext.

Turanga independence of mind may well have been troublesome to the Crown, but it was not illegal. It was certainly not rebellious. Most importantly, that very expectation of independence was guaranteed explicitly in the Treaty promise of *tino rangatiratanga*.

(4) *Rebellion and the Treaty relationship*

It must be axiomatic that a Crown which acts unlawfully so as to defeat the legal rights of Maori citizens is also acting in breach of the principles of the Treaty of Waitangi. Article 3 of the Treaty bestows upon Maori all the rights and privileges of British subjects, and British subjects have a right to the rule of law and to protection against a capricious sovereign. There is no principle more fundamental to British legal culture than that which subjects the sovereign to the ordinary law of the land. Though it is undoubtedly unnecessary to go further, it is appropriate to consider the preamble to the Treaty, which notes that the arrival of the Crown was to bring about an end to lawlessness. In the attack at Waerenga a Hika, it was the Crown that was being lawless, not Maori.

Beyond that, it seems to us that there are two Treaty principles of particular relevance to our assessment of Crown actions at Waerenga a Hika. The first is about process and attitude; the second, substantive rights.

As to process, we look to the Crown’s obligation to act at all times in accordance with the Treaty principle of utmost good faith, which was so firmly articulated by the Court of Appeal in the *Lands* case.³³⁷ This is a high standard. It imposes an obligation to behave impeccably in dealings with Maori; a negative duty to avoid any appearance whatever of manipulation or sharp dealing; and a positive duty to look to the Maori interest at all times and to protect that interest to the extent reasonably practicable in the circumstances.³³⁸ At Waerenga a Hika, the Crown did not act in utmost good faith: it manipulated existing tensions in Turanga

336. Draft, McLean to Fraser, 15 November 1865, AGG-HB4/8, Archives NZ (doc F16, p106)

337. *NZ Maori Council v Attorney-General* [1987] 2 NZLR 641 (CA)

338. See *R v Taylor and Williams* (1981) 62 CCC (2nd) 227, 235

in order to meet its strategic objectives and political convenience. In our view, McLean's manipulation, in particular his use of Tareha Te Moananui as a stalking horse – coupled with his own refusal to personally engage with the Turanga leadership – was calculated manipulation. It gave every appearance of sharp dealing in negotiations with Rukupo and the Pai Marire leaders. The evidence shows that officials actively conspired to defeat rather than to protect the interests of Turanga Pai Marire. In short, the evidence amply demonstrates that the Crown acted in breach of its Treaty obligation to act in utmost good faith.

We have already referred to the substantive Treaty right which was affected by these events – the guarantee of tino rangatiratanga. Wars in New Zealand between the Crown and Maori have always been about autonomy or self-determination on the part of Maori. The Waitangi Tribunal in its *Taranaki Report* eloquently reflected this:

Maori autonomy is pivotal to the Treaty and to the partnership concept it entails. . . . 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.

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The rhetorical question in the Government's eyes was, 'whose authority should prevail, that of Maori or that of the Queen?' The question in Maori eyes, as evidenced from the leadership of Wiremu Kingi, Te Whiti, and the Maori King, was how the respective authorities of Maori and Pakeha were to be recognised and respected and the partnerships maintained. To the governors of the day, such a position was an invitation to war. To Maori, it was the only foundation for peace.³³⁹

And so it was in Turanga at Waerenga a Hika. Stafford and McLean – key figures in the shaping and implementation of colonial policy at Turanga – saw continued Maori autonomy as anathema. But Turanga Maori were never going to give up their Treaty-guaranteed tribal autonomy without a fight. In our view, not only did English constitutional law give Maori a right of self-defence but the Treaty also contemplated a right to defend its guarantee of tino rangatiratanga – by force of arms if in response to unlawful Crown attack.

We would reiterate finally that the Government had the clear statutory option of taking steps to protect Maori autonomy. Section 71 of the Constitution Act 1852, as we have pointed out above, provided that native districts could be set apart by proclamation and that within those districts Maori law and institutions could be preserved and, no doubt, adapted to meet the needs of the new economy. It was always open to the Governor to make such a proclamation. There was always the possibility that the Crown and Maori could have struck a principled and constitutionally sanctioned balance between kawanatanga and rangatiratanga. The British Parliament had created a mechanism which provided for such a balance.

³³⁹. Waitangi Tribunal, *Taranaki Report*, pp5– 6

As well, in the House of Representatives late in 1865 an alternative measure was considered. FitzGerald's Native Provinces Bill provided for the creation of three semi-autonomous Maori provinces, one of them on the East Coast. 'Rebel' chiefs would be offered the authority and finance to administer and police their own districts. The Crown would be represented not by a magistrate but by a resident. FitzGerald proposed that a Government officer negotiate with Maori in selected districts over several months 'to ascertain what sort of government would be acceptable to them – what sort of government they would consent to live under, on condition that they would permit the Queen's authority to be carried out in their districts'.³⁴⁰

In other words, even after five years of war, the House was at least willing to explore a new kind of political relationship between the Crown and tribes, and the possibility of informal native districts. But the Bill was defeated in the House. The failure of the Crown to adopt either of these constitutional paths meant that a potent opportunity for peace in Turanga was lost.

(5) *The aftermath of the battle of Waerenga a Hika*

We return to the immediate aftermath of the battle at Waerenga a Hika. It is not a battle whose name looms large in the history of the New Zealand wars of the mid-nineteenth century; in fact, it is barely heard of beyond the Gisborne area. It is also not a battle that military historians have devoted much time or space to analysing. Professor Belich, in his book *The New Zealand Wars*, spent one paragraph on it. James Cowan, that indefatigable recorder of the battles of the wars, stretched, in his two-volume history, to four pages.³⁴¹ How, then, can we explain the Crown's next move: its fateful decision as to the treatment of those who emerged from the pa to surrender on 22 November 1865? We consider the detention of Turanga Maori without trial on Wharekauri in chapter 5. Here, we note the context in which that decision was shaped: the Crown's evident determination to finish what it had begun at Waerenga a Hika.

Stafford's instructions to McLean on 7 December – that the prisoners must be punished to mark their 'signal conduct' – indicate both the hard line that the Government intended to take and something of its purpose; they were to serve as a warning to others. But Stafford went further: 'It is full time,' he wrote, 'the Natives should know and believe that the Govt will really do what it says. Pity tis that after some 26 years of our (I was going to say "rule" but won't) presence in the Colony they have yet to find out that!'³⁴²

This was the hard-line colonial approach – infused, perhaps, with a growing sense of desperation that the wars could not be afforded much longer and that Maori were still

340. NZPD, 28 September 1865, p621

341. J Cowan, *The New Zealand Wars: a History of the Maori Campaigns and the Pioneering Period*, 2 vols (Wellington: Government Printer, 1983), vol 2, pp 124–128

342. 3 December 1865, McLean papers, ATL (E Bohan, Edward Stafford, p 216)

showing few signs of being ready to 'submit'. We have to ask why the Government mindset was so entrenched that it still could not turn to negotiation as an alternative to subjugation.

The Colonial Office in Britain, while accepting the need for 'pacification', had cautioned the Government in the past against a treatment of Maori that was too harsh and that would only compound their sense of alienation and grievance.³⁴³ As so often, however, the New Zealand Government was not listening. Considering themselves as having to make the real calls on the ground, governors and colonial Ministers tended to prefer a military solution. In the long run, this was not really a solution at all, as the Government would find in many parts of the North Island.

We cannot agree with the Crown's argument expressed before us that 'the imposition of control in a battlefield is not in any way inconsistent with a long-term aim of living in amity and without any precondition that particular values should be dominant'.³⁴⁴ It seems to us that the outcome for Turanga people of the Crown's 'imposition of control' on the battlefield, and its decision as to how to treat those afterwards taken prisoner, proved highly destructive of the long-term aim of 'living in amity'. The Crown's military solution at Turanga left over 70 people killed and over 100 Maori deported without trial. Their families followed. Thus, almost a fifth of the Turanga population were displaced. The Crown's high-handed actions in detaining and deporting all its prisoners, including Te Kooti, were not just illegal but foolish. How could the Crown have failed to anticipate the extreme sense of grievance that its actions were bound to create? How could the exercise of *kawanatanga* have failed so signally? The result of the Crown's actions was not peace and order but, ultimately, retribution and death. The angry despair that the Crown's actions produced was to be tragically revisited on those who had played a part in creating it.

3.5.4 Specific findings: how claimant groups were affected

As set out through this chapter, most Treaty breaches relating to the events of 1865 apply equally to all Turanga Maori. We have found that the Crown was in error when it judged that Maori in Turanga were 'in rebellion' and that it had no just cause for attacking them there. The Crown also had no justification under the Treaty for setting out to crush Maori autonomy in Turanga. In addition, however, we are concerned to quantify specific effects of the Crown's action at Waerenga a Hika, particularly in terms of loss of life. This is a painful but necessary task.

As far as we know, 71 of the defenders at Waerenga a Hika were killed by the Crown's forces or its Maori allies.³⁴⁵ We have no evidence that identifies the individual tribal affiliation of those who were killed. The majority of the casualties were likely to have belonged to Te

343. See, for instance, Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 20

344. Transcript 4.25, p 35

345. Document H14(3), p 38 ; doc A23, p 108; doc A43, p 37

Aitanga a Mahaki. Waerenga a Hika was a Te Aitanga a Mahaki pa. The Crown choice to attack that pa and not others was deliberate: on the eve of the battle, Donald McLean wrote to Fraser that ‘The tribe that more particularly requires to be chastised is the Aitanga Mahaki residing at Waerengahika’.³⁴⁶

Rongowhakaata too almost certainly lost men at Waerenga a Hika. Approximately 200 Rongowhakaata joined in the defence of the pa, some arriving after the siege had commenced.³⁴⁷

Among the casualties were doubtless some affiliated to Te Whanau a Kai, because they were likely to have supported their Mahaki relatives. It is possible that Te Whanau a Kai people were at Waerenga a Hika from the outset and, in any event, it is likely that some also came across to the pa with Rongowhakaata during the siege (Mr Stirling recorded that Pukeamionga, a pa near Patutahi, housed members of Rongowhakaata and Te Whanau a Kai under Anaru Matete).³⁴⁸

We can say with some certainty that the descendants of Rawiri Tamanui (Ngariki Kai-putahi) fought at Waerenga a Hika – Pera Te Uatuku and two of his immediate relatives were among the first batch of prisoners sent to Wharekauri – but we are unable to say, on the evidence before us, if any Ngariki Kaiputahi men were killed.³⁴⁹

It is also possible that some Ngai Tamanuhiri were present at Waerenga a Hika. If so, their losses were likely to have been fewer than those of other iwi. The Tribunal heard that people of Ngai Tamanuhiri descent were sent to Wharekauri, which indicates that some were present at the siege and surrendered there.³⁵⁰ The larger part of Ngai Tamanuhiri was probably not involved in the fighting.³⁵¹

For completeness, we note that the Turanga kawanatanga party that fought at Waerenga a Hika probably included some Rongowhakaata, some Ngai Tamanuhiri, and, perhaps, some Te Aitanga a Mahaki (we note that Hirini Te Kani claimed descent through Te Aitanga a Mahaki). We do not know what their losses may have been out of the 11 casualties on the kawanatanga side.

346. Draft, McLean to Fraser, 15 November 1865, AGG-HB4/8, Archives NZ (doc A10, p151), see also doc F16, p106

347. Document A10, p152; doc A23, p107

348. Document A23, p107

349. Document H8, p3; doc A22, p21

350. Ngai Tamanuhiri have identified eight individuals listed on the Wharekauri prisoner list: soc 11, para 10.2.

351. Document A35, pp26–27

CHAPTER 4

EAST COAST LEGISLATION

Te ai o mahara, ka mate au i Waerenga a Hika

Te ki mai koe, me whakawa marire

Hopu ana koe i a au, kawea ana ki Wharekauri

So you made the mistake of thinking I would die at Waerenga a Hika

Why could you not simply have tried me [in a court of law]

Instead you seized me and transported me off to Wharekauri

4.1 INTRODUCTION

Following the conflict at Waerenga a Hika, the Crown sought to implement a policy of land confiscation in Turanga. Initially, it was intended to use the New Zealand Settlements Act 1863 for this purpose, as had been done elsewhere in the North Island. No land was taken under this Act in Turanga, however, during 1866. Instead, the Crown embarked on alternative measures for the confiscation of the land. Meanwhile, those who had surrendered after Waerenga a Hika and were being detained were dispatched in three successive groups to Wharekauri.

In the early part of 1866, petroleum springs were discovered in Turanga, in the Waipaoa Valley. This made Turanga attractive both to commercial interests and to two rival provincial governments, Auckland and Hawke's Bay. At the end of the previous year, the New Zealand Government had decided to transfer the administrative control of confiscated lands within the Auckland province to the provincial government, and Turanga was then part of that province. Donald McLean, the superintendent of Hawke's Bay, was also the agent of the general government on the East Coast. Although McLean had initially favoured the confiscation of Turanga lands under the standard confiscation legislation (the New Zealand Settlements Act), he did not in fact pursue this in 1866. It appears that he had hoped that Parliament would pass legislation later in the year changing the provincial boundaries so that Turanga would become part of Hawke's Bay.

Frederick Whitaker, the superintendent of Auckland province, did not push for confiscation either. Whitaker sent his own agent to negotiate with the Maori owners of the oil springs

lands, thus competing with agents of Auckland commercial interests. Whitaker initially wanted to secure provincial rights to the lands once the Native Land Court awarded title to the owners. He found, however, that many of the owners had been deemed 'rebels' and were being held on Wharekauri.

This made it politically difficult for Whitaker to buy the land that he wanted. Turanga Maori, aware of the possibility that their land could be confiscated, had applied to have their title determined under the Native Lands Act 1865. The Native Land Court was scheduled to sit in Turanga under this Act on 12 September 1866, but the Crown ensured the adjournment of both that and the next hearing, which had been scheduled for 29 October 1866. Whitaker now worked with the Stafford Government to develop new legislation of the sort that he wanted for the East Coast.

In October 1866, nearly a year after Waerenga a Hika, Parliament finally passed the East Coast Land Titles Investigation Act. This Act provided a more sophisticated mechanism for the confiscation of 'rebel' land on the East Coast than the blunter instrument of the New Zealand Settlements Act 1863.¹ The 1866 Act enabled the Native Land Court to investigate title to lands that were subject to the Act, and to distinguish in its investigations between those Maori who had been engaged in 'rebellion' and those who had not. The court could make awards to Maori who had not 'rebelled', and, where it found that land was jointly owned by 'rebels' and 'non rebels', it had the power to partition out the land of those who had not 'rebelled' and award it to them. Land found to be that of 'rebels' was to be declared Crown land. The Act provided that all Crown lands not reserved were to be sold or let. The money received was to be applied towards meeting the expenses incurred in suppressing the 'rebellion'. The Native Land Court was thus to exercise a confiscatory role – a role that it did not possess under the Native Lands Act.

In November 1866, Captain Reginald Biggs was appointed to represent the Crown at hearings of Turanga cases in the court and to investigate the respective interests of 'rebel' and 'friendly' Maori. Biggs, however, decided it would be preferable to secure one large block of land before the court sat, and, in accordance with Crown policy elsewhere on the East Coast, he tried to secure a 'cession' of land from the Turanga chiefs.

In 1867, because of drafting defects in the East Coast Land Titles Investigation Act, Biggs was able to secure an adjournment of the court before it could sit under that law. The East Coast Land Titles Investigation Act Amendment Act 1867, passed on 10 October 1867, corrected the errors in the original legislation and amended the schedule so as to include a greater area of land under the Act, including the oil springs land. But by then it had become apparent that the oil could not easily be extracted and was unlikely to be a commercial proposition.

1. The effect of the 1863 Act was extended by the New Zealand Settlements Amendment and Continuance Act 1865.

A further sitting of the Native Land Court was then scheduled for 9 March 1868. However, Turanga Maori boycotted the sitting on the ground that they had no confidence in the court, sitting under the 'confiscatory' East Coast legislation.

By 1868, Turanga Maori, disenchanted both with the Crown's agent and with the new powers of the Native Land Court, petitioned Parliament. Parliament in turn debated the issue of East Coast confiscation at length, and new legislation – the East Coast Act 1868 – was finally passed, repealing the previous East Coast Titles Act 1866 and its 1867 amendment. The East Coast Act made the confiscatory powers of the Native Land Court explicit. A key change from the earlier legislation was the discretion given to the court to order a certificate of title to 'non rebel' owners of a whole block, even where some of the owners were deemed 'rebels'. It also provided that the court might divide lands on which it adjudicated between those who had not been in rebellion and those who were deemed rebels, and that the lands of 'rebels' should be deemed to be Crown land.

Ultimately, the legislation considered in this chapter had little impact on the determination of title to Turanga land. During 1867 and 1868, Biggs continued to seek a cession, and, though the chiefs would not agree to give him the amount of land he sought, they were prepared, at different times, to offer him land. After two fruitless years of effort, Biggs was prepared to accept a cession of just 10,000 to 15,000 acres, which was a much smaller area than he had originally sought. But, before he could finally reach an agreement, he was killed in Te Kooti's November 1868 assault on the settlers at Matawhero. It was only after Te Kooti's attacks on the Turanga communities that the Crown managed to secure a substantial cession of land from Turanga Maori (see ch 6).

Throughout that period, while the Crown considered its confiscation policy, the prisoners who had been detained after their surrender at Waerenga a Hika had been held on Wharekauri without trial. Finally, under Te Kooti's leadership, they organised their escape to the mainland. We return to consider these events in the next chapter.

Only after the tragic events at Turanga that followed the return of the detainees did the Crown gain control of over one million acres of Turanga land by a 'deed of cession'. This deed was entered into on 18 December 1868 and came after three years of negotiation between the Crown and Turanga Maori following the hostilities at Waerenga a Hika. The nature and significance of the deed of cession are considered in chapter 6.

The key issues arising in respect of the Crown's confiscation policy in Turanga are:

- ▶ If Turanga Maori were not in rebellion at Waerenga a Hika, should their lands have been subject to confiscation or an imposed cession?
- ▶ Why did the Crown decide not to implement confiscation in Turanga under the New Zealand Settlements Act during 1866?
- ▶ Why did the Crown decide to pass new legislation (the East Coast Land Titles Investigation Act 1866, its 1867 amendment, and the East Coast Act 1868) to implement confiscation in Turanga?

- ▶ Why, from the end of 1866, did the Crown attempt to confiscate Turanga land by two different mechanisms: namely, via an imposed cession and, under the East Coast Land Titles legislation, through the Native Land Court?
- ▶ What impact did the East Coast legislation have on the willingness of Turanga Maori to agree to a cession of land?
- ▶ What was the impact of the Crown's delay in implementing its confiscation policy on those Turanga Maori who were held without trial on Wharekauri after Waerenga a Hika?

4.2 EARLY CONFISCATION POLICY IN TURANGA

The possibility of the confiscation of Turanga land was first mentioned in Stafford's instructions to Donald McLean of 1 November 1865. McLean was to warn Maori on the East Coast and at Turanga that, if they did not preserve the peace, part of their land would be taken to defray the cost of repressing outrage and maintaining order.² Shortly afterwards, McLean met with Ngati Porou kwanatanga chiefs further north at Waiapu. He indicated that the Crown did not wish to 'interfere with the land taken from the Hauhaus', but that it would 'make it all over' to friendly chiefs. 'The Hauhaus,' he said, had to be provided for.³

The Crown first intimated the possibility of land confiscation to Turanga Pai Marire leaders in the terms of 10 November 1865, which McLean sent to them a week before Waerenga a Hika Pa was invested (see ch3). If they did not meet the terms, 'the lands of the promoters of disturbance' would be taken, 'for the purpose of defraying the expenses' of Pakeha and Maori military settlers (see ch3).

McLean stated later that 'The Government always contemplated the confiscation of land on the East Coast, and the carrying out of some arrangement that would lead to a settlement of the question'.⁴ According to Crown witnesses before us, this policy was to be part of an overall strategy to achieve two objectives: the punishment of those 'deemed to be in rebellion' and the pacification of the North Island.⁵

It seems that the Government initially contemplated taking Turanga and East Coast lands under the New Zealand Settlements Act 1863, the confiscation legislation that it had used elsewhere in the North Island. It hoped to do so, however, with some measure of agreement from Maori. By 1865, the Government was well aware of the British Government's deep reservations about the New Zealand Settlements Act. This statute provided for the confiscation of Maori land, at Executive discretion, in districts where a tribe or a section of a tribe, or 'any considerable number thereof' were deemed to be in rebellion. In practice, however, once the

2. Document F18, p17

3. Minutes of conference, 6 November 1865, AGG-HB1/1, Archives NZ (doc F18, p17)

4. McLean, 3 September 1868, NZPD, 1868, vol3, p149 (doc F18, p6)

5. Document F18, pp6-7; doc H14(5), pp19-20

Crown declared a district under the 1863 Act, all land within the district could be confiscated as a matter of course. The Crown thus gained control of all the land within a proclaimed district, and it could decide where to place military settlers, which land to sell to help defray the costs of suppressing 'insurrection', and how to deal with Maori who had claims to land in the district.

A key feature of the New Zealand Settlements Act was its provision for military settlement within proclaimed districts, in 'sites for settlement' defined by the Crown. The settlers would form the nuclei of British settlement in districts deemed 'rebellious' and they would act as a deterrent to further 'native' uprisings. Maori who had not been engaged in 'levying or making war', or carrying arms against the Queen or her forces, would be entitled to submit written claims for compensation for lands taken under the Act, and these claims would be heard by compensation courts set up for the purpose.⁶ These courts would be empowered to issue the claimants with certificates describing the land concerned and specifying the amount of compensation they were entitled to in respect of that land. The specified compensation would then be paid by the Colonial Treasurer.

In a dispatch of April 1864, Edward Cardwell, the Secretary of State for the Colonies, had intimated the imperial government's concern at the potential for the abuse of the legislation, which, in its view, left Maori open to proceedings which might be 'secret, without argument, and without appeal'.⁷ The Governor was advised that, although the Queen's assent to the legislation would not be withheld, conditions would be set on the operation of the New Zealand Settlements Act. Cardwell instructed that the operation of the Act should be limited to a definite period, perhaps two years, and that the extent of the confiscations and the exact locations of the land to be taken should be made public as soon as possible. The Governor himself was to ensure that he was personally satisfied that confiscation was 'just and moderate'.⁸ The Secretary of State went on to suggest to Governor Grey that, rather than confiscating land, it would be desirable that confiscation 'take the form of a cession imposed by yourself and General Cameron upon the conquered tribes'.⁹

This instruction seems to have been the basis for McLean's first approach to securing land at Turanga. After Waerenga a Hika, he returned to Turanga on 29 November 1865 to arrange the fate of those who had given themselves up to the colonial forces. Some were being held at the Kohanga Karearea redoubt, while others were at Oweta Pa. JC Richmond later testified that McLean met with Turanga Maori in early December and arranged for the whole of their lands to be placed at the disposal of the Government. According to Richmond's account, McLean had obtained:

6. Section 5 of the Act set out categories of offences, the commitment of any one of which would debar any person from being granted compensation under the Act. They included assisting any persons levying war or carrying arms against the Queen, or committing any 'outrage against person or property' in furthering such aims.

7. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, app, p 20

8. Ibid, p 23

9. Ibid, p 22

the unanimous consent of the whole Native population of the Turanga District, including the Rebel Natives who had been defeated, the Loyal Natives who had fought on our side, and the Neutral Natives, who had taken no active part on either side, an arrangement to the effect that the whole of their joint lands should be at the absolute disposal of the Government.¹⁰

JD Ormond gave a similar account to Parliament in September 1867, stating that, after Waerenga a Hika, the 'Natives' (both 'rebel' and 'friendly') had agreed with McLean to 'put the whole of their estate at his disposal, and expressed their willingness to accept whatever terms he might make in respect to them'. McLean, according to Ormond, explained that the 'friendly' Maori should get some of the land of those who had been in rebellion, that the Crown would recoup the expenses of the military forces sent against them from 'the proceeds of land that would be forfeited', and that settler claims would also be dealt with fairly.¹¹

In fact, it is clear that after Waerenga a Hika both Stafford and McLean assumed that confiscation would be implemented. In December 1865, Stafford wrote McLean that a 'scheme of colonization of the lands forfeited by the Natives on the East Coast' was very desirable, especially to enable the Government to recoup its military costs.¹² McLean replied that he was willing to prepare a scheme for the colonisation of the 'newly conquered Districts' and that either the New Zealand Settlements Act 1863 or the new Outlying Districts Police Act 1865 might be used. This latter Act provided for the confiscation of land by the Governor, if the 'Chiefs and other inhabitants' of a district failed to deliver up suspected criminals (including those who might have committed 'armed resistance to any officer of the law'). The Governor then might sell such lands to pay for the cost of establishing magistrates and police officers in 'outlying districts'.¹³ McLean suggested that a district stretching south from Hicks Bay to Turanga and inland to the Hikurangi Ranges might be proclaimed.¹⁴

A few days later, McLean wrote to Stafford that the war 'is fast approaching an end on the EC [East Coast]', and he reassured Stafford about the costs of feeding 'native' forces and the prisoners: 'the confiscated territory will more than cover *all* [expenses] besides leaving a very handsome margin' (emphasis added).¹⁵

Stafford was privately doubtful as to whether it would in fact be possible to recoup a large part of the costs, given the need both to compensate loyal Maori whose land was included in

10. Public Petitions Committee, 1867/9, minutes and report, Le 1 1867, JHR, 1867, pp 71–72 (doc F18, p18)

11. 10 September 1867, NZPD, 1867, vol 1, p 859 (doc A10, pp 172–173)

12. [Stafford] to McLean, [7 December 1865] (draft), IA1/1866/1470, Archives NZ (doc A10, p176)

13. Where the Governor suspected that 'perpetrators' or 'suspected perpetrators' of murder, assault with intent to kill, rape, 'burglary, arson or armed resistance to an officer of the law' were being 'harboured or protected' in any district, he might issue a proclamation calling on the chiefs and people of the district to aid in the arrest of such criminals. The proclamation was to warn that if the chiefs withheld their co-operation, their lands were liable to be brought under the Act. The Governor might then declare a district under the Act, and he could also alter the boundaries of a district at his discretion.

14. McLean to Colonial Secretary, 12 December 1865, 1/1866/1470, Archives NZ (doc A10(a), vol 1, pp 457–458)

15. McLean to Stafford, 16 December 1865, McLean papers, MS papers 0032–0019, ATL (doc A10(a), vol 2, pp 796–797)

confiscated areas and to provide for reserves for ‘natives’ and military settlers’ requirements. If the settlers could be made self-supporting and self-defending, that was the maximum that might be hoped for. But he was anxious for a ‘good & safe scheme’.¹⁶ Officially, however, Stafford endorsed the use of the New Zealand Settlements Act 1863 with enthusiasm, agreeing that the Government should take possession of the ‘forfeited’ East Coast lands and that the lands should be systematically settled, so that ‘peace and order’ might be maintained:

I believe no better course could be taken than to bring all the lands on the East Coast under that Act with the object of apportioning them between Natives and Europeans in organised settlements strong and progressive enough to be able of themselves to enforce Law and Order.¹⁷

McLean agreed that the New Zealand Settlements Act should be used: ‘The plan you suggest of bringing the land on the East Coast under the New Zealand Settlements Act is the only one. There will be no difficulty in getting the Natives to agree to it, they have already done so for all practical purposes.’¹⁸ The land should be surveyed, the confiscated land set apart, the title of ‘friendlies’ (kawanatanga Maori) confirmed, and part of the proceeds of sale of confiscated land given to them.¹⁹

In the first few months of 1866, as the Government began to send Turanga detainees away to Wharekauri, apprehension among Turanga Maori as to the Crown’s intentions was evident. In January 1866, Biggs wrote to McLean to report that ‘The impression among the Maoris at Turanga is, that all those who are in any way implicated with the Hau Hau, will lose the whole of their lands’.²⁰ On 20 February, Defence Minister Colonel Haultain visited Turanga and indicated the Government’s intention of deporting a number of prisoners to Wharekauri, ‘the object being to have them out of the way until the question of the confiscation of land should be settled’.²¹ On 3 March, the first group of detainees were sent to Napier. In April, a rumour circulated among Turanga Maori that ‘they were all going to be sent to the Chathams and their lands divided between Ngati Porou and the Queen’.²² Between March and June, three groups in total were sent to Wharekauri.

16. Stafford to McLean, [4] January [1866?], McLean papers, MS papers 0032–0584, ATL (doc A10(a), vol2, pp1245–1248).

17. Stafford to McLean, 13 January 1866, AGG-HB official letter book, qms-1213, ATL (doc A10, pp178–179)

18. McLean to Stafford, 17 January 1866, McLean papers, qms-1203, ATL (as quoted doc A10, p179)

19. The New Zealand Settlements Amendment and Continuance Act 1865, passed on 30 October 1865, provided for the Crown to abandon its right to take land in respect of which compensation was claimed at any time, after which such land would be excluded from the operation of the settlements legislation. It further provided for land to be granted to Maori, either wholly or in part, in compensation for land to which they had submitted claims under the provisions of the Act. The Colonial Secretary might also decide at any time before the Compensation Court made an award to give the claimants land instead of money. In such cases, the court would determine the extent of the land to be granted.

20. Biggs to McLean, 4 January 1866, McLean papers, MS papers 0032–0162, ATL (doc A10(a), vol2, p832)

21. W L Williams, *East Coast (NZ) Historical Records* (Gisborne: Poverty Bay Herald, 1932), p50 (doc A1, p47)

22. Document A1, p48

4.2.1 The origins of the East Coast Land Titles Investigation Act 1866

Despite the intentions of the Government at the beginning of 1866, however, confiscation was not implemented immediately under the New Zealand Settlements Act. On the face of it, this was an unexpected development in light of the correspondence that had passed between Stafford and McLean from December 1865 to January 1866. On 16 December 1865, McLean promised Stafford that he would send his plan of settlement ‘very soon’.²³ Much later, in 1868, Stafford referred in Parliament to their correspondence, and he reminded McLean that he had ‘gladly accepted’ his proposals and that he had asked McLean to develop them and formulate a Bill that could be introduced into the House in 1866. But, Stafford added:

for some reason or another, which to this day I am not acquainted with, the honourable gentleman, either from his duties preventing him, or from some other cause, did not do so, and the fact remains, that he made no proposal in writing, and I believe not even verbally, for settling these difficulties.²⁴

McLean, though sitting in the House, offered no explanation in 1868 either.

By May 1866, McLean had in fact rethought confiscation under the New Zealand Settlements Act. His close political colleague, JD Ormond, wrote to him on 2 May to reassure him that he was no longer in ‘fear’ of the imminent confiscation of East Coast land before the General Assembly met (the session was due to open at the end of June); Stafford, he said, would not rush into it. Ormond had mentioned in a letter to Governor Grey that, should any such proposal be aired before the Assembly convened, it would be helpful if he did not ‘encourage’ it.²⁵ Five days later, on 7 May 1866, McLean wrote to Stafford warning that no proclamation relating to the confiscation of ‘rebel lands on the East Coast’ should be issued in the meantime – he evidently meant a proclamation under the New Zealand Settlements Act – until he could report that ‘the war on the East Coast [was] finally ended’. ‘Disaffected Natives’ still threatened Poverty Bay and Wairoa. McLean suggested that it would be important to visit the coast and mark off the Hauhau lands from those of ‘friendly Natives’ before any further steps were taken.²⁶ Stafford replied, with some evident surprise: ‘you appear to have changed your mind from what you first proposed to me as to the settlement of the lands on the East Coast’.²⁷ He suggested further that, since Parliament was about to sit, the whole matter would have to be brought before it and there might in fact need to be a change to the existing law.

23. McLean to Stafford, 16 December 1865, McLean papers, MS papers 0032–0019, ATL (doc A10(a), vol2, p796)

24. 3 September 1868, NZPD, 1868, vol3, p154

25. Ormond to McLean, 2 May 1866, McLean papers, MS papers 0032–0481, ATL (doc A10, p203)

26. McLean to Colonial Secretary, 7 May 1866, IA1/1866/1470, Archives NZ (doc A10, pp204–205)

27. Stafford to McLean, 15 May 1866, McLean papers, MS papers 0032–0584 (doc A10(a), vol2, p1249)

4.2.2 The transfer of confiscated land to the Auckland Provincial Government

During the latter months of 1865 and the early part of 1866, there were new developments regarding the administration and settlement of confiscated lands. On 26 October 1865, the House of Representatives passed a number of resolutions declaring the terms by which the administration of confiscated lands within the Auckland province would be transferred to the Auckland Provincial Government ‘for the purposes of colonization’.²⁸ Stafford, as the new Premier, was concerned that the general government should not be responsible for immigration and the settlement of confiscated lands. Some conditions, however, were placed on the transfer of the lands to the Auckland province. Sufficient lands had to be retained to meet the general government’s commitments to military settlers, and the province had to pay Maori any compensation awarded by the Compensation Court as well as compensate settlers for war losses. The province also had to undertake to spend the whole proceeds of the sale of confiscated lands on colonisation and for the general advantage of the confiscated districts. Discussions between the general government and the Auckland superintendent on the funding of this proposal continued into January 1866.²⁹ Then, on 2 February 1866, the Auckland Provincial Government agreed to accept the transfer of the confiscated lands.³⁰ This secured Auckland the right to plan the settlement of the lands and to gain the revenue from their sales, subject to various liabilities it had to meet.³¹ The Auckland government was primarily interested in the Waikato and Turanga lands, but it was also anxious to secure the recently confiscated Opotiki lands.³² In these circumstances, any Turanga lands which might be confiscated would attract greater attention.

4.2.3 The discovery of petroleum in Turanga

The discovery of petroleum in Turanga early in 1866 was an additional factor in the growing interest in Turanga lands. Oil was discovered in the Waipaoa Valley, about 35 miles up the river, as well as at Waiapu and at Te Araroa, near East Cape. Samples of the Waipaoa oil were received in February 1866 by James Mackelvie, a partner in, and the general manager of, the well-known Auckland firm Brown, Campbell and Company. Mackelvie was excited by the discovery, considering that the consumption of oil in the Australian colonies would be

28. Extract from the *Journals of the House of Representatives*, 26 October 1865, AJHR, 1866, A-2, p1

29. Initially, it was agreed that the general government would make a temporary loan to the provincial government of £100,000. When the General Assembly reconvened later in the year, the Government would introduce a Bill to raise £250,000 on behalf of the Auckland Provincial Government to carry out the settlement of the confiscated lands: Stafford to Whitaker, 18 January 1866, AJHR, 1866, A-2, p5.

30. Extract from the *Journals of the Auckland Provincial Council*, 2 February 1866, AJHR, 1866, A-2, p9

31. In fact, by May 1866, the Auckland Provincial Government and the general government had been unable to resolve difficulties which arose from the Auckland Provincial Council’s proposed regulations for the sale of confiscated lands (which had to be made by Order in Council), and the matter was held over till the General Assembly met at the end of June.

32. Whitaker to Stafford, 5 March 1866, AJHR, 1866, A-2, pp10–11

‘enormous’.³³ By early May, the firm had dispatched two agents, James Preece and Henry Hanson Turton, to follow up the discovery. The *Hawke’s Bay Herald* published a story about the petroleum on 14 April, describing the whole valley adjoining the Waipaoa as ‘saturated with oil’. The discovery, it said, ‘opens up a whole field for British enterprise’.³⁴ News of the discoveries spread rapidly through Australasia and aroused substantial new interest in the Turanga lands. This led to competition both between potential private developers and provincial governments and between the two interested provincial governments (Auckland and Hawke’s Bay). Each government, it may be noted, was headed by a major political player of the time. Auckland’s superintendent was Frederick Whitaker; Donald McLean was the superintendent of Hawke’s Bay. Though Turanga fell within the boundaries of Auckland province, McLean had seen the possibilities for his own province in expanding northwards. During 1865 and 1866, there was increasing agitation among the settlers of Hawke’s Bay and Turanga for the annexation of the whole East Coast to Hawke’s Bay.³⁵ Whitaker and McLean were also both agents for the general government, Whitaker in Auckland and McLean on the East Coast.³⁶

During May and June 1866, speculators approached the relevant political authority, the superintendent of Auckland province, to lease the oil springs. Among them was Julius Vogel, then a journalist and the member of the House of Representatives for Dunedin North. On 11 May, on behalf of Dunedin and Melbourne interests, Vogel wrote to Whitaker offering to lease between 500 and 2500 acres for 21 years, ‘whenever your Honor is in a position to grant it’, and to pay a royalty of one-fifteenth of the oil raised.³⁷ In his reply, Whitaker made it clear that, in order to gain title to the land, he intended to go through the Native Land Court.³⁸ In consequence of Vogel’s offer, Whitaker intended taking measures to secure the land, on behalf of the Auckland Provincial Government, through the court. He would then be prepared to negotiate a lease with Vogel. Whitaker also sent an agent of the province, Henry Rice, to conduct a full inquiry into the ‘state of the district’, the oil springs, and the title to the land where the springs were situated, with a view to the provincial government being able to acquire the land.³⁹

33. GC Dunstall, ‘Colonial Merchant: JT MacKelvie, Brown Campbell and Co, and the Business Community of Auckland, 1865–1871’, MA thesis, University of Auckland, 1970, p171

34. *Hawke’s Bay Herald*, 14 April 1866

35. Auckland was considered too distant, especially in a time of conflict and burgeoning colonisation: RH Truscott, ‘Poverty Bay and Colonial Land Policy, 1865–1868’, MA thesis, University of Auckland, 1976, pp 6–7.

36. We have already discussed McLean’s role as general government agent in chapter 3. The role of general government agent in Auckland was created after the seat of government moved from Auckland to Wellington in 1865.

37. Vogel to superintendent of Auckland, 11 May 1866, JAPC, 1866–1867, sess 20, A-12, p3 (doc A10(a), vol4 p2298); Truscott, p17

38. We deal with the ordinary working of the Native Land Court in chapter 8. For present purposes, it is important to emphasise that the Native Land Court was established as an independent court of record to determine Maori title to customary land and to provide for the conversion of customary title to Crown-derived title.

39. Carleton to Rice, 18 May 1866, JAPC, 1866–1867, sess 20, A-12, p6 (doc A10(a), vol4, p2301)

By June, Rice had visited the springs at Mangatu, of which there were 10, and reported favourably on them. He had discovered, as noted above, that the land, and other lands in the district, had been ‘handed over to Mr McLean for the [general] Government’ but that ‘some of the Queen’s natives’ had not signed the document. Rice had thus drawn up his own document for Maori to sign which assigned the land and the oil springs to the Auckland Provincial Government. He had gained the signature of the ‘principal owner’, Henare Ruru, who had promised to secure more signatures for him.⁴⁰ James Preece was also in the district securing signatures and making downpayments to Maori owners; he claimed ‘all but one man’ had agreed to sell the springs to Brown, Campbell and Company.⁴¹ According to a forceful letter he later wrote, Preece had secured his agreement before Rice had even spoken to Maori.⁴² Rice also reported both the interests of a Napier firm in the springs and the activity in the district of representatives from Hawke’s Bay, who were gathering signatures for their petition to have Turanga annexed to Hawke’s Bay province.

At this point, Whitaker and Mackelvie each took further steps to improve their positions. Mackelvie evidently decided that his best course was to push for a Native Land Court hearing, and he secured the services of lawyer Thomas Gillies to lobby Chief Judge Fenton on the company’s behalf for a sitting of the court on the East Coast.

4.2.4 The Native Land Court on the East Coast

On 17 July 1866, Chief Judge Fenton requested the publication of notices advertising a sitting of the Native Land Court at Waiapu and Turanga in September. Mackelvie reported on this with some triumph to Brown:

Gillies has been very useful in this business and as Fenton the judge of the native land court, considers himself under obligation to Gillies he is now doing all he can to assist in this matter. A Court will be held at Turanganui on 12 September, which is as soon as the land can be surveyed and another court at Waiapu on the 24 idem.⁴³

But the Government moved to stop the hearings; the Native Minister A H Russell refused to publish the notices in the *Kahiti* as the Act required him to, stating that the district was not sufficiently settled to allow for such sittings.⁴⁴ Mackelvie referred to the Government’s explanation as ‘d—d humbug’; according to him, the real reason for stalling the court sitting was to keep his company out of the oil springs.⁴⁵ Mackelvie was cynically confident, however,

40. Rice to superintendent, 11 June 1866, JAPC, 1866–1867, sess 20, A-12, pp7–8 (doc A10(a), vol4, pp2302–2303)

41. Document A10, p189

42. Rice to Whitaker, 15 June 1866, JAPC, 1866–1867, sess 20, A-12, p8 (doc A10(a), vol4, p2303); J Preece to Whitaker, 3 September 1866, JAPC, 1866–1867, sess 20, A-12, p22 (doc A10(a), vol4, p2317)

43. Mackelvie to Brown, 17 July 1866, Mackelvie papers, APL (doc A10, p189)

44. Document A10, p189

45. Mackelvie to Hamilton, 10 August 1866, Mackelvie papers, APL (doc A10, p190)

that, if those Maori who had received payments from his company petitioned the Governor for a court hearing in order that they could honour their commitments to sell, their position would be a strong one.⁴⁶

Preece and Turton, Mackelvie's agents, complained to the Colonial Secretary. In a letter to Stafford of 8 August, they asserted the right of 'loyal' Maori to take their lands to the Native Land Court for an investigation of their title. Those applying to the court, they stated, were the proper owners of the lands, had never been in rebellion, and sought recognition of their title to enable them to sell land to developers, a situation that would clearly be in the best interests of the district. Preece and Turton themselves had carried out survey work (according to Rice, they had brought a 'staff of surveyors' to Mangatu) and had incurred expenses in preparing claims for the court.⁴⁷ The agents pointed to the rival provincial governments of Auckland and Hawke's Bay as being dogs in the manger, anxious only to keep private enterprise out in the hope that each could acquire the district for its own province. For this reason, they asserted, the 'unsettled state' of the East Coast districts was being 'grossly magnified' so that a confiscation might be justified.⁴⁸

Turton and Preece thus highlighted three central issues in the politicking under way at this time. The first was the question of whether the owners of the oil springs land were, or were not, 'rebels'. (If some of them were, then a further question arose as to how their lands were to be dealt with.) The second issue was the political rivalry between the two provincial governments, coupled with their common interest in keeping out the private developers, and the third issue was the relationship between the confiscated lands and the Native Land Court.

At this point, Donald McLean reacted angrily to suggestions that the court sitting should proceed. He questioned whether Preece and Turton had any knowledge of whether the lands they sought did or did not belong to 'rebels', and he argued that the agents were irresponsible and had no concern for the possible results of their dealing with Maori for land which might affect 'the relations of hostile native tribes to each other and [*sic*] the peace of that part of the District'.⁴⁹

Preece and Turton continued to push for the advertised sitting of the court to proceed, and, in support of their position, they dispatched a letter from some claimants to the Governor. They reiterated that the district was not, in their view, in a 'disturbed state'.⁵⁰ Leonard Williams noted a few days later that Preece was going to Wellington to see about the court sitting, and he speculated that the Government might not have wanted to see the court sit until the confiscation deal had been worked out: 'I fancy that the Govt do not want to have any thing of that sort done until they have decided what they are going to do in the district.'⁵¹

46. Document A10, pp190–191

47. Rice to Deputy Superintendent, 17 August 1866, JAPC, 1866–1867, sess 20, A-12, p9 (doc A10(a), vol4, p2304)

48. Turton to Stafford, 8 August 1866, MA62/8, Archives NZ (doc A10, pp191–192)

49. McLean file note, 20 August 1866, MA62/8, Archives NZ (doc F18, p22)

50. Preece and Turton to Colonial Secretary, 23 August 1866, MA62/8, Archives NZ (doc F18, p22)

51. Document F18, p23, citing L Williams to W Williams, 27 August 1866, MS copy micro 0677–11, ATL.

On 4 September, McLean urged the Government that the court should not sit on the East Coast until an arrangement had been reached between the Government and Maori; to do so would be ‘both inexpedient and impolitic’.⁵² But it was not till 8 September that JC Richmond wrote to Chief Judge Fenton to encourage him to postpone the sitting on the ground that it would ‘give rise to Embarrassment and be injurious to the public service’.⁵³

Ultimately, the first scheduled hearing of the Native Land Court did not take place. The sitting was adjourned by Judge Monro till 29 October 1866, but that sitting did not take place either. Richmond informed Fenton that he should withhold further notices of sitting till notified by the Government. But Fenton had already posted his notices. His reply to Richmond informing him of this, and expressing his relief that he had acted before receiving Richmond’s letter, was a defiant one:

your letter would have caused me the greatest Embarrassment for, without questioning the truth of the statement made in your letter of the 8th instant, I cannot pretend to be unaware that the Government have no lawful authority [*ex mers* motion?] to stop the sittings of the Court, and I remember that Mr Fitzgerald [*sic*] when carrying the Native Land Bill through the House of Representatives explained that the exclusion of the power of the Executive Government to influence or interfere with the proceedings of the Court has a chief point in which an alteration had been made from the Act of 1862 and he enlarged upon this great principle and the House deliberately adopted it.⁵⁴

Despite Fenton’s protest, however, the sitting was adjourned, as we outline in the next section. When the Native Land Court did finally sit, it was under the new East Coast Land Titles Investigation Act 1866.

4.2.5 Whitaker’s attempts to secure the oil springs, 1866

In the meantime, Whitaker had done his own lobbying for Auckland province. Early in July 1866, he went to Wellington to attend the General Assembly and had discussions with Stafford, the Premier and Colonial Secretary. Whitaker, according to his own later account, had already concluded that the Native Land Court could not be used to determine title because the law left it no alternative but to recognise ‘Hauhau’ claims. Yet, clearly, ‘Hauhau’ rebels, some of whom were prisoners (here, Whitaker referred to those whom the Government had sent to Wharekauri), could not be allowed to deal with their land on equal terms with ‘loyal natives’. Whitaker thus offered the intervention of his own provincial government as a solution; for a province might both buy the title of the ‘loyal’ natives and make a special arrangement with the general government respecting the claims of the ‘Hau Hau rebels,

52. McLean memo, 4 September 1866, MA62/8, Archives NZ (doc F18, p23)

53. Richmond to Chief Judge Fenton, 8 September 1866, MA62/8, Archives NZ (doc F18, p24)

54. Fenton to Richmond, 25 September 1866, MA62/8, Archives NZ (doc F18, p25)

captive and at large'.⁵⁵ Thus, while Preece and Turton were pressing for a Native Land Court sitting, Whitaker was in effect outflanking them by manoeuvring to circumvent the court.

In August, Whitaker took the first steps to implement such an arrangement. As superintendent of Auckland province, he applied to the Colonial Secretary for permission to negotiate valid purchases of East Coast land before the land passed through the Native Land Court under section 83 of the Native Lands Act 1865.⁵⁶ This request, Whitaker stated later, was verbally agreed to.⁵⁷ Rice, who was instructed to come to Wellington with several 'principal men' of the district, arrived in August, whereupon Whitaker discovered that these men did not wish to sell their land. They would, however, lease it to him.⁵⁸ Anxious to complete his undertaking with Vogel, Whitaker entered into an agreement with these leaders for a 21-year lease, paying an advance of £100. Rice also subsequently entered into arrangements to lease blocks of land – which it was hoped were oil-bearing – at Waiapu, Tuparoa, and Riporua.⁵⁹

Meanwhile, however, Whitaker persisted with his plans to purchase land on behalf of the province. When the Government suggested to him that it would be better not to depart from the ordinary practice of the Native Land Court in relation to buying Maori land, he agreed. On his suggestion, a new clause was included in the Native Lands Bill 1866, which came before the House on 26 September; this clause in effect provided for superintendents of provinces to make valid purchases of Maori land before certificates of titles were issued.⁶⁰

Such a clause, of course, might equally have applied to the superintendent of Hawke's Bay province. Thus, in order that Auckland province both reaped the maximum advantage from the new statutory provision and cemented its position in Turanga, Whitaker had to beat off the competition from Hawke's Bay. This did not prove difficult. Despite the petitions to Parliament which Ormond and McLean had got up and circulated widely along the East Coast seeking Maori support for the annexation to Hawke's Bay, it was not enough to carry the day.⁶¹ McLean, now newly elected to the House, moved for leave to introduce his Auckland and

55. Whitaker, message no 43, 5 February 1867, JAPC, 1866–1867, sess 20, p95 (quoted A10, pp196–197) Note that the message, dated 1867, refers to events from the previous year.

56. Whitaker argued that sometimes, in the name of the Crown, the provincial government should be able to extinguish the native title over land of 'especial value', such as the land where the oil springs were. He relied also on section 83 of the Native Lands Act 1865, which provided that Her Majesty's power of extinguishing the native title should be delegated to the Governor or the superintendent of any province: Whitaker to Colonial Secretary, 9 August 1866, JAPC, 1867, sess 20, A-12, pp 21–22 (doc A10(a), vol 4, pp 2316–2317).

57. Document A10, p197

58. Whitaker, message 43, 5 February 1867, JAPC, 1866–1867, sess 20, p96 (doc A10(a), vol 4, p2295)

59. No rent was payable for these East Coast lands unless the oil springs were worked or the land was occupied: Whitaker, message 43, 5 February 1867, JAPC, 1866–1867, sess 20, p96 (doc A10(a), vol 4, p2295).

60. Early in 1867, the clause was deemed invalid on the ground that, under the Constitution Act 1852, only the Queen, not the Governor, could delegate authority to superintendents to make valid purchases on behalf of the Crown: doc A10, p198.

61. Three petitions were presented: two from 'East Coast Natives' (one with 510 signatures and one with 1400 signatures) and one from settlers in Turanga with 44 signatures. Ormond had suggested the wording for the Maori petitions. Rice, the agent of the Auckland Provincial Government, brought Panapa Waihopi and Paora Parau to Wellington at the provincial government's expense, apparently to meet Whitaker about the oil springs. They then gave evidence before the public petitions committee in respect of the way in which Maori signatures to the petition were

Hawke's Bay Boundaries Bill on 13 September 1866. This, it may be noted, was a few days after the Government moved to ensure the postponement of the Native Land Court sitting in Turanga. Disclaiming any provincial self-interest, McLean tried to attract support for the Bill by promising that, if it were passed, he would take responsibility both for paying compensation to 'friendly natives' for their services during the hostilities and for the purchase of land for the Natives.⁶² But McLean and Ormond were not able to gather enough support for their position. The debate on the motion was adjourned, and, on 1 October, Ormond admitted in the House that the Bill was unlikely to pass during the session.⁶³

Now it was clear that Turanga would remain in the Auckland province, Ormond reverted to suggesting that the New Zealand Settlements Act 1863 be used on the East Coast. He moved that 'the lands of the Natives lately in rebellion in that part of the East Coast situated between East Cape and Mahia Peninsula should be taken under the New Zealand Settlements Act'. Ormond drew a direct link between his motion that the New Zealand Settlements Act should be used on the East Coast and the failure of the Hawke's Bay politicians to secure the passing of the Boundaries Bill, which would have annexed Turanga to that province. Because he had given up all idea of being able to pass that Bill at present, 'he therefore brought forward this motion'. The East Coast lands, he said, 'especially the Poverty Bay district', should be opened for settlement, but not in the way that the Auckland Provincial Government intended to proceed.⁶⁴ In other words, having lost the boundary battle, he simply wanted to get on with confiscation.

Stafford then indicated that the Government was considering different legislation for dealing with the East Coast lands. (It is possible that Ormond's motion may have been designed to elicit this information.⁶⁵) Stafford asked Ormond not to press his motion, because it would commit the House to a 'settlement' under the New Zealand Settlements Act, and he thought that 'better courses could be taken'. The Government was considering the matter, he said, and might introduce a Bill soon; 'perhaps next day'.⁶⁶ On 2 October, Ormond's motion was not

Footnote 61 continued

gathered. The evidence of both men was that included on the petitions were the names of people who had not themselves signed; Waihopi stated that he knew a small number of men whose names were appended without their knowledge, and Pgrau stated that, after a meeting which had approved the petition, he had written the names of a number of his people. The committee's report, based on the evidence of these two men and of the superintendent of Hawke's Bay, was non-committal. It reported simply the number of names attached to each petition and that it had taken evidence and the evidence was appended. It did not find that the petitions were fraudulent, nor did it endorse the methods by which signatures were obtained: AJHR, 1866, F-11A, p 4 (we note that the report in F-11A is misnumbered as F-3, though the title page is correctly given as F-11A). See also Truscott, *Poverty Bay and Colonial Land Policy*, p10.

62. 13 September 1866, NZPD, 1866, pp 962–963

63. 1 October 1866, NZPD, 1866, p1022

64. 1 October 1866, NZPD, 1866, p1022

65. In fact, it appears that the Government had been working to prepare for this during September. On 15 September, Richmond had written a note on McLean's memo of 4 September 1866, in relation to the postponement of the Native Land Court sittings, to the effect that 'Action can now be taken under the East Coast Lands Act': Richmond, 15 September 1866, scribbled note on fly of McLean memo, 4 September 1866, MA62/8, Archives NZ (doc F18, p 24).

66. 1 October 1866, NZPD, 1866, p1022

proceeded with. The following day, the Government's new legislation was introduced into the House. According to Stafford himself, he had asked Frederick Whitaker to assist the Government in devising such a Bill for the East Coast.

4.2.6 The East Coast Land Titles Investigation Act 1866

The East Coast Land Titles Investigation Bill was introduced into the House on 3 October 1866. It embodied the Government's decision to handle confiscation on the East Coast by a different mechanism from confiscation elsewhere in the North Island. Under the New Zealand Settlements Act 1863, the Crown assumed control of a whole district proclaimed under the Act, and could take any land within the district and deem it Crown land. But, under the East Coast legislation, land remained under customary title until the Native Land Court investigated it. Within the boundaries designated in the schedule to the legislation,⁶⁷ the court was empowered to exercise a function it did not normally have:

- ▶ it could distinguish claimants on the basis of whether or not they had been engaged in 'rebellion' (the tests for 'rebellion' were as defined in section 5 of the New Zealand Settlements Act 1863);
- ▶ it could also initiate inquiries into the title of any land claimed by Maori, 'or other British subjects',⁶⁸ whether or not the claimants themselves sought an investigation;
- ▶ it could certify that grants of land be made to those Maori who had not been engaged in 'rebellion' and who were found to be landowners (in effect, the grants were of their own land), and the Governor could then issue Crown grants to those to whom the court had awarded certificates; and
- ▶ where 'rebels' were found to be joint landowners with 'non-rebels', it could partition out the non-rebels' lands and certify which lands were 'rebel' property.⁶⁹

In the wake of the court's determination of title:

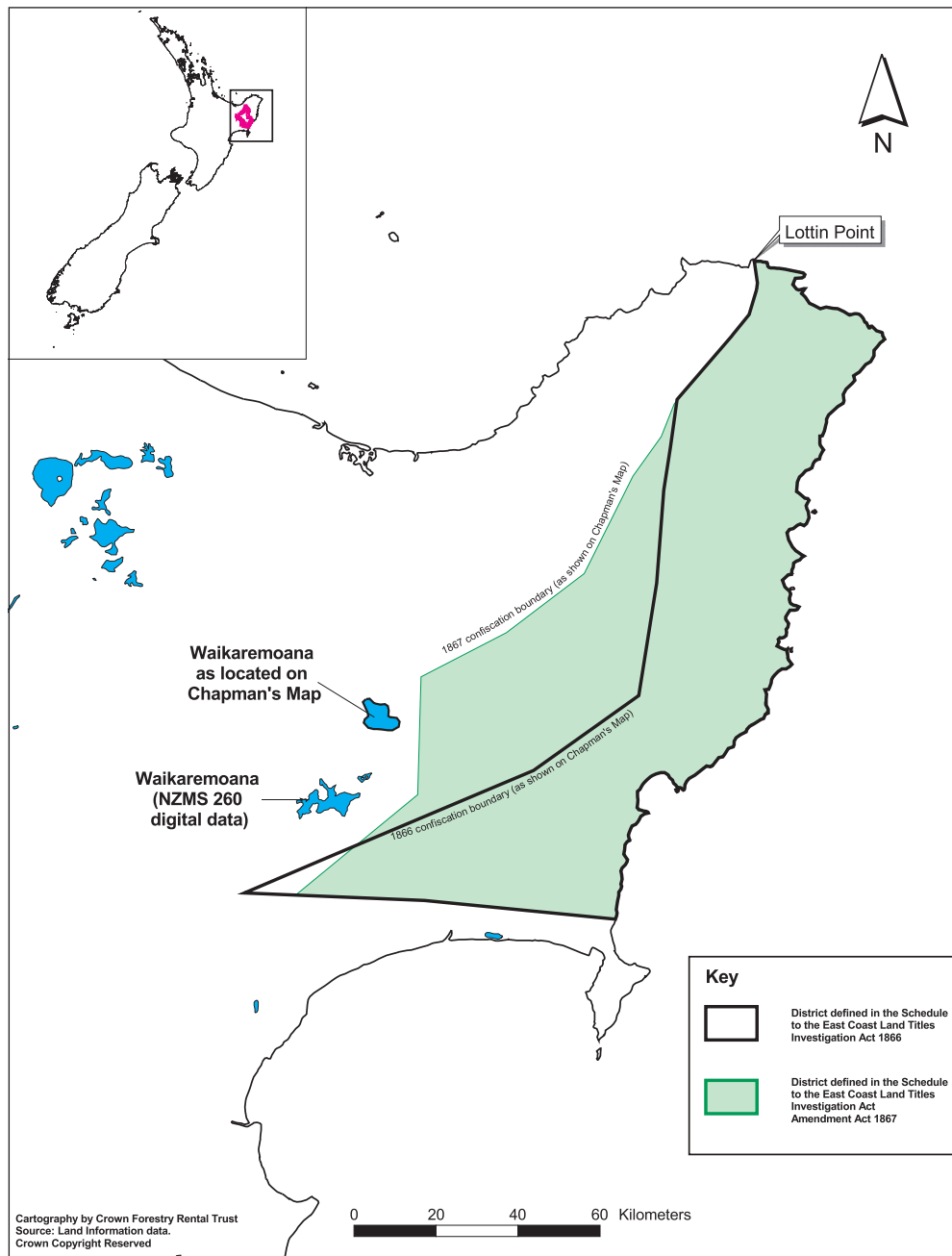
- ▶ 'rebel' lands were immediately deemed Crown land;
- ▶ the Governor might make reserves for 'rebels'; and
- ▶ the Governor might set aside land for settlement (ie, town, suburban, and rural land) and lease or sell any remaining land (the profits to be applied to the costs incurred in 'suppressing the rebellion'), but military settlement was not explicitly provided for.

There were, therefore, two key features of the East Coast Land Titles Investigation Act. First, the Native Land Court, not the Crown, would decide which Maori were, or were not,

67. The schedule stated: 'To the North and East by the sea from Lottery Point [*sic*] to the Northern Boundary of the Province of Hawke's Bay thence by the said boundary to the summit of the Maunga Haruru Range thence by a line to Haurangi thence by a line to Purororangi thence by a line to Hikurangi and thence by a line to Lottery Point [*sic*].'

68. The reference to 'other British subjects' appears to indicate a path to title for settlers whose claims to land had not yet been adjudicated on. This provision presaged that made for settlers in the 1868 deed of cession.

69. The Act itself did not use the terms 'rebels' or 'non-rebels' but distinguished between Maori who had been engaged in the 'rebellion' and Maori who had not have been so engaged. For the state of brevity, we use the abbreviated terms here.



Map 8: Raupatu boundaries as shown on Chapman's map of the North Island, including the provinces of Auckland, Taranaki, Hawke's Bay, and Wellington, 1865–66

'rebels'. The court was, of course, an independent judicial body. It thus offered 'loyal' Maori and, technically, 'rebel' Maori too, the opportunity they did not have under the New Zealand Settlements Act of proving their title before any act of confiscation took place.⁷⁰ The onus was

70. The Act also offered, in effect, an inducement to 'loyal' Maori to attempt to prove their title to any land which they did not wish to see pass to the Crown.

on the Crown to prove in court the 'rebel' status of those whose land it considered should be forfeit. Secondly, and following on from this, only land deemed to belong to 'rebel' Maori was to become the property of the Crown. As a result, the East Coast Land Titles Investigation Act was regarded as a less 'hard' law than its predecessor, the New Zealand Settlements Act.

The East Coast Land Titles Investigation Bill was passed through the House very quickly: it had its second reading on 4 October, the day after it had been introduced, and it passed through all its remaining stages that same day without amendment. No Government statement was made explaining or justifying its passage through the House, and the only speech of substance concerning it was made by George Graham, an Auckland member, who cautioned in general terms against not listening to the grievances of the 'Natives'. On the East Coast, he asserted, 'no steps had ever been taken with a view to ascertaining what those Natives [identified as rebels] had to say in their defence'. If possible, a 'peaceful and satisfactory settlement of their grievances' should be reached, and he hoped that the Government might take some steps towards restoring to their lands, or to some quantity of land, those who had been 'in rebellion'.⁷¹ In the Legislative Council, the Bill apparently passed through its various stages without comment.

According to James Preece, the Act was not referred to the imperial government.⁷² The colonial government was already under considerable pressure from London on account of two Acts it had passed the preceding year: the New Zealand Settlements Amendment and Continuance Act 1865 and the Outlying Districts Police Act 1865. The first Act made the New Zealand Settlements Act 1863 perpetual, though it provided for the Governor in Council to retain the power of proclaiming districts only until 3 December 1867 (ie, for two more years). It also contained a number of provisions relative to the powers of the Compensation Court. The second Act provided that chiefs of tribes harbouring men wanted for a range of crimes had to surrender the fugitives or forfeit land to pay for the cost of police action and garrisons in the district.⁷³

These two Acts together had produced a very strong reaction from the Colonial Office. Secretary of State Cardwell's dispatch of 26 April 1866 reached Wellington on 29 June, just before the new session of the General Assembly convened. The Acts, he wrote to Governor Grey, had escaped disallowance for only one reason; namely, the decision of the New Zealand Government in 1864 to accept responsibility for native policy and for defence. The imperial government was thus withdrawing its troops and, Cardwell implied, such matters were no longer its business. But the state of affairs established by the two laws and those proceedings that had already occurred under the New Zealand Settlements Act were 'departures from the policy which Her Majesty's Government would have desired to have adopted had they

71. 4 October 1866, NZPD, 1866, pp1039–1040

72. Document A10, p284

73. Alan Ward, *Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1995), p188

remained as directly responsible as heretofore'. Cardwell complained about the fact that the New Zealand Government had confiscated land without establishing an independent commission of inquiry, as earlier instructed, and about the extension of time within which confiscation might take place. He was particularly scathing about the Outlying Districts Police Act (which McLean had favoured): 'It would seem . . . that in any Native districts in which the police arrangements are insufficient for the preservation of order, occasions may be expected continually to arise on which Government will proceed to confiscate land and sell it for settlement.' A Government armed with such powers might be 'much misunderstood' by those against whom such powers were used; such circumstances were 'calculated to awaken or keep alive a feeling of distrust in the Natives'. If the implementation of the laws were not to the liking of the imperial government, Cardwell warned, it might yet be necessary to advise the Queen to disallow them.⁷⁴

It is not surprising, in light of this blast, that Stafford should later have dissociated himself from the New Zealand Settlements Act:

I do not at all desire to exonerate myself from blame for the delay which took place, because I believe that possibly the settlement might have been made within a few weeks after hostilities had ceased; but I could find no Act under which this could be done except the New Zealand Settlements Act, and the general effect of that Act I so much disliked as not to desire to put it into operation again.⁷⁵

Nor is it surprising that Stafford was willing, or perhaps even anxious, to consider a different approach to the 'problem' of confiscation.

4.2.7 Biggs' management of confiscation: attempts to secure a cession

Once the East Coast Land Titles Investigation Act 1866 had been passed, the Government made provision for a sitting of the Native Land Court under the new Act. Richmond wrote at once to Chief Judge Fenton, instructing him to take steps to proceed under the Act. By the end of November, Fenton had issued notice of his intention to hold sittings accordingly, as soon as surveys were completed. The Government also appointed a new Crown agent with responsibility for implementing the confiscation on the East Coast – Captain Reginald Biggs. Biggs, an officer who had fought with the colonial forces on the East Coast, arrived in Turanga late in 1865, shortly before Waerenga a Hika. He remained there after the hostilities, settling at Matawhero.⁷⁶

74. Cardwell to Grey, 26 April 1866, AJHR, 1866, A-1, pp 52–55

75. 3 September 1868, NZPD, 1868, vol 3, p 155 (doc F18, p 20)

76. Reginald Biggs was a lieutenant from 22 April 1865 until October 1865, when he was promoted to a captain of the militia. Then, on 1 August 1868, he was promoted to major. He was also a justice of the peace from November 1865, and in May 1866 was given the command of the Gisborne militia. In February 1867, he was mademagistrate at Gisborne: 'Reginald Biggs', DNZB, vol 1, pp 29–30.

Biggs was instructed to act as counsel for the Crown in the Native Land Court, within the entire district indicated in the schedule to the East Coast Land Titles Investigation Act. In the meantime, he was to embark on an inquiry and ascertain ‘the names of all the tribes & hapus owning or claiming this block of land the names of the males comprising these hapus and of such women and non adults as may profess claims in themselves’.⁷⁷ Biggs accepted the appointment on 22 November 1866. As such, he was responsible for overseeing the work of the district surveyor, who prepared block surveys in advance of the sitting of the Native Land Court. Biggs urged Samuel Locke to accept the appointment, adding that ‘You and I would be the only persons who would know what land would be confiscated and what left in the hands of the friendly natives [and] we might manage to obtain a good deal of the latter at [illegible] prices’ (the last two words were effectively crossed out).⁷⁸ McLean remained agent for the general government, though in practice the authority had now passed to Biggs. Biggs, however, continued to consult McLean.

In the months that followed, Biggs developed his own strong views on how to handle his task. He rapidly decided that it was not enough to become familiar with the extent of ‘friendly’ and ‘rebel’ claims to land in the area; he had to have a strategy to determine claims before the land court sat. First, he wanted to get the land needed for a town. According to his account, Turanga Maori were willing to ‘give the land’ necessary. He therefore hoped that the court might sit once the land was surveyed, because the sale would give the Government ‘some money in hand to go on with’.⁷⁹

But Biggs’ major decision was that the Government should settle on a block of land to be confiscated from the ‘rebels’ and that it should do this before the land came before the court, and have the boundaries clearly defined. He had concluded that it would in fact be virtually impossible to separate out the claims of ‘loyal’ and ‘rebel natives’ in an area where close relatives had been fighting on both sides.⁸⁰ The only way to proceed was to decide which land was to be taken. In early January 1867, he reported to McLean that he had ‘set the Maoris to work to divide the land’; he was sure that they would ‘abide by almost any division of land we choose to make’.⁸¹

There was a problem, however, that Biggs could see immediately. This related to the boundaries defined in the schedule to the East Coast Land Titles Investigation Act 1866, which, Biggs pointed out:

77. Haultain, memorandum for Captain Biggs, private, not dated [November 1866?], McLean papers, MS papers 0032–0162 (doc A10(a), vol 2, pp 860–861)

78. This sentence of the letter appears to have a large cross through it, but the text, apart from the last two words, remains clearly legible. If this was a draft, Biggs appears to have thought better about including the above sentence; but it also shows, in our view, how Biggs was thinking at the time: Biggs to Locke, not dated [November 1866?], McLean papers, MS papers 0032–0162, ATL (doc A10(a), vol 2, p 863).

79. Biggs to Locke, not dated, [1865?], McLean papers, MS papers 0032–0162, ATL (doc A10(a), p 865)

80. Biggs to Halse, 6 January 1867, MA62/8, Archives NZ (doc A10, pp 227–228)

81. Biggs to McLean, 2 January 1867, McLean papers, MS papers 0032–0162, ATL (doc A10(a), vol 2, p 870)

do not take in some of the most valuable lands belonging to the Aitangamahaki [*sic*] Tribe which Tribe was more implicated in the rebellion at Poverty Bay than any other only a remnant of the Aitanga mahaki remaining in the district the larger portion of them being at the Chatham Islands.⁸²

The lands that would be lost to the Crown, he pointed out, included both valuable agricultural land and the oil springs. He thus recommended altering the boundaries to include these lands.

The Government responded quickly. First, on 11 February 1867, it protected the larger block of land by suspending the operations of the Native Land Court over the East Coast from Lottin Point in the north to the Mohaka River in the south and inland to the watershed with the Bay of Plenty.⁸³ Secondly, it indicated that it would amend the East Coast Land Titles Investigation Act when Parliament sat later in the year.⁸⁴ On the ground, Biggs extended the surveys accordingly.

4.2.8 Biggs' attempts to secure a cession, but Turanga Maori oppose him

Biggs' approach to confiscation in Turanga quickly aroused extensive Maori opposition. There were a number of reasons for this. First, there was disquiet among those Maori who had assumed that their lands would be protected from being confiscated because they had been loyal to the Government. They were disconcerted when they perceived that Biggs' decision to take a large block of land would deny them this protection.⁸⁵ Secondly, there was opposition to the Government's continuing efforts to take land so long after Waerenga a Hika, since there had been no further hostilities between Turanga Maori and the Crown. Maori considered that they had already paid both in lives lost in the fighting and through the banishment of prisoners to Wharekauri. Thirdly, though there was opposition to the Native Land Court's confiscatory function, Maori preferred to wait for the court in the hope that they might secure their titles there. They were aware that, if their title were upheld by the court, they might sell their land rather than lose it without payment to the Crown; they all knew that Auckland agents were carrying out their own surveys at the same time. Fourthly, the size of the block and the amount of flat land that Biggs wanted comprised a substantial obstacle for Turanga Maori.⁸⁶

At a meeting at Te Whakato on 12 April 1867 (which Richmond attended), Biggs proposed that an extensive area of Turanga land between the Waipaoa and Waimata Rivers and extending as far inland as Maungapohatu be given to the Crown. The area described amounted to

82. Biggs to Halse, 6 January 1867, MA62/8, Archives NZ (doc A10, pp 226–227)

83. *New Zealand Gazette*, 11 February 1867

84. Document A10, p 229

85. See, for instance, Wi Pere and 8 others to Sir George Grey, 19 April 1867, RDB, vol 131, pp 50356–50358.

86. Petition of Natives at Poverty Bay [8 July 1867], AJHR, 1867, G-1, p 10



some 200,000 acres. After two days' discussion, those present rejected the proposal, being determined not to give up their land. Richmond suggested that a small committee of six to eight chiefs representing the various hapu meet with Biggs to continue the discussion. The committee was no happier with Biggs' next proposal, which was to shift the boundary line, thus 'giving the Maoris some eighty thousand acres back' but still confiscating about 120,000 acres.⁸⁷ Paratene Turangi wrote to Richmond on 20 April 1867 stating that the committee had presented Biggs with three different proposals concerning the lands that they were prepared to give up, but that Biggs had rejected all of them, insisting on his own boundary.⁸⁸ Turanga Maori did not consider Biggs a good negotiator; on the contrary, they complained about his inflexibility.

Richmond later summed up his 'East Coast dealings' on this visit as not having enjoyed 'brilliant success'. There had, however, been one outcome: 'The only great thing done was the confiscation and carrying off a beautiful carved house with a military promptitude that will be recorded to my glory.'⁸⁹ This 'house' was the Rongowhakaata wharenui Te Hau ki Turanga. (In chapter 10, we discuss in greater detail the specific claims brought before this Tribunal relating to Te Hau ki Turanga.)

4.2.9 Biggs and Richmond return to the New Zealand Settlements Act

By late April, Biggs had decided that a sitting of the Native Land Court under the East Coast legislation was not the answer. He recommended instead that the Government use the New Zealand Settlements Act 1863:

I would strongly urge on the Government the necessity of bringing the Turanga District under the 'New Zealand Settlements Act' as by far the easiest mode of settling matters for the block in question must be taken for the purpose of settlement and as far as I can see there seems to be no chance of the natives working with the Government in order to carry out the object of the 'East Coast Land Titles Investigation Act 1866'.⁹⁰

Clearly, he saw this as the only method by which he would secure a large tract of land. Biggs had interpreted his instructions about investigating the number of 'friendly' as opposed to 'rebel' natives to mean that the amount of land the Crown took would be in proportion to these numbers. He divided the land into tribal blocks and assessed the proportion of 'rebels' and 'friendly natives' in each. His calculations showed that there in fact more 'friendlies' (279)

87. Biggs to under-secretary, Native Office, 20 April 1867, MA62/8, Archives NZ

88. Paratene Turangi and 12 others to Richmond, 20 April 1867 (RDB, vol131, pp50364–50365). Richmond's minute on this letter indicates that an official letter was sent to Biggs cautioning him 'that the Govt do not wish to deal hardly with any friendly natives at Turanga': JC Richmond, 6 May 1867 (RDB, vol131, p50364).

89. JC Richmond to E Richmond, 24 April 1867, Richmond–Atkinson papers, vol2, pp240–241 (doc F5, p8)

90. Biggs to Native Minister, 20 April 1867, MA62/8, Archives NZ (doc A10, p235)

than 'rebels' (244). But he explained that, when he added those killed at Waerenga a Hika (71), others lost in 'different engagements', and 'some' who were still 'at large', there was in fact a majority of 'rebels'.⁹¹ By May, he had concluded that 'at least two thirds of the land should be taken by the Government'.⁹² Biggs thus considered that he was being reasonable in his demands, since he was not aiming for the two-thirds of the land that he believed the Crown was entitled to: 'The block which I have proposed to confiscate is not more than one third.'⁹³

Richmond supported Biggs' suggestion of using the New Zealand Settlements Act 1863 and confiscating a large block of land:

The NZ Settlements Act is more workable. It gives title to Govt requiring the loyal claimants to show their claims and giving them, compensation – which in such a case as the present would amount to returning them their land. I am strongly of opinion that if possible a large block around Turanga should be brought under the NZ Settlements Act otherwise the so-called loyal natives and the returned rebels with their European advisers will have a triumph over Govt which it is most inexpedient to allow them. Land is moreover wanted for the Napier Defence Force. I recommend immediate action.⁹⁴

Richmond took steps in fact to bring Turanga land under the New Zealand Settlements Act. He had already threatened Turanga Maori in April with this 'harder law' if they did not cooperate with Biggs in implementing the East Coast legislation, and he now sought legal advice on bringing the New Zealand Settlements Act into force over the lands comprised in the schedule to the East Coast Land Titles Investigation Act 1866.⁹⁵ Following advice from Attorney-General Prendergast, Richmond went so far as to instruct the preparation of an Order in Council bringing East Coast land under the New Zealand Settlements Act.⁹⁶ The

91. Biggs gave 'rebel': 'loyal' proportions (men only) for each tribal group as follows: Te Aitanga a Hauiti: 6 'rebels', 119 'loyal'; Te Aitanga a Mahaki: 95 'rebels', 18 'loyal'; Te Whanau a Kai: 54 'rebels', 10 'loyals'; Rongowhakaata: 64 'rebels', 41 'loyals'; Ngai Tahu (Tamanuhiri): 91 'loyal', 25 'rebels': Biggs to assistant under-secretary, 23 May 1867 (cited in RDB, vol 131, p 50331).

92. Biggs to Native Secretary, 20 April 1867, MA62/8, Archives NZ (doc F18, p 46)

93. Ibid

94. Richmond to Ministers, 23 April 1867, MA62/8, Archives NZ (doc F18, p 47)

95. Under the New Zealand Settlements Act 1863, as we have already noted, the Crown might proclaim extensive districts and take any land for military settlement within those districts, deeming it Crown land. It was then up to Maori to make written claims for compensation, which would be heard by compensation courts. In effect, the onus was on Maori to prove their claim to compensation and to prove that they could pass the rebellion tests set out in the Act. The New Zealand Settlements Amendment and Continuance Act 1865 provided, for the first time, that land might be granted to claimants as compensation instead of money (by the Colonial Secretary, on behalf of the Crown), but not necessarily the claimants' land. The land was simply taken to be 'out of any land within the same Province' subject to the settlements legislation. By contrast, under the East Coast Land Titles Investigation Act 1866, Maori who were found not to be 'rebels' and proved title might secure certificates, and then Crown grants, for their own land. The onus was on the Crown to prove before the court that some Maori owners might have been engaged in 'rebellion' and that their lands, as certified by the court, would therefore become Crown property. Richmond was very aware of the difference between the two Acts.

96. Document F18, p 48

block to be constituted a district under the Act was called the Turanga district.⁹⁷ Clearly, he was ready to use the Act in Turanga, despite private indications that he was ‘very loth’ to do so.⁹⁸

By June 1867, Biggs was reporting the breakdown of negotiations with Turanga Maori for a cession of the amount of land that he considered adequate. They had offered only 15,000 acres on the north side of the Waipaoa River, and of this they wanted 2500 acres for reserves. Biggs stated that 1800 acres of it already belonged to settlers (legally, in fact, it did not) and that another 3000 acres were ‘utterly useless’ land.⁹⁹ Maori also wanted to be paid for the oil springs and the town block. Biggs still wanted the New Zealand Settlements Act to be brought into effect over the land contained in the schedule to the East Coast legislation, and, failing that, he wanted the Act to be used over the land not then included in the schedule to the East Coast Land Titles Investigation Act (so as to include valuable agricultural land and the oil springs). In the meantime, the chiefs had stopped even meeting with him and were waiting for the sitting of the Native Land Court on 3 July.¹⁰⁰

4.2.10 The Native Land Court sits under the East Coast Land Titles Investigation Act

On 3 July 1867, the Native Land Court was scheduled to sit in Turanga under the East Coast Land Titles Investigation Act 1866. From the Government’s point of view, however, it would be sitting under a cloud. Three weeks earlier, on 11 June, Chief Judge Fenton had pointed out a clerical error in section 2 of the Act. Effectively, this meant that all those who had engaged in ‘rebellion’ were excluded from (instead of ‘included in’) the definition of ‘rebels’ whose lands were liable to confiscation. Fenton observed that the wording as it stood would ‘greatly embarrass the Judges of this Court and may frustrate the great object of the Act’.¹⁰¹ The Attorney-General, whose opinion was sought, had advised that the Government could not now intervene to prevent the court sitting from proceeding; it might, however, request the chief judge to postpone the sitting. Failing that, an adjournment might be sought when the hearing commenced on the ground that not enough information had been gathered to ‘prove the title of Rebels’.¹⁰²

The Government did write to Fenton seeking a postponement of the sitting. Fenton replied that the court must sit, but he thought it unlikely in the circumstances that it would give any decisions.

97. The proposed block was from the mouth of the Uawa River south to Paritu, then inland along the Wairoa River to the watershed between the Bay of Plenty and the East Coast, then back to the coast at the southern end of Tolaga Bay: JC Richmond, instruction to Halse; Halse’s response, 27 April 1867 (cited in RDB, vol 131, pp 50359–50360).

98. Document A10, p 237

99. Biggs to Native Secretary, 14 June 1867, MA62/8, Archives NZ (doc F18, p 50)

100. Document F18, pp 50–51

101. Fenton to Native Minister, 11 June 1867, MA62/8, Archives NZ (doc A10, p 245)

102. Prendergast to Native Minister, 21 June 1867, MA62/8, Archives NZ (doc A10, p 245)

The sitting was in fact postponed by one day because Biggs, the Crown agent, was late in returning from Wellington. Judge Henry Monro presided over the court when it opened, and present were some 500 to 600 Maori ‘from all parts of the coast between the East Cape and the Wairoa’ along with a number of settlers.¹⁰³ Biggs at once applied for an adjournment on several grounds. One was the drafting error in the Act and another was that the Government had not had enough time to gather sufficient evidence to identify ‘rebel’ lands. Turanga Maori had been uncooperative and had withheld vital information, and Biggs said that he needed more time to gather evidence and might have to go to Wharekauri to procure information.¹⁰⁴

Preece, representing Te Aitanga a Mahaki, objected to the adjournment, arguing that the Government had had sufficient time to prepare and that this was the third time that his clients had travelled great distances to attend the hearing, at some considerable expense and inconvenience.¹⁰⁵ Judge Monro agreed that the Government had had sufficient time to prepare but granted the adjournment on the grounds of the errors in the Act. However, he ordered costs of more than £70 against the Government, telling the assembled Maori that:

he felt almost ashamed to have to tell them that they had assembled on this occasion only to be told that they may go home again. He had been aware that they had on two other occasions assembled and been disappointed; and he should not feel surprised at their expressing their feelings strongly on having again to be disappointed. The delay was not the doing of the Court. They had published the notice fully intending to hold the sitting. As it was, however, there was no other course that could be adopted now than to adjourn.¹⁰⁶

The judge contrasted the Native Land Court with the Compensation Court that operated under the New Zealand settlements legislation. He quashed the rumour that the ‘land taking – Compensation Court’ Te Kooti Tango Whenua, would come to Turanga.¹⁰⁷ Rather, it would be the Native Land Court. He also distinguished between the Native Land Court as it would sit in Turanga and the court ‘in the North’, as he put it. Whereas ‘in the North’ the court had dealt simply with native title to land, on the East Coast there had been ‘rebellion’.¹⁰⁸ The court would therefore investigate the titles of both ‘rebels’ and ‘loyals’; those who had joined in the rebellion would be deprived of their land and those who had not ‘would be preserved from the loss of any lands’. Thus, Maori ‘might rest assured that the duties of the court were not as

103. Monro to Fenton, 25 July 1867, AJHR, 1867, A-10D, p 4 (doc A10, p 248)

104. Document A10, p 248

105. Document A1, p 94; doc A10, p 249

106. The Government, however, refused to pay the court costs: Monro to Richmond, 15 August 1867, AJHR, 1867, A-10D, p 7 (doc A10, p 250).

107. Possibly, Monro had read of an allegation by James Wyllie that Biggs had threatened Turanga Maori with the ‘kooti tango whenua’ if they did not cooperate with him: *Hawke’s Bay Herald*, 11 May 1867 (republished in the *Daily Southern Cross*) (doc A10, p 250)

108. For a discussion of the Native Land Court, see chapter 8

they had been described to them, namely, to take their land away from them, but to determine to whom the land belonged, and act accordingly'.¹⁰⁹

The court sitting had two immediate consequences. The first was a detailed complaint about Biggs by Turanga Maori, 256 of whom sent a petition to Parliament on 8 July 1867:

Captain Biggs was urgent in asking us to consent to our land being ceded; then we consented to hand over a piece of land, it was a very large piece, leaving a piece for ourselves much smaller as compared with the other, the greater portion of which piece belonged to ourselves, the Government Natives. But we gave our consent only because we were wearied at his constantly teasing us, and because of the many intimidating words of the Government used towards us; but he was not satisfied with what we had agreed to. What he wanted was, to get all the level country, and we might perch ourselves on the mountains. Thereupon we told him it must be left for the Land Court to give us relief; then he replied, he would bring the land-taking Court. This was the first time we had heard such a name for the Court, and we were surprised. Still we waited patiently for the Lands Court, appointed to be holden on the third of this month . . . Alas! where was the relief? No sooner came the Court here, than it was adjourned by Biggs, or rather by the Government.¹¹⁰

The chiefs asked Parliament for relief to save their lands, which the Government was 'constantly trying to take away from us'. Nothing had been said when the hostilities had finished about the land being taken; it was only after 'two years' had passed, when 'the blood shed' had 'long since dried', that the Government stated that it wished to take the land.¹¹¹

The petition was referred to the public petitions committee, which considered it on 26 July 1867. Richmond stated in evidence that the Government had decided that, under the East Coast legislation, arrangements should be made between the Government's agent, Biggs, and the claimants to consolidate 'the shares of the Rebels and the Loyal Natives'. This approach had worked at Wairoa, where a satisfactory agreement had been reached with Maori, and at Waiapu and Tolaga Bay, where agreement had been reached in principle with Ngati Porou for cessions of land.¹¹² But at Turanga it was different, and 'there was little disposition to co-operate with the Government'.

109. Monro to Richmond, 15 August 1867, AJHR, 1867, A-10B, p7 (doc A10, pp 250–251) We note O'Malley's comment that the judge was less than accurate in his assessment of the Native Land Court and Compensation Court. The Compensation Court compensated Maori whose land had been confiscated once they had proved their 'loyalty' to the Crown, whereas the Native Land Court, sitting under the East Coast Land Titles Investigation Act, could take land away from those whom the Crown had proved to be 'rebels': doc A10, p 251.

110. Petition of Natives of Poverty Bay, 8 July 1867, AJHR, 1867, G-1, p10 (doc A10, p 256; doc F18, p 51)

111. Ibid (pp 255–256). O'Malley stated that the original signed petition is no longer extant, and it is merely described in the printed sources as that of '256 Natives of Poverty Bay'.

112. Evidence of JC Richmond, 26 July 1867, Le 1 1867/13, Archives NZ (doc A10, p 258) Biggs reported in April 1867 that at Wairoa he had, with 'some little difficulty', secured the agreement of 'loyal natives' to his taking 40,000 acres on the Wairoa River. At Uawa and Anaura, two blocks totalling 20,000 acres, were ceded, as were 15–20,000 acres at Tokomaru: Biggs to under-secretary, Native Office, 16 April 1867 (RDB, vol131, p50377); Biggs to under-secretary, Native Office, 21 May 1867 (RDB vol131, pp50337–50340).

The committee advised against taking land under the New Zealand Settlements Act, since Parliament was about to sit. But it did recommend that no further delay should take place in deciding what East Coast lands should be deemed forfeit or in the sitting at Turanga of 'Courts established by the law for the settlement of ownership of, and title to Native Lands'.¹¹³

The second consequence of the court sitting was ministerial criticism of Judge Monro for his comments. Richmond wrote to Monro:

The Native Lands Court is not a proper place for indicating or promoting political opinions of any sort. The whole tone of your address is highly objectionable, as attempting to draw deep the distinction between the Court and the Government, with a view to extol the former at the expense of the latter. Such partisanship is highly indecent in a gentleman in your position.¹¹⁴

In the House, Richmond complained that Monro had assumed too great an air of independence, which confounded the Government's intentions. And, like Biggs, he voiced his continuing mistrust of those Turanga Maori who had aligned themselves with the Government:

There was, in plain terms, a conspiracy at Turanga to prevent the Government from making any title to lands whatever; a conspiracy not for the benefit of the unfortunate Hauhaus, but of the so-called loyal inhabitants themselves. When it was remembered that on the outbreak of hostilities there the Government could not find twenty men to stand by them, as one-half were in open rebellion and the other half waiting to see . . . how the cat would jump, the House would agree that it was an indiscreet, unfair, most wrong, and highly censurable action of Mr Monro to endeavour to act in such a way as might support a conspiracy to defeat the policy of the Legislature.¹¹⁵

4.2.11 The recall of McLean to secure a cession of Turanga lands for the Crown

Following requests from the Government in late 1867, McLean returned to Turanga in February 1868 to resolve the East Coast 'land question'.¹¹⁶ During his visit, several meetings were held and McLean secured agreement for the purchase of the land that became known as the Turanganui 2 block, being 500 acres on the banks of the Turanganui River earmarked for a township.¹¹⁷ He also learned, at the beginning of his visit, that Maori believed that they were safer with the Native Land Court, which would not take their land, than with the

113. 'Report of the Public Petitions Committee on Petition No 9 of 1867', 9 August 1867, JHR, 1867, pp71-72 (doc F18, p54)

114. Richmond to Monro, 24 August 1867, AJHR, 1867, A-10D, pp7-8 (doc A10, p252)

115. 18 September 1867, NZPD, 1867, vol1, p957 (doc A10, p254)

116. Document F18, p55

117. O'Malley noted that a deed signed at this time was evidently 'destroyed' and that a new deed dated 9 August 1869 confirmed the transfer of the land to the Crown: doc A10, p277.

Government's negotiators, and he began explaining that they were misinformed.¹¹⁸ 'I suppose,' wrote Leonard Williams, 'he has been explaining to them that the Act provides that the land belonging to the Hauhaus is to be taken possession of by the Government.'¹¹⁹

A major hui was held in Turanga on 27 February 1868. McLean told the assembled chiefs that he had previously advised them to remain peaceable, but, as a result of events in the district, the Government would keep certain lands: 'you would not listen, consequently the country is in my hands had you listened you would still be possessors as it is the Govt will take possession of certain blocks. It is no new thing.'¹²⁰ McLean referred to the blocks of land that the Government wished to keep, telling the chiefs that he hoped that they would follow his earlier caution and 'throw away evil advises'.¹²¹

The response from the chiefs was unanimous. They told McLean that the time for taking land was past. Biggs' handling of the negotiations and changing circumstances in Turanga had undermined their willingness to negotiate with him. The chiefs believed that Biggs meant to take all the good land and leave them with nothing but bush and scrub to live on. Renata Whakaare and Tamati Hapimana stated: 'When the fire was burning was the time to take the land.' Kemara said, 'When we were in trouble and the boundaries were laid out, we agreed to it, but since time has elapsed, things have differed. If you take that land, then tell us to go into the sea.'¹²²

According to Leonard Williams, Biggs then spoke and outlined the area that the Government wished to claim, which extended from:

the mouth of the Kopututea & go up the river to Te Ahipakura, thence in a straight line to Pakearuionga, Thence to the source of the Waikohu and down Waikohu to the mouth thence up the Waipaoa to its source, across to source of Waimataa and down Waimataa to the sea.¹²³

Biggs proposed five reserves, £2000 compensation, a two-acre reserve in the township at the Ngai Te Kete pa, and 10-acre town sections for the chiefs. His main point, however, was that this was not a great deal of land and that Maori stood to lose a great deal more if their lands were investigated by the Native Land Court under the East Coast Land Titles Investigation Act. Williams believed that in fact the proposal took almost all of the best land in the district. It would also deprive some 'friendly' Maori of all the land they owned. Rongowhakaata, on the other hand, 'who comprised many Hauhaus [would] be very leniently treated while a

118. L Williams to W Williams, 26 February 1868, MS copy micro 0677-11 (doc F18, p 57)

119. L Williams to W Williams, 26 February 1868, MS copy micro 0677-11 (doc F18, p 57)

120. Notes of meeting at Turanganui, 27 February 1868, AGG-HB7, 2A, Archives NZ (doc F18, p 58). The assembled chiefs were Pita Te Huhu, Tamihana Ruatapu, Raharuhi Rukupo, Wi Haronga, Renata Whakaare, Tamati Apirama (?), Wi Kingi Paia, Henare Ruru, Kemara (?), Himiona Katipa, Wi Pere, Paratene, Paora Kate, Rawiri Tamairiao, and an unnamed woman.

121. Notes of meeting at Turanganui, 27 February 1868, AGG-HB7, 2A, Archives NZ (doc F18, p 58)

122. Notes of meeting at Turanganui, 27 February 1868, AGG-HB7, 2A, Archives NZ (doc F18, p 59)

123. L Williams to W Williams, 29 February 1868, MS copy micro 0677-11 (doc F18, p 61)

number of friendly natives would be severely handled'.¹²⁴ The chiefs themselves remained opposed to Biggs' proposals.

Williams found the proceedings so discouraging that he spoke to McLean after the hui and succeeded in getting fresh proposals put to the chiefs. Three blocks were to be taken and, for the first time, specific acreages were mentioned: the first block, of some 24,000 acres, was at Te Arai; the second, being 64,000 acres, extended from Toanga to the source of the Waikohu; and the third, 200,000 acres in area, extended from Te Koreke up the Waipaoa to the source of the Waimata and from there to Taruheru and back to Te Koreke.¹²⁵ The total area was therefore about 288,000 acres. Williams described the proposals as 'much more satisfactory' because they left the 'greater proportion of the flat land untouched'; most of the land to be taken was hill country extending far inland.¹²⁶ Williams, like Biggs, stressed to the chiefs that they stood to lose more land under the East Coast legislation – 'they would certainly lose $\frac{2}{3}$ of the district' – and that it would be much better if they came to an arrangement with McLean.¹²⁷

Williams was critical of the role settler James Wyllie had assumed in advising Turanga Maori: 'The worst of the matter is that Wyllie has been stuffing their heads with a quantity of nonsense about the illegality of the law. I had a chat with him & pointed out the practical point in the business viz that it was a choice of evils.'¹²⁸

At a further meeting attended by McLean, there appeared some prospect of an agreement being reached. But, the next day, this prospect was dashed. Turanga Maori would not even suggest amendments to Biggs' boundaries. According to Williams, they would do 'nothing but offer small scraps which bore no proportion whatever to what is already virtually confiscated'.¹²⁹ The East Coast Land Titles Investigation Act was thus left to run its course in the Native Land Court.

4.2.12 The second sitting of the Native Land Court at Turanga, 1868

The Native Land Court was rescheduled to convene in Turanga on 9 March 1868. By then, two changes had been made to the East Coast legislation by the East Coast Land Titles Investigation Act Amendment Act 1867. First, the drafting error in section 2 was corrected, so that loyal claimants were 'included', not 'excluded'.¹³⁰ Secondly, the schedule defining the boundaries under the Act was altered, so that the boundaries now extended inland to include a

124. L Williams to W Williams, 29 February 1868, MS copy micro 0677-11 (doc F18, p 62)

125. Williams commented that he thought the second block would be 'much less' than 64,000 acres: L Williams to W Williams, 29 February 1868, MS copy micro 0677-11 (doc F18, p 62)

126. L Williams to W Williams, 29 February 1868, MS copy micro 0677-11 (doc F18, p 62)

127. Ibid (p 63)

128. L Williams to W Williams, 1 March 1868, MS copy micro 0677-11 (doc F18, p 63)

129. Ibid

130. Document A3, p 71

considerably larger area of back-country land, including the area known to contain the oil springs.¹³¹ Yet, interest in the oil was already waning by 1867, since it had been discovered that the oil did not flow to the surface but could be obtained only by deep boring.

When the court opened in March under Judge Maning, just over 100 cases were scheduled to be heard. However, Biggs, representing the Government, sought to have title investigated to the whole district described in the schedule to the East Coast Titles Land Investigation Amendment Act 1867. The court declined because such a claim had not been advertised in the *Kahiti* (the *New Zealand Gazette*).¹³² Biggs then sought to prevent the court from investigating and adjudicating lands that he and McLean claimed were then under negotiation for cession by the Crown.¹³³

Turanga Maori were by then equally opposed to having their claims investigated by a court which had power to confiscate 'rebel' interests. James Preece, who had begun negotiations to purchase some Turanga land in 1866 on behalf of Brown, Campbell and Company, was in court acting as an agent for Turanga Maori in a number of cases that came before the court. He too now sought a withdrawal of all the claims he represented, on the ground that Maori had no confidence in the court sitting under the East Coast legislation. As Preece pointed out, with some surprise, this meant that he and Biggs were united in seeking the same outcome, though not for the same reasons. Of the cases scheduled for investigation, 72 were withdrawn.¹³⁴ The court awarded only four blocks and none of these was in the present Turanga inquiry district. The remaining cases lapsed, mostly because the surveys were incomplete.¹³⁵

Following the failed sitting of March 1868, East Coast and Turanga Maori sent the Governor a number of petitions containing hundreds of signatures. They requested that no land be taken from them, and they complained of the delays in the court sittings. They also cited Sir George Grey's promise to them, made after the hostilities had ceased: 'This side of this island will be spared in consideration of the strenuous endeavours of the Maori chiefs to put down evil.' Yet, they were being made to pay for the offences of 'the other tribes'.¹³⁶ In a covering letter, Preece asked for the withdrawal of the special legislation so that the Native Land Court might sit under its normal jurisdiction. Preece also claimed that the Government had

131. Document A10, p265. The schedule of the East Coast Land Titles Investigation Act 1867 described the boundaries as from 'The sea from the eastern extremity of the Northern boundary of the Province of Hawke's Bay to Lottin Point thence the range of mountains forming the watershed between the East Coast and the Bay of Plenty to the extremity of the said range north-east of Waikare Moana thence a straight line to the junction of the River Waiau with the River Waikare-taheke thence a straight line running south-west true bearing to the said northern boundary of the Province of Hawke's Bay thence the said boundary to the commencing point on the East Coast'.

132. This was required under section 5 of the Native Lands Act 1867.

133. Biggs cited section 38 of the Native Lands Act 1867: Gisborne Maori Land Court minute book 1, micro MS coll 06-019 (cited in doc A10(a), vol4, p1835)

134. O'Malley recorded the number of cases scheduled for this hearing as 102 while Edwards recorded that more than 104 cases were scheduled, many under the normal jurisdiction of the court: see doc A10, p279; doc F18, p63.

135. Document A10, p279

136. AJHR, 1868, A-16, pp3-6 (doc F18, p65)

threatened the use of the New Zealand Settlements Act to coerce Maori into ceding the required lands.¹³⁷

Biggs, however, entreated McLean not to waver from implementing confiscation, because Maori would see this as a sign of weakness.¹³⁸ Biggs believed the intention of the petitions was to stop further court sittings until new legislation was passed: ‘when the originators Preece & Co hope to obtain fresh legislation on the subject such legislation being to take no land at all’.¹³⁹

4.2.13 The Government’s third legislative attempt: the East Coast Act 1868

The East Coast legislation was brought before the House again by Hugh Carleton (the member for the Bay of Islands), who had throughout taken an interest in the matter. He was the son-in-law of Henry Williams, and thus closely related by marriage to William and Leonard Williams. Carleton had been spurred into action, he stated in the House, by the petitions from the East Coast (referred to above). The signatories requested that the East Coast Land Titles Investigation Act be repealed because the conflict that had led to the proposal of land confiscation was well past.¹⁴⁰ Moreover, Carleton argued, the Act had converted the Native Land Court into a ‘Land taking Court’.¹⁴¹

Carleton outlined four reasons for repealing the legislation. First, it was only after Whitaker had failed in his efforts to purchase land in the district that the Government had moved to confiscate land. It appeared to Carleton that this confiscation was ‘not intended as a punishment for rebels, but for the purpose of obtaining 50,000 acres of fine flat land’.¹⁴² Secondly, Carleton believed that the land could be acquired by fairer and less expensive means than confiscation, simply by buying the land from Maori after it had passed through the court. The expenses of settling confiscated land in the Waikato, he said, had been high. Thirdly, he believed that the court had been brought into contempt amongst East Coast Maori through its use as an instrument of confiscation. Fourthly, Carleton claimed that the East Coast Land Titles Investigation Act was a sham, resorted to in order to avoid attracting the attention of the imperial government. Richmond, who was in effect the Native Minister at the time, had acknowledged that the Act ‘attempted in an indirect manner to effect that which could only be treated as confiscation’; but, by avoiding re-enacting the confiscating clauses of the New Zealand Settlements Act when they had expired, the Government had taken a less than straightforward route. The Assembly had passed a new Act:

137. Document A1, pp103–104; doc F18, p65

138. Document F18, p66

139. Biggs to McLean, 27 March 1868, McLean papers (private) (doc A1, p102)

140. Document F18, pp72–73

141. 16 August 1868, NZPD, 1868, vol3, p518 (doc F18, p73)

142. 26 August 1868, NZPD, 1868, vol3, p37

which made the very tribunal which the Natives had appealed to – the Native Lands Court – an instrument whereby the Government would obtain very large tracts of land thereby confiscating by a side-wind, in direct opposition to the instructions of the Imperial Government.¹⁴³

Carleton suggested that the House should now in all honesty re-enact the confiscating clauses of the New Zealand Settlements Act and take its chances with the imperial government.¹⁴⁴

Richmond's reply was to produce his own Bill, drafted by Chief Judge Fenton. This was the Native Land Court Empowering Bill, which was passed on 20 October 1868, becoming the East Coast Act 1868. The key features of this Act were as follows:

- ▶ The preamble explicitly stated that the Act was intended to punish those East Coast Maori who had been, or were then, in 'rebellion' by confiscating their land.
- ▶ The Act provided that the Native Land Court was 'required' to refuse to order a certificate of title to anyone who failed to pass the rebellion tests in section 5 of the New Zealand Settlements Act, and it deemed such refusal lawful.
- ▶ Most significantly, where the Native Land Court found that any of the owners of land claimed were 'rebels' within section 5 of the New Zealand Settlements Act, it could award all the land to those who had not rebelled; thus, the effect was to transfer title from 'rebel' to 'loyal' Maori.
- ▶ In such circumstances, the court could also divide the land as it chose and, for each division, either issue a certificate of title to those deemed not in 'rebellion' or issue a certificate stating that the land belonged, according to custom, to those who were deemed in 'rebellion'.
- ▶ The court's final option was to certify that all the land claimed belonged to those deemed to be in 'rebellion'.

As with the earlier East Coast legislation, land certified as belonging, according to custom, to 'rebels' was deemed from that time to be Crown land. The Governor might make reserves for 'specified aboriginal Natives' from any such confiscated lands.

Richmond assured the House that the original intention of rewarding loyal Maori and punishing the Queen's enemies was enshrined in the new Bill. However, he considered the policy of seeking a cession was a 'still better plan', and accordingly he intended to ask McLean to return to the East Coast and attempt to persuade Maori that the Government's intentions towards them were worthy of being taken seriously.¹⁴⁵

143. 26 August 1868, NZPD, 1868, vol3, p39

144. Document F18, p74; doc A1, pp104–105

145. 3 September 1868, NZPD, 1868, vol3, p146; doc F18, p74

4.2.14 The final phase of Biggs' negotiations for a cession

By the time that the East Coast Act 1868 was passed, Te Kooti had already led the 298 Waerenga a Hika prisoners in their escape from detention on Wharekauri. Over three months had passed since they had landed at Whareongaonga, south of Turanga, and made their way inland, skirting the Maori and Pakeha settlements on the Turanga flats. The return to Turanga of so many people deemed 'rebels' in these circumstances, under Te Kooti's powerful leadership, brought 'a return of heightened tensions in the district'.¹⁴⁶ In the months that followed, three colonial forces in succession pursued Te Kooti, as instructed by Biggs; then, by early October, Biggs fell back in accordance with his instructions from Wellington. (These matters are discussed fully in the next chapter.)

Te Kooti's return also caused some apprehension among kawanatanga Turanga Maori. This is perhaps not surprising. The latter had, after all, been in negotiation with the Crown over the cession of the land of those who had been detained on Wharekauri. It is fair to say, however, that the negotiation on the Maori side had been undertaken with considerable reluctance.

By the end of September, Biggs reported that the tribes had 'at last come to their senses' over the land question and seemed anxious to reach an agreement.¹⁴⁷ Early in November, Biggs, McLean, and Richmond met in Turanga to discuss defence matters. Late on 9 November, Biggs wrote to Richmond informing him that he believed Turanga Maori were about to offer 10,000 to 15,000 acres of flat land. Biggs wrote that he would accept that offer and settle the matter.¹⁴⁸ But Biggs and his family were among the settlers killed hours later in Te Kooti's attack on Matawhero. Biggs' negotiations thus came to an unexpected and tragic end.

Nearly three years after the siege of Waerenga a Hika and the surrender of most of those inside, the Government had still not secured the land that it sought from Turanga Maori. In the next two chapters, we take up the story of those who were sent to Wharekauri after the surrender at Waerenga a Hika, their return to Turanga in 1868, their eventual assault on the settler and Maori communities of Turanga, and the subsequent capitulation of those communities to the cession of land that the Government had so long sought. For, in December 1868, the Maori of Turanga signed a deed of cession to the Crown.

4.3 CROWN AND CLAIMANT CASES**4.3.1 The Crown's case**

Crown counsel, considering the overall intent of the East Coast legislation, submitted that it was consistent with Crown policy to 'take some land as punishment for the fighting at

146. Document F18, p75

147. Biggs to McLean, 28 September 1868, McLean papers (doc A10(a) vol2, p908)

148. Document F18, p72

Waerenga a Hika'.¹⁴⁹ Counsel considered that confiscation or forfeiture were both appropriate descriptions of the intention of the East Coast legislation. They drew a distinction between 'confiscate' (defined as 'taking or seizing property with authority') and 'forfeit' ('losing or being deprived of property or a right or privilege as a penalty for wrongdoing'). On the basis of this distinction, counsel considered that the use of the term 'forfeit' might be more appropriate for the East Coast legislation because it carried the implication of 'investigation and due penalty'.¹⁵⁰

The purpose of confiscating Turanga lands, the Crown said, was to 'punish rebels and pacify the district'.¹⁵¹ It was not about oil. Oil might have mattered to the provincial governments, but it was not a prime factor in the general government's decisions. Counsel stressed that McLean had instigated a policy of confiscation as soon as the conflict at Waerenga a Hika was over.

The East Coast legislation was a substitute for the New Zealand Settlements Act 1863, and it was 'better law' because the Native Land Court was given the independent task of determining precisely which lands in the district were owned by rebels. The court was to receive evidence as to who was entitled to the land, and it was then to apply the test of section 5 of the New Zealand Settlements Act to determine if any owner was a rebel. The court could therefore determine guilt at an individual level, without needing to apply 'an overarching test of overall rebellion'.¹⁵² Thus, the legislation established procedures independent of the Crown for determining which land might be 'forfeit'. Loyal Maori understood, said counsel, that under the East Coast Land Titles Investigation Act (and in contrast to the New Zealand Settlements Act), the process relied on their cooperation to provide evidence of which land was owned by loyal Maori and which land was owned by rebel Maori. Counsel did acknowledge that there were no explicit appeal procedures set out in the legislation but noted that aggrieved parties could petition Parliament with their concerns.

Crown counsel acknowledged that statements made by Crown agents referring to the New Zealand Settlements Act seem to have been made to exert pressure on Maori to come to an agreement to cede land to the Crown. It was submitted, however, that despite Biggs' discussions about applying the New Zealand Settlements Act in June 1867, the Government had decided by May not to use the Act in Turanga.¹⁵³ With regard to the cession negotiations themselves, Crown counsel conceded that the evidence pointed to a clearly unequal position of strength between the parties. But, notwithstanding Biggs' inflexible bargaining position, counsel stated that the evidence bore out the Crown's commitment to gaining the agreement of loyal Maori.¹⁵⁴

149. Document H14(5), p9

150. Ibid, pp13–14

151. Ibid, p19

152. Ibid, p16

153. Ibid, p34

154. Ibid, pp7–8

The Crown noted that, between 1866 and 1868, none of the East Coast Acts was actually applied in the district in a substantive way. Counsel submitted that the legislation therefore did not have a material effect in changing the land interests of Maori. Counsel did acknowledge that the preparations for the cancelled hearings between 1866 and 1868 (such as the carrying out of survey work) cost Turanga Maori money, though counsel also suggested that some of this survey work was used later so its value may not have been altogether lost. Moreover, the Crown agreed that the legislation became politically discredited when the putative owners, 'loyal' or 'rebel', would not cooperate to enable the court to determine properly which land belonged to 'loyal' Maori and which to 'rebels'.

4.3.2 The claimants' case

Claimant counsel argued that the clear intent of the East Coast Land Titles Investigation Act 1866 and its amending Act was to enable confiscation.¹⁵⁵ Counsel further submitted that the evidence indicated that Turanga Maori were threatened with the New Zealand Settlements Act if they did not cooperate with the Crown's efforts to confiscate land through the use of the East Coast Land Titles Investigation Act.¹⁵⁶

Claimant counsel challenged the Crown position that the change in policy on confiscation on the East Coast reflected a desire for a 'milder' form of land acquisition. The real reasons for the East Coast legislation were instead that the New Zealand Settlements Act 1863 had proved unworkable, and had met with the disapproval of the imperial government.¹⁵⁷ The discovery of oil, counsel argued, was also important in the unfolding of confiscation. McLean's and Ormond's push to have Turanga annexed to Hawke's Bay, and active pursuit of Maori signatures for the petition to this effect, was crucial evidence of their determination to open the oil springs to benefit Hawke's Bay, 'and also probably themselves'. The fact that the Colonial Secretary had asked for specimens from the oil springs three months before the East Coast Land Titles Investigation Act was passed also demonstrated the general government's interest in the springs. Biggs' letter of January 1867 made it clear that the boundaries in the schedule to the Act were extended so that they would include the springs.¹⁵⁸

Claimant counsel disputed the Crown's view that the East Coast Acts were 'better law', arguing that the 1866 Act was so poorly drafted that it mistakenly provided for the confiscation of 'loyalist' rather than 'rebel' lands. And, though tests for rebellion were set out in all three Acts, by reference to section 5 of the New Zealand Settlements Act, no mechanism for determining whether rebellion had taken place was set out in any of them. Instead, the Native Land Court was to apply the section 5 test when awarding certificates of title.¹⁵⁹ However, counsel

155. Document H2, p36

156. Ibid, p38

157. Ibid, p37

158. Document H1, p57

159. Document H2, pp36–37; doc H3, pp36–37

suggested that that court was not the proper place to make such decisions as to individual acts of rebellion: ‘The appropriate way of dealing with the matter would have been to have those suspected of rebellion tried before a [general] Court.’¹⁶⁰

Claimant counsel argued that the material effect of the 1866, 1867, and 1868 Acts was to lower the ability of Turanga Maori to resist a cession. Counsel referred to Carleton’s statement that the Crown had been ‘begging with a bludgeon’. Counsel submitted that, without the ‘bludgeon’ of the East Coast legislation, there was ‘no incentive for Maori to agree to cede lands in lieu of the Crown’s claims on rebel interests’.¹⁶¹ Counsel submitted that, ultimately, the successful outcome of this strategy was the 1868 deed of cession, which extinguished native title over much of the Turanga district.¹⁶² This matter is discussed further in chapter 6.

4.4 TRIBUNAL ANALYSIS AND FINDINGS

We turn first to the question as to whether any confiscation of Turanga Maori lands was justified. In the previous chapter, we concluded that Turanga Maori were not in rebellion at Waerenga a Hika, or in the period preceding the outbreak of hostilities in November 1865. Accordingly, it must follow that a policy of confiscation, whether through the New Zealand Settlements Act, the East Coast legislation, or an imposed cession, was without any justification and was in breach of article 2 of the Treaty of Waitangi.

The second matter that demands examination is why the Crown decided to pass new legislation (the East Coast Land Titles Investigation Act 1866, its 1867 amendment, and the East Coast Act 1868) in order to confiscate Turanga land rather than use the New Zealand Settlements Act 1863.

In relation to the Government’s decision not to use the New Zealand settlements legislation in Turanga, it was put to us by claimant counsel that the Act was perceived by this time as being ‘cumbersome and ineffective’.¹⁶³ When we asked counsel why, in that case, the Act was used for the confiscation of Ngati Awa land in January 1866, it was suggested that the murders of the Reverend Carl Völkner and James Fulloon had by that time created a need for the Government to be seen to be acting quickly and decisively, alongside the court-martial of those suspected of the murders. We accept that that may be the case; even though the Government may have been slow to act after the Bay of Plenty murders, when it did finally send in forces, it wanted to be seen to achieve pacification with some speed.

If this was the case, however, it must be asked why the Government did not wish to be seen to be acting equally decisively in Turanga at the same time. Was it because there had been no

160. Document H3, p 37

161. Document H1, p 55

162. Document H2, p 35; doc H3, pp 35–36

163. Transcript 2.26, p 85

murders and because the need for pacification was perceived as being less compelling? On the face of it, this does not appear to be the explanation, because the evidence is that McLean and Stafford were ready to proceed with confiscation at the beginning of 1866. Stafford expected McLean to produce a plan for confiscation and military settlement in accordance with his own offer to do so. But McLean did not.

Nor are we convinced by Crown and claimant suggestions that the disapproval of the imperial government was crucial. The New Zealand Settlements Act was used in Hawke's Bay in January 1867, six months after the colonial government had received Cardwell's second dispatch, that of April 1866, expressing disapproval in much stronger terms. McLean himself was instrumental in this confiscation.¹⁶⁴ The imperial government's views almost certainly had a bearing on the Government's decision to pass new legislation to confiscate land on the East Coast later in 1866, but they do not explain McLean's failure to suggest a confiscation plan at the start of the year, as requested by Stafford. By the time Cardwell's 1866 dispatch had arrived, the decision not to use the New Zealand Settlements Act in Turanga had already been taken by McLean.

In order to understand the decision not to use the New Zealand settlements legislation to confiscate Turanga lands, we have to explain:

- ▶ why McLean procrastinated early in 1866;
- ▶ why Whitaker, the superintendent of the Auckland province, did not push for the use of the settlements legislation during 1866, when this seemed to be in his province's interest; and
- ▶ why the Stafford Government did not insist upon a confiscation.

The crucial factors in understanding McLean's procrastination in early 1866 are as follows:

- ▶ The discovery of petroleum in Turanga early in 1866.
- ▶ The rivalry between the provincial government of Auckland (whose boundaries included Turanga) and that of Hawke's Bay over the issue of the right both to develop Turanga lands after Turanga Maori surrendered at Waerenga a Hika and to secure the potentially lucrative oil springs.
- ▶ The decision of the Auckland provincial government in February 1866 to accept responsibility for the confiscated lands in the province, 'for the purposes of colonization'. The general government had decided to transfer the lands to the Auckland province, which meant that the Hawke's Bay province stood to lose to Auckland any profits from the potential sale of any East Coast confiscated lands.¹⁶⁵
- ▶ The continued possibility that McLean and his provincial council might yet secure Turanga lands for Hawke's Bay province. During the middle months of 1866, they gathered signatures throughout the East Coast for the annexation of 'Poverty Bay' to Hawke's

164. Alan Ward, *Waitangi Tribunal Rangahaua Whanui Series*, vol 3 (Wellington: GP Publications, 1997), p 197

165. *Journals of the House of Representatives*, 26 October 1865, AJHR, 1866, A-2, p1; *Journals of the Auckland Provincial Council*, 2 February 1866, AJHR, 1866, A-2, p9

Bay, hoping to push for such an annexation later in the year, after the General Assembly had convened.

In our view, Hawke's Bay province stood to lose the Turanga lands, with the bonus of the oil springs, to Auckland province if they were confiscated under the New Zealand settlements legislation. It is this fact that explains McLean's silence on the confiscation after his initial enthusiasm.¹⁶⁶

The crucial facts in understanding Whitaker's decision are as follows:

- ▶ Whitaker had decided initially to work with Maori claimants, whom he evidently assumed were not 'rebels'. He planned to use the Native Land Court to secure the province's title to the oil-bearing lands at Turanga so he could lease them to commercial interests.
- ▶ Faced both with strong competition from Auckland commercial interests for the oil-bearing lands and with the realisation that 'rebels' owned parts of these lands, Whitaker decided against the Native Land Court route under the Native Lands Act. The court was not prohibited under that Act from awarding land to 'rebels', and such awards posed political difficulties for his planned purchases.
- ▶ Whitaker evidently considered two possibilities. Both involved waiting till the General Assembly sat in the second half of the year, because both ultimately involved legislative change.
- ▶ The first possibility was to secure permission to negotiate valid purchases of East Coast land before the lands passed through the Native Land Court. In September, Whitaker was able to add a new clause to the Native Lands Bill 1866 to this effect.
- ▶ The second possibility was to secure the enactment of new legislation under which confiscation could be implemented on the East Coast. What Whitaker evidently wanted (because that was what the new East Coast Land Titles Investigation Act provided for) was an Act which allowed the Native Land Court to determine title and to grant land to 'friendly natives' but prevented it from making grants of land to those who had 'rebelled'. The New Zealand Settlements Act did not provide for this level of precision in awards, which explains Whitaker's lack of enthusiasm for it in Turanga. We discuss this legislation further below.

We have dwelt at some length on the respective preoccupations of the Auckland and Hawke's Bay superintendents because they are clearly crucial in explaining the Crown's delay in implementing confiscation in Turanga. Both men, of course, were more than superintendents – both were also agents of the general government: Whitaker in Auckland and McLean on the East Coast. On the East Coast, McLean represented the Crown and had extensive powers to conduct relations with Maori. As appears to be so often the case in colonial New

166. It also explains why Ormond wrote to McLean in May to reassure him that there was no 'fear' that confiscation would go ahead; this is an inexplicable comment if not viewed in the context of provincial rivalry, given Ormond's general enthusiasm for the confiscation of Turanga and East Coast lands.

Zealand, McLean had a clear conflict of interest in holding both offices at once.¹⁶⁷ His decision early in 1866 not to proceed with confiscation in the interests of his province – a decision made to delay implementation rather than to abandon it – would turn out to have long-term consequences.¹⁶⁸

Finally, the Stafford Government did not itself proceed with confiscation. The reasons appear to be these:

- ▶ to do so early in 1866 would have meant proceeding without McLean's blessing, and Stafford may have hesitated to alienate McLean;
- ▶ as the year progressed and Stafford faced two powerful men, both pushing for a delay until the General Assembly convened so they could try for legislative change in the interests of their provinces, he may simply have decided to let matters take their course;
- ▶ Cardwell's 1866 dispatch condemning the Settlements Amendment Act and the parent Act which it made perpetual would certainly have been an incentive to consider another mechanism for confiscation; and
- ▶ there was, in fact, no pressing need for confiscation or military settlement at Turanga – the area was peaceful, no specific crimes had been committed, and large numbers of men were in any case being removed by the Crown and sent to Wharekauri.

We conclude that there were strong political and economic reasons for the provincial governments of Auckland and Hawke's Bay not to push for confiscation under the New Zealand settlements legislation during 1866. Evidently, there was no strong reason for the general government to insist on confiscation and military settlement at that time, despite the fact that the justification for Waerenga a Hika was a breakdown of law and order in Turanga by the end of 1865.

Why, then, did the Crown decide to pass new legislation (the East Coast Land Titles Investigation Act 1866, its 1867 amendment, and the East Coast Act 1868) to implement confiscation in Turanga? This, we may answer briefly:

- ▶ The East Coast Land Titles Investigation Act 1866 was drafted by Frederick Whitaker, who at that time had a particular interest in securing 'rebel' lands on which oil springs had been found. Indeed, Whitaker had already sent an agent to try to secure these lands for Auckland province.
- ▶ The legislation provided a mechanism by which Turanga lands could be dealt with in the Native Land Court, so that 'friendly' Maori could be awarded land which they could then legally sell and lease.
- ▶ The Act also appeared to provide a mechanism by which, at the same time, 'rebel' natives might be dispossessed of their lands by due process.

167. McLean later emphasised Whitaker's conflict of interest, apparently without considering his own: 3 September 1868, NZPD, 1868, vol 3, p148.

168. Whitaker was subject to strong public criticism from the *Daily Southern Cross* (owned by William Brown, of Brown, Campbell, and Company), for his interference in Turanga, though the New Zealand Herald defended his moves to prevent private interests from buying 'rebel' lands subject to confiscation: Wai 144 ROI, doc A3, p68.

- The Act thus also had the advantage for the general government of appearing to meet the requirements of the imperial government (though the long title of the Act – ‘An Act to enable the Native Lands Court to inquire into and determine Titles to Land in the East Coast District’ – was so innocuous that it would hardly have attracted attention in London).
- The East Coast Land Titles Investigation Act Amendment Act 1867 was passed to fix a clerical error in the original Act, allowing the Native Land Court to confiscate the interests of ‘rebels’ as had been intended. It is obvious that the Government also took the opportunity presented by this error to extend the boundaries of the district subject to the Act to include the oil springs land.
- The East Coast Act 1868 was passed in the wake of growing political concern over the nature of the Crown’s policy. This concern was sparked by Maori discontent all along the East Coast with that policy, and with Biggs’ inflexible approach to securing a ‘cession of land’, and it was reflected in Hugh Carleton’s wish to see the East Coast Land Titles Investigation Act 1866 repealed. The new Act attempted to meet political criticism by a new provision which allowed the Native Land Court the discretion to order a certificate of title to ‘non-rebel’ owners of a whole block, even when some of the owners were deemed ‘rebels’. In other words, ‘rebel’ rights might be transferred to their ‘non-rebel’ whanaunga.

We turn then to the question why, given that the Crown passed the East Coast legislation to provide for land confiscation, did it also seek a cession of land to the Crown by way of reparation for Waerenga a Hika?

By 1867, it seems that the Crown had decided to pursue the policy originally urged by the imperial government of imposing ‘cessions’ of land on Maori. Cardwell’s 1866 dispatch had undoubtedly increased the pressure on the New Zealand Government to be seen to adopt a less punitive policy. The colonial government thus instituted such a policy at Wairoa, on the East Coast, and at Turanga. And it is possible that Biggs might have secured a cession earlier if he had been more flexible. For, despite everything – the failure of the Crown agents to finalise confiscation during 1866 (when it was expected), the arrival in Turanga of land agents who entered into arrangements with Turanga Maori, the emerging view among Turanga Maori that they had in fact escaped confiscation – in early 1867 they were still willing, albeit with great reluctance, to give up land to the Crown. Even though Biggs’ demands were regarded as exorbitant, the Turanga leadership was evidently willing to continue discussions. But, from mid-1867 to early 1868, their mood changed. Judge Monro assured them that their lands would be safe in his court, which, he said, was not a ‘land taking Compensation court’.¹⁶⁹ McLean told them that their lands would be much safer if they kept them out of the court and negotiated with the Crown. Biggs and Williams offered deals, alongside McLean, which respectively took nearly all the good land or a vast amount of hill country.

169. Monro to Richmond, 15 August 1867, AJHR, 1867, A-10D, p7 (doc A10, p250)

Turanga Maori, by now, trusted neither the negotiators nor the Native Land Court, acting in its new confiscation jurisdiction. But, in the end, after the escape of their whanaunga from detention on Wharekauri, the chiefs finally came close to an agreement with Biggs for a smaller amount of land – between 10,000 to 15,000 acres.

In short, because the cession policy depended on Maori cooperation, Biggs had to be able to sell it to Turanga Maori. While he insisted on a vast area of land, and on taking the land of those who had aligned themselves with the Government, he could not do so. Ultimately, Biggs' approach exposed the fact that the imperial government's idea of an 'imposed' cession was a contradiction in terms. Biggs and Richmond recognised this when they gave serious consideration to using the New Zealand Settlements Act instead. Turanga Maori were prepared to negotiate a cession on their terms, but they were not prepared to be dictated to.

Prior to the escape of Te Kooti and the prisoners from Wharekauri and their return to Turuanga, both Ngati Porou and Turanga Maori were in strong opposition to what they considered a forced cession. They cited the statement Sir George Grey made in March 1866 when he visited Turanga. Grey and McLean both later denied that Grey had promised that Turanga lands would be spared, since confiscation on the East Coast (as McLean put it) had always been intended.¹⁷⁰ According to Carleton, Turanga Maori reacted by composing a song about the Governor's pledge, which stated that 'as it was not made in writing they supposed it was traced in sand'.¹⁷¹

Turanga Maori also argued that the punishment was being borne by the many men sent away. This view would have been reinforced by the fact that Grey spoke to them as the first large group of detainees were put on the boat to Wharekauri. It appeared, too, that punishment was to be borne on a tribal basis, for the Crown emphasised the wrongdoings of tribes – McLean, for example, singled out Te Aitanga a Mahaki – and made no attempt to conduct any judicial process which identified individual culpability.

But Biggs tried to secure a cession in Turanga not just because it was Government policy but for a more practical reason – he did not think the East Coast legislation would work. In fact, it seems to us that the legislation laid bare the false premise on which the Crown's confiscation policy was based: namely, that it was possible to separate the interests of 'friendly' and 'rebel' Maori, and take the lands of the latter without inflicting injustice on the former. The advantage of cession was that it removed all the risks of experimental legislation including, as we saw from the crucial error in the 1866 Act, simple incompetence. A cession secured by a little 'squeezing' of the ceding party was still a cession. We will deal with this issue in more detail in chapter 6. The material point is that the Crown never wavered in its intention to confiscate land by whatever means proved least inconvenient to it, and was ultimately successful after the escape of Te Kooti and the prisoners from their detention on Wharekauri.

170. But he did not deny that Grey may have made a statement to 'friendly Natives' to the effect that no land would be required of them: 3 September 1868, NZPD, 1868, vol3, p149.

171. 26 August 1868, NZPD, 1868, vol3, p39

Finally, and most importantly, the delay in implementing the Crown's policy changed the course of history in a fundamental way. For a whole year after Waerenga a Hika, the Crown refrained from implementing its confiscation policy. This was, moreover, during the crucial year when the significance of the Maori surrender at Waerenga a Hika was fresh in everyone's mind. It appears that immediately after Waerenga a Hika Turanga Maori may have been prepared to place their lands in McLean's hands. This was perhaps more than anything else a gesture of acceptance that on the battlefield the Crown had won the right to have some say over the fate of Turanga lands – a right that it had never before had in the area. It is possible that, if the Crown had at this point confiscated an amount of land which Turanga Maori regarded as reasonable, this might have been accepted. Turanga had, after all, lost the battle.

Yet, confiscation was put on hold while the Auckland and Hawke's Bay provincial governments vied to secure the right to develop Turanga lands. Auckland was especially anxious to secure the oil springs, while Hawke's Bay was especially anxious to secure the inclusion of Poverty Bay within its political boundaries. By humouring both provinces, and thus failing to intervene to implement its policy at the appropriate time, the New Zealand Government also failed in its obligation to Turanga Maori at the very time when it urged the importance of submission to its authority. In particular, the imperial government's clear instruction to the Governor that, in carrying out confiscations (even assuming them to be just), the extent and position of lands to be confiscated should be made known at once to Maori was lost sight of at Turanga.¹⁷²

For those held on Wharekauri, this paralysis of policy would have very particular ramifications. We are left to conclude that the unreasonable length of the wretched imprisonment of those who had surrendered at Waerenga a Hika was over a needless patch-war between Whitaker, McLean, and their respective provinces. It had nothing at all to do with either punishment or pacification.

Had the detainees been released after 12 months, the indications are that they would have left Wharekauri the same way they had lived there – peacefully – because all they wanted to do was go home. They had been given to understand that their release depended on their good behaviour, and they had conducted themselves accordingly (see ch5). The sense of grievance of the majority had not yet reached a point where they were prepared to take direct action to free themselves. The evidence is that a change in their attitude was not evident till early in 1868 and that it came about precisely because they saw no end in sight.

There is a terrible irony in the fact that, if the Crown had been focused on carrying out its own policy of pacification after Waerenga a Hika, it might at that time have achieved the peace that it said it wished to achieve (even though there was no need for Turanga to be pacified). In chapter 5, we will consider the awful result of the Crown's delay.

172. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, app, pp 20–23

CHAPTER 5

THE STORY OF TE KOOTI AND THE WHAKARAU

*Tenei te Tira hou, tenei haramai nei
Na te rongō pai na te rangimarie
Nau mai ka haere taua, ki roto o Turanga
Kia whakangungua koe ki te miini
Ki te hoari, ki te pu hurihuri
Nga rakau kohuru a te Pakeha a Takoto nei*

*A new company of travellers is setting out
By the Gospel and in peace
Come we will go to Turanga
That you may be tested by the Minnie rifle
By the sword and the revolver
Those Pakeha instruments of murder that are lying everywhere*

—From *Pinepine te Kura*, a Ngati Kahungunu waiata

5.1 INTRODUCTION

Following its victory at Waerenga a Hika, the Crown immediately set about pressing home its advantage. One hundred and thirteen of the men who had surrendered at Waerenga a Hika were detained without trial on Wharekauri; some were joined by their families. By the end of 1866, 73 more men taken captive after battles near Napier had also been sent there. The detention of all of them lengthened into 1868. At the same time, the Crown sought from those who remained a cession of land and the extinguishment of native title in the entire district of Turanga. This dual strategy was to have far-reaching and unforeseen consequences, and this chapter addresses those consequences. They constitute some of the most distressing events in New Zealand's colonial past.

Among the prisoners on Wharekauri was Rongowhakaata man Te Kooti Rikirangi. He was to emerge from the stresses of imprisonment on Wharekauri as the spiritual leader of his comrades. A central tenet of his new faith was that Maori, like the Old Testament Israelites,

suffered at the hands of an oppressive state, from which God would save them. It was in pursuit of this belief that he planned both the successful escape to Turanga in July 1868 of all the detainees from Wharekauri and their journey inland to Taupo, where he intended to build his new faith. Like Pai Marire before him, Te Kooti's was a faith that offered hope to the oppressed.

On 9 July, the Whakarau, 298 people in all, landed on the east coast of the North Island at Whareongaonga.¹ From this small bay, some 20 kilometres south of the settlement that would become known as Gisborne, they began their slow progress inland. Te Kooti made it clear that they wished to travel peacefully. The general government reacted slowly to the escape of the Turanga detainees from Wharekauri, and, by the time it had been decided that they could be offered the option of remaining peacefully in Turanga, too much had happened. The local militia commander Captain Reginald Biggs spoke for the Crown. He demanded immediate submission. Whether as a result of their treatment in Wharekauri or their dislike of Biggs, Te Kooti's people trusted neither him nor the Crown. Biggs did not himself go to meet Te Kooti, but he prevailed on local rangatira to urge him to lay down his arms. At the same time, Biggs gathered a force and prepared for conflict.

Before long, negotiations were abandoned and Crown forces and the Whakarau came to blows. Three successive forces – from Turanga, Wairoa, and Napier – were sent in pursuit of the Whakarau. When all three failed, the Crown offered terms through an intermediary, but Te Kooti made no response. It had now been three months since the return of the Whakarau. Te Kooti made his base at Puketapu, on the borders of Urewera country. He sought to press on to Taupo but was ultimately refused passage by Kingitanga and Tuhoe leaders. (It is likely that those leaders, having already suffered military invasion and confiscation in their respective territories, had no stomach for the trouble which would accompany Te Kooti.)

In late October 1868, Te Kooti and the Whakarau finally made their decision and turned back towards Turanga in anger. Turanga had changed during their long absence. The Crown had forcibly 'acquired' the Rongowhakaata icon meeting house Te Hau ki Turanga and removed it to Wellington, where it remains today. The Crown had long pressed for the cession of the entire district through its agent Major Biggs; only in November would Biggs finally modify his demands. Meanwhile, Biggs had personally settled on lands which Te Kooti claimed ongoing rights in.

On the night of 9 November 1868, Te Kooti and his men attacked and killed a number of settlers and Maori at Matawhero, beginning with the two senior military officers in the region, Captain James Wilson and Major Biggs, and their families. Over the next few days, certain rangatira in the nearby villages were also targeted and executed. In all, 29 to 34 settlers and children of dual descent were killed the first night, with perhaps another 20 to 40 Maori killed

1. The term 'Whakarau' refers literally to the 'exiles' or 'banished ones', but within the Ringatu Church, it is the term used for those who shared detention on Wharekauri, along with Te Kooti, and escaped with him. They accepted his spiritual leadership, and as his first followers, have a special place in the history of the Haahi Ringatu.

subsequently. About 300 Maori were taken prisoner by Te Kooti and forced inland with the retreating Whakarau. The murder of some 50 to 70 people in such circumstances caused great fear and outrage both in Turanga and throughout New Zealand.

After Matawhero, the Whakarau withdrew from Turanga to Ngatapa Pa, high on Ngatapa mountain. Colonial and kawanatanga forces pursued Te Kooti there, besieging the Whakarau for the first five days of January 1869. The siege ended when most of the defenders managed to escape down the one unguarded – and very steep – escarpment on the northern side of the pa, and the besieging forces took possession of the pa. A number of Ngati Porou and Te Arawa in the Crown's forces pursued those escaping, and some of the Whakarau (and, it appears, some of their prisoners) were killed in that bush pursuit. The Crown accepted before us that a number of those captured were executed without 'trial'. It is possible that some of those executed were in fact prisoners of the Whakarau. Just how many were executed was a matter of considerable difference of opinion in the evidence called by the claimants and the Crown. We will address those differences in detail below.

After the fall of Ngatapa, Te Kooti escaped into the Urewera and rebuilt his forces. He raided communities near Whakatane and at Mohaka and was pursued by colonial and kawanatanga forces throughout the Urewera and as far inland as Taupo. He finally escaped into the King Country in May 1872, and the Government gave up its pursuit. By the time of his death in 1893, Te Kooti had established the Haahi Ringatu (Ringatu Church), which spread throughout the Urewera and the Bay of Plenty and to communities in Napier, Wairoa, and Hauraki.

The following key questions arise from the events of 1865 to 1869:

- ▶ Why were the prisoners taken at Waerenga a Hika, including Te Kooti Rikirangi, sent to Wharekauri and held there for so long without trial?
- ▶ Was the prisoners' detention lawful according to the standards of the time and was it consistent with Treaty principles?
- ▶ Were the detainees entitled to free themselves from this detention and return to Turanga?
- ▶ Did the Crown act consistently with Treaty principles by seeking to attack and subdue the Whakarau prior to Matawhero and was it entitled to attack and subdue the Whakarau after the killings at Turanga?
- ▶ Were the Crown's actions at Ngatapa reasonable in the circumstances and consistent with Treaty principles?

5.2 THE DETENTION OF TURANGA MAORI ON WHAREKAURI

The outcome of the battle of Waerenga a Hika left the fate of those who had surrendered in the hands of the New Zealand Government. For many – those deemed the 'worst offenders' –

5.2.1(1)

it took some months before it was clear what form their punishment would take. Eventually, they were sent in successive groups to Wharekaui to be detained. Among them was the Rongowhakaata man Te Kooti Rikirangi.² The story of these political prisoners, who would eventually be forged into a close-knit community under Te Kooti's spiritual leadership, unfolds from this point. That community is known within the Ringatu church as 'the Whakarau'.

5.2.1 Government policy on the treatment of detainees

(1) *Making an example*

On 7 December, Stafford gave McLean an indication of the treatment those who had surrendered at Wairenga a Hika could expect:

The Government is determined with respect to the prisoners taken at Poverty Bay, after due warning had been given to them, and as regards all future prisoners so taken, to mark its sense of their conduct in a signal manner. Those amongst them who are believed to have been guilty of murders or other serious crimes are to be tried by Court Martial with as little delay as possible, so soon as the necessary evidence is ready. The remainder will be treated in the same manner as it is proposed that the Prisoners taken in the Wanganui District shall be dealt with, namely they will be sent to hard labor on public works (probably in the Middle Island) and will receive a pardon after a time conditionally on their having conducted themselves well while so employed.³

Stafford also raised the possibility that the male prisoners might be employed on public works around Napier; otherwise, they were to be sent to Wellington on the *Sturt*. In the meantime, they were held at Kohanga Karearea and Oweta in the villages of their whanaunga, who had aligned themselves with the Crown. In early February 1866, Captain Biggs (as he then was) met Stafford and Governor Grey and reported to McLean that both seemed to 'like the idea of getting rid of the Maoris who have surrendered'.⁴

Stafford, it will be remembered, had instructed McLean before Wairenga a Hika that the Government was 'absolutely determined' to 'punish all future outbreaks by taking sufficient lands to pay for the cost of putting them down, and for establishing military settlements to maintain the Queen's authority'.⁵

2. Nga Uri o Te Kooti Rikirangi give the name of their tupuna as Te Kooti Rikirangi, see doc H4, p2. And we have chosen to accept this form of his name. Judith Binney stated that Te Kooti is understood to be his Christian baptismal name; and that he took Te Turuki, the name of a young kinsman of his father, on his return from Wharekaui: Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press, 1995), p17.

3. Stafford to McLean, 7 December 1865, 65/165 3/3, Archives NZ (doc F16, p112) Fifty men and women had been captured in a colonial assault on a village at Weraroa in July 1865.

4. Biggs to McLean, 12 February 1866, MS papers 0032-0162, ATL. In fact, Stafford believed that the Government's efforts in Turanga would otherwise have been in vain.

5. Stafford to McLean, 3 November 1865, McLean papers, ATL (doc A10, p159)

Leonard Williams heard Defence Minister Haultain suggest on 20 February that the prisoners could be sent to Wharekauri, with the object of 'having them out of the way until the question of the confiscation of land should be settled'. According to Williams, 'it was contemplated that, if they should be deported, they would be brought back again in the course of about 12 months'.⁶ By 24 February, the Government had decided to send the prisoners to Wharekauri, which had been suggested as a penal colony some years earlier.⁷ The rationale for this decision was given in March by Native Minister Russell: 'It is desired, by removing as rapidly as possible from association with the less guilty prisoners all those who have been foremost in exciting them to fanaticism and bloodshed, to obtain power to release the remainder upon their taking an oath of allegiance.'⁸

Haultain also wrote to McLean on the subject, expressing the hope that McLean had 'quietly despatched the prisoners to the Chatham Islands'. He considered that 'This deportation of rebels has had a most beneficial effect in all directions, and I really trust that we are approaching the termination of the native difficulties.'⁹

In late February 1866, official instructions were sent from Russell to Captain Thomas, the resident magistrate on Wharekauri, instructing him to prepare for the prisoners.¹⁰ Thomas was also instructed that the prisoners were to be treated with kindness, that their wives and children would be accompanying them, and that they would have to grow their own food and build their own accommodation. In addition, as a privilege, they could work for other islanders for money (which at first would be held in trust for them).¹¹ The prisoners were to be informed that their return would depend on 'their own good conduct and the termination of the rebellion'.¹² It was hoped that none of the prisoners would be kept for 'longer than may be necessary'.¹³

On 3 March, Grey and McLean met with Turanga kawanatanga chiefs and informed them of the proposal to send some of the prisoners to Wharekauri for a period, the length of which would be determined by their behaviour there.¹⁴ According to Leonard Williams, the chiefs approved of the proposal.¹⁵ (However, on 9 April St George recorded that, when more prisoners were loaded on the *St Kilda* for Napier, Hirini Te Kani, Paora Kate, and 'other loyalists' "did

6. W L Williams, *East Coast (NZ) Historical Document Records* (Gisborne: *Poverty Bay Herald*, [1932]), p50 (doc A10, pp160–161); see also doc A23, p111

7. Document F3, p6

8. Russell to McLean, 24 March 1866, AJHR, 1868, A-15A, p4 (doc F16, p115)

9. Haultain to McLean, 13 March 1866, MS papers 0032–331, ATL (doc F16, p115)

10. Document F3, pp8–9

11. Ibid

12. 'Instructions and authorities under which the Native Prisoners were sent to the Chatham Islands', Russell to Resident Magistrate, [?] February 1866, AJHR, 1868, A-15A, p3 (doc F3, p9)

13. Ibid

14. Binney, p54

15. Williams did not identify these chiefs; he recorded them as 'friendly chiefs': Williams, p51.

their utmost to prevent him”¹⁶) Within four hours, the first group of 90 detainees were on their way to Napier.¹⁷ All but one were Te Aitanga a Mahaki. McLean’s grounds for targeting this iwi were that its members were the ‘most conspicuous for hostility to the Europeans, having defiantly refused to accede to any terms until taken prisoners of war at Waerenga [a] Hika’.¹⁸ The one political prisoner who was not of Te Aitanga a Mahaki was Te Kooti Rikirangi of Rongowhakaata, who had been arrested for spying on 21 November 1865. However, some of these 90, including Te Kooti, were returned to Turanga owing to a lack of evidence against them.

The first group taken from Turanga arrived on Wharekauri on 14 March 1866. It consisted of 39 male detainees and their families (10 women and 19 children). They were accompanied by 27 guardsmen. It appears that the Crown had not informed Taranaki Maori living on Wharekauri of its intention to send the detainees, though they were dependent on them to provide land. After discussions among the Taranaki Maori, one chief offered land with wood and water, and this offer was accepted.¹⁹ The second group of 88 (also including women and children) arrived under guard on 27 April 1866. The third group, comprising another 47 detainees, arrived on 10 June 1866. In this group was Te Kooti, who had been rearrested. (We will return to the story of his arrest later.) By this time, the total number of detainees on the island, including wives and children, was 203 – 116 men, 49 women, and 38 children.²⁰ These people were all from Turanga, chiefly Te Aitanga a Mahaki and Rongowhakaata.

Some months later, another two groups of detainees, numbering about 100 people in all, arrived on Wharekauri. These prisoners had been captured after the battles of Omarunui and Petane near Napier. These engagements occurred on 12 October 1866 between Pai Marire believers led by Ngati Hineuru and Napier military settlers, volunteers, and Ngati Kahungunu aligned with the settler forces. This included a further six Rongowhakaata and one Te Whanau a Kai man. An important arrival in this group was the Ngati Tuwharetoa chief Te Rangitahau. By December 1866, the total number of Turanga Maori political prisoners held on Wharekauri was 123.²¹ The report of 30 November 1867 showed that there were 154 Te

16. Paora Kate, Rukupo’s brother, had taken the oath of allegiance on 14 November 1865, with Tamihana Ruatapu’s people at Oweta Pa. He was also the scribe of the letter sent by Rukupo and the Pai Marire leaders to McLean of 12 November, 1865. For events on 9 April 1866, see St George, journal, 9 April 1866, MS papers 1842, ATL (doc F16, p116).

17. Crown witness Cecilia Edwards stated in evidence that she preferred the term ‘detainee’ rather than ‘prisoner’ to describe the status of the men sent to the Chathams, indicating that they had not been tried in a civilian court. We have used the term ‘detainee’ ourselves as defined in the *Concise Oxford Dictionary*: ‘A person detained in custody, esp for political reasons’: HW Fowler and FG Fowler, ed, *The Concise Oxford Dictionary*, 8th ed (Oxford: Oxford University Press, 1990), p317.

18. McLean to Colonial Secretary (Stafford), 26 April 1866, IA1/1866/1352, Archives NZ (doc A10, p163); see also doc A23, p112

19. Document F3, pp8, 12. The Crown leased a small piece of land for the resident magistrate’s house; it did not own any itself.

20. Document F3, p17

21. Document F3, p17. This figure is taken from the 1866 return. Edwards noted that this differed from Thomas’ report written two days earlier. She stated that the figures varied by a few individuals depending on which source is relied upon; the figures for the number of women and children were more unreliable than these for the men, as the women and children are not usually named.

Aitanga a Mahaki, 84 of whom were men, plus 40 women and 30 children.²² (This figure may have included Te Whanau a Kai and Ngariki Kaiputahi.) The 53 Rongowhakaata detainees comprised 36 men, nine women, and eight children.²³ There were several detainees of Ngai Tamanuhiri descent.

(2) Conditions on Wharekaui

On 13 May, Russell wrote to Thomas, reminding him that the women and children were not to be treated as prisoners. Thomas reported back that he was anxious to house the detainees before winter because they felt the change in climate.²⁴ The detainees had been building huts for their and the guards' accommodation throughout the winter and early spring. It was cold and wet work, the weather was bad, and the location of the huts was exposed. As a result, many of the detainees were rendered too weak to work. Because the site was swampy, much of the work had to be redone on a more suitable site. The detainees were initially given two months' rations, and were then supposed to be self-sufficient. But, though they began growing potatoes straight away, their crops were not always very successful and they remained on Government rations throughout their time on Wharekaui.²⁵ The women remained on a two-thirds ration throughout and the children were on a one-third ration. All were to get meat once a week. Rations for all detainees were to be smaller than those for the guard.²⁶

Thomas often requested more warm clothing, as well as seeds, tools, and other stores. Some of his requests were met, others went unanswered. For example, the Government sent arms and ammunition in October 1866 instead of the requested stores.²⁷ On 2 March 1867, the Government instructed Thomas that the prisoners should not be better fed than 'loyal Maori' on the mainland. They were not to get the full meat ration, nor tea, sugar, or rice.²⁸ On 23 December 1867, the Government further instructed Thomas that, in regard to the detainees, it was 'not the intention of the Government to maintain them in idleness' and he was not to let them work for other islanders until they had become self-sufficient.²⁹ However, the detainees remained employed in both public and private works, such as road cutting, building a hospital, and stone cutting. By then, they were paid in food and cash for any private work they undertook.³⁰

Ill health amongst the prisoners was prevalent in the winter months especially. A measles epidemic swept the islands in August 1867, killing many Moriori and Taranaki Maori but only

22. We acknowledge that there are problems with the sources. Because of inconsistencies in the reports of the arrivals of the prisoners, we have chosen to use here, the figures from the official return made in November 1867.

23. We include in this figure, the six Rongowhakaata men who were sent in later shipments; Edwards does not. This figure is taken from the 1867 official return.

24. Document F3, pp15–16

25. Document F3, pp26–28, 30

26. Document F3, p30

27. Document F3, pp28–29

28. Holt to Thomas, 22 March 1867, AJHR, 1868, A-15A, p8 (cited in doc F3, p29)

29. Stevens to Thomas, 23 December 1867, AJHR, 1868, A-15A, p9

30. Document F3, pp33–34

one prisoner. Perhaps the detainees brought a higher resistance to such epidemics with them from the mainland. Crown historian Cecilia Edwards noted that ‘Te Kooti was recorded as the detainee who was most often sick – with illness[es] including dysentery, asthma, chest disease’.³¹

The behaviour of the detainees was generally considered rather peaceful, and their relationships with officials on the island generally good. On 23 October 1866, in honour of the birth of his son, Thomas threw a party to which he invited the whole island. The detainees themselves gave a big feast for other islanders on 6 August 1867. There were two marriages of detainees, including that of Te Kooti (who described himself as a bachelor³²) and Maata Te Owai (a widow whose husband may have died on the island).³³ Professor Binney described this wedding:

The civil ceremony was conducted by Thomas, and Te Kooti gave the prison doctor’s little daughter, who acted as their bridesmaid, his light greenstone (inanga) oval pendant, inlaid with paua shell, which he had worn at his neck since being sent into exile. It was carved in the form of three birds’ heads, and represented the three islands of Aotearoa in unity.³⁴

By January 1868, the situation had changed. The guard had been reduced to half its former strength. Furthermore, it was now made up of members of the Armed Constabulary, rather than militiamen, and the Maori contingent had been removed.³⁵ The behaviour of some of the guards had been the cause of complaint by detainees, who made allegations against them of physical and verbal abuse, and of random inappropriate behaviour. Ms Edwards commented that ‘Alcohol appears to have played a large role in the daily life of the guard’.³⁶

The behaviour of Doctor Watson was also the subject of complaint. Watson appears to have been an alcoholic, and this impaired his performance. In addition, Watson himself had to pay for any medical supplies he used in treating patients (he was also responsible for the other islanders’ health). Watson did not always record the health of the detainees in a reliable manner. He did note births and deaths, but the records are uneven. There seem to have been 22 births to 69 women over 27 months. That equates to around one birth for every six women

31. Document F3, pp 47–48

32. We note, however, that Te Kooti was already married to Irihapeti, daughter of Te Waka Puakanga, by whom he had a son, Wetini.

33. Document F3, pp 50–51

34. Binney, p 72

35. Document F3 pp 37–38. The guard that accompanied the first shipment of detainees was made up of one officer, two non commissioned officers (NCOs) and 25 men (Pakeha and Maori) from the Colonial Forces in Hawke’s Bay. With the third group of prisoners (who arrived in June 1866), came the news that ‘the guard’ was to be withdrawn and replaced with chief Toenga and resident Maori. But at any rate, more prisoners arrived in October, bringing with them a guard of two officers, 20 NCOs and men of the Napier Military Settlers. In January 1868, the guard was changed again. According to Edwards, the practice of having a mixed guard was not a success. Many locals replaced the outgoing guard. In April 1868, the militia were replaced by a guard under the Armed Constabulary Act. The force now consisted of one senior sergeant, one corporal, and nine constables. They also had to police the island.

36. Document F3, pp 38–39

per annum. Four of the babies died with days of their birth. Adult deaths between March 1866 and November 1867 amounted to six men and two women. Six children also died. By early 1869, the records said that 22 men had died in the course of their detention.³⁷ Ms Edwards noted Professor Binney's opinion that 28 men had died, but she was not sure how that figure was reached.³⁸ Watson recorded 19 deaths over 24 months, which, if the missing months were included, would equate to around 23 deaths in 27 months.³⁹

The complaints against the guards and Watson were investigated in the course of Government reviews. Two such reviews were conducted into the conditions of detention. The second review was particularly relevant to the specific claims against the guards and the doctor. This review was conducted by W Rolleston, the under-secretary of the Native Department, in late January 1868. Rolleston found Thomas to be a satisfactory agent of the Crown, unlike the guards: 'The influence [Thomas] has obtained with the Native prisoners has, I think, prevented any evil result, which might have been entailed by what on a cursory view, I cannot but look upon as the unsatisfactory character of the military guard.'⁴⁰ The guards, in Rolleston's opinion, were drunken public nuisances. Some of them engaged in 'petty acts of insult and tyranny' against the detainees. Rolleston reminded Thomas that the prisoners were not 'men under sentence as ordinary criminals' but 'political offenders' and that it was therefore necessary to 'prevent any abuse of power'.⁴¹

Rolleston was particularly critical of Watson, both because of the latter's alcoholism and because of an incident that the Government later found to have been most improper. Rolleston referred to allegations from the detainees that they had been forced to parade naked – men and women together – while Watson, with the assistance of the interpreter, inspected them for venereal disease. Defence Minister Haultain, on hearing this complaint, requested that Thomas report into the allegations, as forwarded by Riwai Taupata, a native assessor of Kaingaroa on Wharekauri. Taupata said that Watson made 'a public inspection of all the prisoners and their women also, compelling the latter to appear in a state of nudity as well and at the same time as the men; in fact both men and women stood in a row naked. The interpreter Mr Shand, was present at a short distance.'⁴²

Thomas duly inquired and reported that Watson had approached him, suspecting a case of syphilis and recommending an inspection. Thomas had requested him to undertake the inspection, 'and to take care that it was carried out in as delicate a manner as possible'. Watson, as reported by Thomas, denied that the detainees were paraded naked; instead, he said that Watson examined each prisoner singly in a separate partition while Mr Shand

37. Ibid, pp 40–43

38. Ibid, p 45

39. Ibid

40. 'Report by Mr Rolleston on Condition of Native Prisoners at the Chatham Islands', 3 February 1868, AJHR, 1868, A-1, p 34 (doc F3, p 61)

41. Rolleston to Thomas, 3 February 1868, AJHR, 1868, A-1, p 34 (doc F3, pp 61–62)

42. EW Puckey to Defence Minister, 24 December 1867, AJHR, 1868, A-15E, p 24 (doc F3, p 63)

waited outside. The result was that one man and his wife were found to be infected, and ‘No complaints were made to me by the prisoners or their women, either before or after the inspection’.⁴³

Haultain replied to Thomas, recommending that Watson be replaced immediately. This was because:

he [Haultain] considers the inspection of Maori women to have been very improper, and that it should not have been recommended by Dr Watson, nor authorized by you. It is only in the case of licensed prostitutes that such examination could be justified, and the result of the inspection proved that it was quite unnecessary.⁴⁴

However, because there was no replacement doctor available, Haultain’s recommendation was not acted upon.

5.2.2 Indefinite detention?

Three reviews considered the possible release of the political prisoners; the two general reviews already mentioned, which were conducted by the Government, and an informal review which weighed the possibility of an amnesty. The matter of release was raised in the first review, conducted by Major Edwards, who reported on 8 May 1867. Edwards told the detainees that he would report their good behaviour, and he assured them that, if, as they stated, they were promised that they would be released after a year, then the Government would fulfil that promise.⁴⁵ On receipt of this report, the Defence Minister asked McLean if some of the detainees should be released. But McLean deferred to the opinion of Captain Biggs, who was trying to secure from the resident leadership both a cession of Turanga land and their cooperation in the implementation of the East Coast Land Titles Investigation Act (see ch 4). According to Biggs, the return of the prisoners would exacerbate his difficulties:

The difficulties at present to be contended against are so great, from the combination of the loyal and rebel Natives of Poverty Bay to obstruct the fair carrying out of ‘The East Coast Land Titles Investigation Act, 1866,’ by concealing all particulars relating to the titles to land, that I fear, by allowing a portion of the prisoners to return, it might add to the perplexity of the case.⁴⁶

McLean relayed Biggs’ view to the Defence Minister that it would be ‘inadvisable to allow any of them [the detainees] to return to Poverty Bay until the land question in that district is finally settled’.⁴⁷ It will be recalled that the delay in settling the land issue during the first

43. Thomas to Haultain, 28 January 1868, AJHR, 1868, A-15E, pp24–25 (doc F3, p63)

44. Holt to Thomas, 4 April 1868, AJHR, 1868, A-15E, p25 (doc F3, pp63–64)

45. Edwards to Defence Minister, 8 May 1867, AJHR, 1868, A-15E, p17

46. Biggs to McLean, 13 June 1867, AJHR, 1868, A-15E, p19 (doc F3, p57)

47. McLean to Defence Minister, 13 June 1867, AJHR, 1868, A-15E, pp18–19 (doc F3, pp56–57)

year of detention was because of the wrangle between Hawke's Bay and Auckland over which province would have the benefit of the confiscated land.

McLean added that, if the Government were to decide to release the detainees in any case, Biggs should be consulted as to who should be released. Three Rongowhakaata men were in fact released after this first review with another 10 detainees released after the second review.⁴⁸ Rolleston arranged for the actual release of eight of the second group of detainees while undertaking the third review. On this occasion, he noted that the detainees themselves requested a general release for all, 'rather than picking off the men for release one by one'.⁴⁹

The informal review of the situation of the detainees was, in fact, a response to a proposal from the province of Auckland for a general amnesty for all political prisoners, and met with a similar response from McLean. Premier Stafford had favoured an amnesty to 'most if not to all of the Native political offenders' held on Wharekauri.⁵⁰ But Mclean advised strongly against such an amnesty on the ground that this would endanger the peace of the colony. He was prepared to release only 10 men. Stafford thus wrote to the Secretary of State for the Colonies opposing an amnesty:

The only political offenders in confinement were captured in arms against the Queen . . . The women and children belong to their families, and have not been sent with them in any way of punishment, but have been allowed to accompany their husbands and fathers, with a view of adding to their domestic comfort.⁵¹

In May 1869 (after the escape of the detainees and after the tragic events at Matawhero and Ngatapa), GS Cooper reviewed the Government's actions in denying the general release of the detainees in 1867. His report stated that there was no evidence that the detainees were promised a definite period of detention. Release had always been dependent, according to Cooper, on the 'termination of the rebellion' and the establishment of peace:

The official reply to several applications . . . for their release has been uniformly to the effect that, quite as much in the interest of the prisoners themselves as of the Colony, their return must be delayed until peace should be securely established, lest they should be tempted to resume their former groundless hostility, and meet a worse fate than the mild banishment they were undergoing.⁵²

The Under-Secretary of Native Affairs wrote to JC Richmond:

It is said that the escape of a large proportion of the prisoners from the Chatham Islands is to be ascribed to the fact that they had been taken there with the expectation, if not

48. Document F3, pp57–58

49. Document F3, p61

50. Stafford to McLean, 12 December 1867, AJHR, 1868, A-1 (doc F3, p57)

51. Memorandum, Stafford to Secretary of State, enclosure 26, 11 February 1868, AJHR, 1868, A-1, p31 (doc F3, p58)

52. Cooper to Richmond, 21 May 1869, AJHR, 1869, A-1, p82 (doc F3, p59)

5.2.3(2)

the promise, that they should be brought back to New Zealand after a given time; that it was only when this expectation or promise was left unfulfilled that they made their escape; and that on their return to their country they did not offer any violence to the settlers till attempts were made to hunt them down . . .

The Native Office contains no record of any promise such as above referred to, and little or no trace of any such expectation.⁵³

The detainees, however, had by then of course taken matters into their own hands and escaped. Various explanations have been suggested for the change in attitude among the detainees noted by April 1868. Government official Cooper reported later that the arrival of seed, which led the detainees to realise that they would be there for some time yet, was an important trigger.⁵⁴ But it is also clear that Te Kooti's influence was growing at this time and that his spiritual leadership was taking hold. Even the prison authorities became aware of this. In an attempt to stem his influence, Thomas had Te Kooti imprisoned in solitary confinement.⁵⁵ This enforced period of introspection probably helped sharpen Te Kooti's thinking and strategies. In any event, from this combination of circumstances was ultimately born Te Kooti's new church – Te Haahi Ringatu. Te Kooti was also to emerge from these circumstances as one of the most important Maori political, military, and (above all) spiritual leaders of the next two decades.

5.2.3 Te Kooti Rikirangi Te Turuki: the emergence of a prophet leader

E te Atua, aue te pouri o toku wairua, mo au kupu kaore nei e whakarongona e tenei iwi mate . . .

E mea ana ratou, i o ratou whakaaro ake . . .

E taku Atua ka tangi tonu atu ahau ki a koe . . .

Ko ratou ia kahore he mahara, he pani nei hoki ratou . . .

Kahore he Matua, he pouaru nei hoki ratou kahore he whenua . . .

Na ko tenei e te Ariki, me whai tonu atu ahau i tou honore me tou kororia

Kua riro to matou wahi tipu i nga tangata ke, ko koe tonu ia hei Matua tipu moku ake ake . . .

The above is from *Te Tangi a Heremaia (The Lamentation of Jeremiah)*, a hymn frequently used by the Ringatu.⁵⁶ It may be translated as follows:

53. Minutes by the Under Secretary for Native Affairs upon two passages in dispatch 30 from Granville to Bower, 26 February 1869, AJHR, 1869, A-1, p82 (doc F3, p79)

54. Cooper to Richmond, 4 August 1868, AJHR, 1868, A-15, pp12–13 (cited in doc F3, p77)

55. Document F3, p70

56. This extract was given in evidence by Ringatu minister Mr C Pera, who had been asked to speak about the Haahi Ringatu and its beginning. Mr Pera stated in explanation (doc D41, p7): 'To Ringatu, this hymn talks about the strangers who have come with their methods of oppression to impose on maori; and their methods of stealing maori land. This is the view held by all iwi who are pleading that their land and their independence be returned to us the maori.'

*O Lord, my spirit is darkened for your words that are ignored by this afflicted people
 They are concerned only with their own thoughts
 O Lord, I will continue to pray to thee
 They are devoid of thought
 They are orphans; they are parentless and widowed and landless
 Lord, I shall continue to honour and glorify you,
 Our inheritance is turned to strangers
 And you will always remain as my guardian forever.⁵⁷*

New Zealanders' understanding of Te Kooti Rikirangi Te Turuki, founder of the Ringatu church, has been greatly shaped in recent years by the scholarly biography of him by Professor Binney, who worked with the senior elders of the Haahi Ringatu and drew on the texts of the Ringatu faith and Te Kooti's notebooks, letters, and waiata (of which he composed many), as well as official sources. Professor Binney gave evidence in this hearing on behalf of the claimant group Nga Uri o Te Kooti (Te Kooti's descendants). Extracts from her book *Redemption Songs* were also submitted by the claimants as evidence.

We acknowledge the work of Professor Binney at the outset, because *Redemption Songs* is a source that cannot be ignored. Our purpose, nevertheless, is different from hers. Our purpose is to consider claims made both by his uri and by the wider Turanga iwi to which he was affiliated, to measure them against the principles of the Treaty, and to make findings on them. The claimants seek an acknowledgement of, and redress for, the wrongs that they claim Te Kooti and the Whakarau suffered.

We begin with an account of the escape of Te Kooti and his fellow political prisoners from their detention on Wharekauri, their landfall on the mainland just south of Turanga, their progress inland, and their establishing of a base at Puketapu Pa, north-west of Lake Waikaremoana. It was from here that Te Kooti would turn back to Turanga to launch his assault on the settlers and Maori communities at Matawhero during the night of 9 November 1868 and subsequent days, killing in all between 50 and 70 people. The pursuit by Crown forces of Te Kooti to the pa he occupied at Ngatapa and the battle and killings there end the narrative. Our analysis of these events against the claims of his descendants and Turanga iwi follows that narrative. Before laying out these events and our analysis of them, it is appropriate to briefly introduce Te Kooti himself.

(1) Te Kooti's early life in Turanga

Te Kooti grew up at the Ngati Maru (a hapu of Rongowhakaata) settlement of Te Pa o Kahu during the period of the first British settlement in Turanga. He was not of rangatira birth, and he does not emerge from the records of these years in any leadership role. But he was not unknown either. From an early age, he had a reputation for troublesome behaviour, and, as a

⁵⁷ Te Kooti's purpose in using these words from Jeremiah was to refer to the experience of the prisoners, placed in an environment far removed from that which they were used to.

young man, he visited the matakite (visionary) Toiroa Ikariki of Nukutaurua on the Mahia Peninsula, whose spiritual guidance would be important to him throughout the years.

On his return to Turanga from this visit to Toiroa, Te Kooti entered the Anglican church and was baptised. He was friendly with the missionary Thomas Grace, and he listened to Grace's advice on economic competition and trade. Later, he accompanied Grace on at least one occasion to Tauranga on Lake Taupo, where Grace was establishing a mission station. According to Grace, Te Kooti was named after Dandeson Coates, an important figure in the Church Missionary Society; Te Kooti chose this name at his baptism. He travelled widely, crewing on various Maori-owned schooners with his kin Raharuhi Rukupo and Te Warihi Potini. Sometimes, while in Auckland, Te Kooti would attend the Wesleyans' Native Institution at Three Kings. It was probably there that he learned to read English. He married his first wife, Irihapeti, of Te Whanau a Ruataupare, with whom he had a son, Wetini.⁵⁸ Irihapeti was a Catholic, and, under her influence, Te Kooti also entered the Catholic Church; his various experiences with missionaries from the three main Christian churches gave him an impressive mastery of the scriptures.

Te Kooti's reputation for being troublesome increased during the 1850s. He became well known amongst particular trader and settler circles as one of a group of young men causing trouble in the district.⁵⁹ Among other things, and along with his fellow 'bother boys', he seized cattle and horses, broke into Norcross's house in reprisal for an ongoing dispute, and confronted Read about his occupation of Rongowhakaata land.⁶⁰ (We suspect that the land was Te Toma at Matawhero. This is the land that Read sold to Biggs and on which Biggs was living when the Whakarau returned to Turanga.) For these actions, he was hauled up before the runanga, where the chief Kahutia defended the actions of the 'social bandits'.⁶¹ The young men's settlement was even attacked by other Turanga Maori, who were tired of their behaviour. Wi Pere, himself very young at this time, said that he led the assault against Te Kooti and his associates. This reprisal was specifically because the troublemakers were said to be stealing all the stock in the area and had stolen alcohol (the runanga was concurrently trying to enforce a ban on alcohol), abducted women, and threatened the men who tried to stop them. But, though most of those deemed troublesome were captured in this attack and handed over to their Rongowhakaata chiefs to be dealt with, Te Kooti escaped. It may have been at this point that he went to visit Taupo with Grace.⁶²

Despite Te Kooti's antagonistic relationships with some of the settlers, others had less censorious memories of him. The family of Louise U'ren of Makaraka, who remembered him working on their farm and reading a bible, included him in their prayers. John Heslop, a

58. Binney, pp19–21

59. He particularly annoyed the settlers Harris, Norcross, Goldsmith, and Read.

60. Binney, p35. Harris named Te Kooti in 1852 as one of those acting as the 'bother boys' of the 'redemption movement' which sought to recover lands from settlers.

61. In the early 1850s, those involved in the 'redemption movement' sought to recover lands from settlers and to repudiate transactions that had been entered into.

62. Binney, pp21–22

settler near Napier, said that Te Kooti worked for them under the name ‘Hiroki’ and that he continued to contact them using this name throughout the period of trouble. The Dunlop family trusted him to mind their children, and he seems to have proven worthy of their trust. Sarah Dunlop remembered him with fondness. However, she did recall that he was for a while very ‘disagreeable’ and frequently stole rum. This was the reason why the settler Goldsmith was hostile to him.⁶³ Te Kooti thus had a range of relationships with settlers. He got on with some, but with others there was a relationship of mutual distrust.

(2) Arrest and deportation

<i>Ka tu au ka korikori</i>	<i>I am bestirred</i>
<i>Ka puta te rongo o Taranaki e hau mai nei.</i>	<i>News of Taranaki has come</i>
<i>Ka toro taku ringa ki te Atua nui o te rangi</i>	<i>My hand reaches forth to God Almighty</i>
<i>E tu iho nei</i>	<i>on high</i>
<i>Ko Tama a Rura, ka mate i te riri i Waerenga a hika.</i>	<i>The mission of Rura failed in the conflict at Waerenga a Hika.</i>
<i>I te toru o Maehe i whiua ai au</i>	<i>On the third of March I was forced</i>
<i>Ki runga i te kaipuke.</i>	<i>On to the boat</i>
<i>Ka tere moana nui au nga whakaihū ki Waikawa, ra</i>	<i>I sailed in the direction of Waikawa,</i>
<i>Ka huri tenei te riu ki Ahuriri kei a Te Makarini,</i>	<i>Then passed by to head to Ahuriri, to McLean</i>
<i>Ka whiua atu au ki runga ki a Te Kira</i>	<i>I as was then compelled to go on board the St Kilda</i>
<i>Ka tahuri whakamuri he wai kai aku kamo</i>	<i>I look homewards, tears welling in my eyes</i>
<i>I Whanganui i Whangaroa nga ngaru whakapuke,</i>	<i>Ahead are the daunting waves of Whanganui and</i>
<i>Kai Wharekauri</i>	<i>Whangaroa, unto Wharekauri</i>
<i>E noho e te iwi, tu ake ki runga ra tiro iho ki raro ra</i>	<i>Settle down O people, be strong and face adversity</i>
<i>Awangawanga ana te rere mai a te ao</i>	<i>The clouds display a troubled flight above Whangaroa</i>
<i>I ahu mai i Turanga i te wa kainga kua wehea nei</i>	<i>They come from Turanga, a divided homeland</i>
<i>No konei te aroha e te iwi kua haere nei</i>	<i>This is the cause of sadness for you, the people who</i>
	<i>have left</i>
<i>Kupapa e te iwi, ki raro ki te maru o te Kuini,</i>	<i>Yield to the authority of the Queen</i>
<i>Hai kawe mo tatau ki runga ki te oranga tonutanga.</i>	<i>That we may receive a good life</i>
<i>Kati ra nga kupu e maka i te wa i mua ra</i>	<i>Enough of the rash words that were spoken in the past</i>
<i>Tena ko tenei e te iwi whakarongo ki te ture Kawana</i>	<i>Here we must heed the laws of the Government</i>
<i>Hai whakapai ake mo te mahi a Rura</i>	<i>To compensate for the wrongs committed by Rura</i>
<i>Nana nei i raru ai e.</i> ⁶⁴	<i>He it was who caused all this trouble.</i> ⁶⁵

63. Ibid, pp 23–24; Te Kooti returned the sentiment, and he killed two of Goldsmith’s children during the attack on Matawhero. See Joseph Mackay, *Historic Poverty Bay and the East Coast, NI, NZ* (Gisborne: JG Mackay, 1973), p 259, in respect of Maria Goldsmith and her younger brother being killed at Matawhero.

64. From a waiata, whose composition is attributed to Te Kooti; still sung by the Ringatu (doc A38, pp 19–20).

65. Rura is the Hauhau or Pai Marire deity who was the dual identity of the angel Gabriel; Waikawa is Portland Island, off the Mahia Peninsula; and Ahuriri is Napier. The reference to ‘Whanganui and Whangaroa, unto Wharekauri’ is a metaphor for mountainous waves.

Te Kooti's personal grievance against the Crown arose from the circumstances in which he was arrested by Major Fraser during the siege of Waerenga a Hika. Fraser arrested him on 21 November 1865 on suspicion of spying. There are various accounts, all recorded after the event, of the details of Te Kooti's alleged spying.⁶⁶ Te Kooti, however, always claimed that he fought alongside the kawanatanga forces. In 1873, he stated that he had killed two Pai Marire fighters during the siege.⁶⁷ It seems that a 'form of inquiry' was then held and Te Kooti was released. There are two versions of this event: according to one, he was released for want of evidence; according to the other, a wounded officer testified that Te Kooti had been with the Crown forces during the siege.⁶⁸ When the siege was over, some prisoners were kept at a redoubt and others, as noted above, were transferred to Rongowhakaata at Oweta under Tamihana Ruatapu. Te Kooti was not in either group, but he was again 'summarily seized' on 3 March 1866, as recorded in his waiata above. On this day, Sir George Grey arrived at Turanga with Te Ua Haumene, the founder of the Pai Marire faith, to display him as a prisoner in order to destroy his mana. At the same time, Donald McLean, on board the vessel *St Kilda*, had arrived to take the prisoners to Napier and Wharekauri (see above). The prisoners were quickly embarked.

There are various versions of the arrest of Te Kooti on this second occasion; according to all of them, he was going about everyday tasks at the time. The reason for his arrest is still uncertain. Again, there are various accounts, some attributing his seizure to particular chiefs who wanted him out of the way (in one case because of his alleged adultery) and thus 'concocted' allegations against him relating to his supplying percussion caps to the Waerenga a Hika defenders. The later account of Captain George Preece, on the other hand, attributed Te Kooti's seizure to a letter that Preece had written to Rongowhakaata leader Anaru Matete. Matete, who had escaped from Waerenga a Hika, remained defiant of the Government; he linked up with other Pai Marire leaders and with the Kingitanga. Hostilities between Pai Marire parties and kawanatanga forces spread in December 1865 to Wairoa and, later, to Hawke's Bay. Te Kooti's message, according to Preece, warned Matete of an ambush.⁶⁹

There is further uncertainty over what happened to Te Kooti once he reached Napier. Like a number of those on the *St Kilda* who were discovered not to have been involved in the fighting, Te Kooti was not sent on to Wharekauri with the first batch of detainees. He and his brother were possibly among those returned to Turanga, in which case he may have been rearrested a third time. It is equally possible, however, that he was kept in Napier. The second batch of detainees was taken from Turanga on 16 April 1866 and sent on to Wharekauri a week later. (They included some who had been returned from the first batch, about whose

66. Document A38, pp12–13

67. Ibid, p10

68. Ibid, p14

69. Ibid, pp15–18. Matete rejected the 'errors' of Kereopa and Patara Raukauri by mid-1866, and talked of the transfer of power to new prophetic leaders in Taranaki: Te Whiti, Tohu Kakahi, and Taikomako. Matete was also sympathetic to the Kingitanga.

release the settler JW Harris had complained to McLean.) But Te Kooti was not sent with this group either. It was not until the third voyage of the *St Kilda*, on 5 June, that Te Kooti and his brother were sent to Wharekauri. They arrived on 10 June 1866, having travelled with a group of detainees who were nearly all Rongowhakaata.⁷⁰

What is certain is that Te Kooti was held in a Napier jail in early June. At that time, he wrote two letters to McLean. In the first, he asked:

Me whakaatu mai taku hara kia marama ai i a au. Hua noa hoki au me wakawa (Explain to me what I have done wrong so that it is clear to me. I would have thought that you would give me a trial).

Na Te koti, kuini maori [Te Koti, Queen's Maori].⁷¹

On 6 June, Te Kooti and his brother Komene wrote again to McLean, naming Read and Wyllie as having given percussion caps to others and naming five 'Maori kawana' (Government Maori) as having given caps to the Hauhau. This letter was dated the day after Te Kooti and Komene left for Wharekauri. Whether McLean considered it is uncertain. FE Hamlin, a Government interpreter at Napier, commented later that Te Kooti, whom he often saw in prison there, had persistently requested a trial. 'My great desire,' he said to Hamlin, 'is to be tried for my offences.'⁷² A third letter that Te Kooti wrote at this time was to his elder relative Te Matenga Tukareaho, and in it he asked Te Matenga to intervene on his behalf with McLean. Again, Te Kooti stressed both his adherence to the Queen (stating that all the Hauhau knew this to be the case) and his wish for a trial, 'so that the error could be brought out'.⁷³ But no trial was ever held for either Te Kooti or any of those with whom he was held.

When Te Kooti last saw Toiroa in 1865, the latter warned him that his earlier prediction would soon come to pass and Te Kooti would be sent away. Toiroa in fact lived to see this: he died on 16 July 1867, while Te Kooti was being held on Wharekauri.⁷⁴

(3) *The beginnings of the Haahi Ringatu (the Ringatu Church)*

On Wharekauri, while he was ill, Te Kooti received his visions. He became sick soon after his arrival there and was seriously ill from 7 December 1866 through to May 1867. He fell sick again later in 1867 and in June 1868. Professor Binney thinks it likely that Te Kooti had tuberculosis, from which he eventually recovered. He was recorded as coughing blood, and at one point he was so sick that he was taken to another whare to die and a coffin was made.

During this time, Te Kooti studied the Bible (possibly an English-language Bible), and possibly also the Anglican Maori prayer-book and psalms. He wrote many passages from both Old and New Testaments into the diary he kept. He began to form karakia which would

70. Document A38, pp20–22

71. HB4/13, Archives NZ (doc A38, p22)

72. 12 May 1879, 83/680, MA23/8A, Archives NZ (doc A38, pp22–23)

73. Binney, p60

74. Ibid, p58

ultimately be the basis of the church's services of worship. The first hymn was *Te Tangi a Heremaia* (*The Lamentation of Jeremiah*), which 'describes the pain of bondage and exile' (part of it is given above).⁷⁵ It was from this hymn that the name of the faith, Ringatu, was derived: 'But let my heart and my hands be raised up in the search for my God' ('Aue kia ara atu toku ngakau me oku ringaringa, ki te whai i toku Atua'). The practice of raising the hand (ringa tu) in praise of God at the end of each prayer has its origins in these words.⁷⁶ Te Kooti also recorded in his diary his communications from God. The Spirit of God 'raised him up, telling him that he had been sent to make known the name of God "to his people who are dwelling in captivity in this land" ("ki tona iwi e noho whakarau nei i tenei whenua")'.⁷⁷ Te Kooti recorded the prayers and laments in accordance with the visions he received, and he began to make known his words to his followers, who, in reliance on scripture, he called the Whakarau.

The new faith offered the hope that God would save those held in their own exile on Wharekauri, as he had saved the Israelites from their exile. The books of Exodus and Deuteronomy promised that, with God's compassion and help, the Whakarau would return 'into the land which thy fathers possessed, and thou shalt possess it' (Deuteronomy 30:3-5).⁷⁸ But God's anger would also fall on those who oppressed His people.

By the early months of 1868, Te Kooti was holding services on the island. He did this out of sight of the authorities, and one place he used was a little valley hidden in the sandhills of Petre Bay to the east of Waitangi. There, Te Kooti made a prediction that ships would come which they could escape on; but, if they did not, he would be given the power to part the sea with a rod, like Moses.⁷⁹

5.2.4 The escape from Wharekauri

Pinepine te kura, hau te kura

Tenei te Tira hou, tenei haramai nei

Na te rongo pai na te rangimarie

Nau mai ka haere taua, ki roto o Turanga

Kia whakangungua koe ki te miini

Ki te hoari, ki te pu hurihuri

Nga rakau kohuru a te Pakeha a Takoto nei

75. Binney, pp 65-66

76. Lamentations 3.41, 'Te Pukapuka o Nga Kawenata e Waru a Te Atua me Nga Karakia Katoa a Te Haahi Ringatu,' nd [1968], p 27 (Binney, p 66)

77. Diary kept on Wharekauri, msS 3091, ATL. CT in GH Davies Maori Manuscripts III, ATL (Binney, p 67)

78. Binney, p 71. In the Haahi Ringatu, it is believed that God revealed covenants to Te Kooti on Wharekauri: the sixth covenant, the Covenant with Israel, showed how access might be gained to the promised land.

79. Ibid, p 73

*Little tiny treasure, treasure of reknown
 A new company of travellers is setting out
 By the Gospel and in peace
 Come we will go to Turanga
 That you may be tested by the Minnie rifle
 By the sword and the revolver
 Those Pakeha instruments of murder that are lying everywhere*

By this time, Te Kooti was planning the escape of the prisoners. The catalyst for the escape appears to have been the dashing of their expectations that they would be released, a few at a time, after a year, ‘and that the whole were to be sent back as soon as the war was over’.⁸⁰ In May 1867, Major Edwards (who had been sent to report on the detainees) recommended that the process of release begin, and he was aware that Maori thought that this would occur soon thereafter.⁸¹ But, in June, Captain Thomas was instructed to tell the detainees that they would not be allowed leave until the East Coast land confiscations had been settled.⁸² In the wake of this blow to their hopes, which also appears to have ‘crystallised the new faith and [given] Te Kooti his following’, the mood of the detainees began to change.⁸³ Professor Binney commented that the planning for the escape was very precise and took place over at least three months. Detainees working in other parts of the island were recalled by letter – some as early as April. Herewini, Thomas Ritchie’s shepherd, gave his notice then, saying ‘he was sorry to leave but . . . he must obey Te Kooti’.⁸⁴ The arrival of the *Rifleman*, a schooner, on 3 July 1868 gave Te Kooti his opportunity: ‘In harbour at the same time was a small ketch, the *Florence*, which was about to sail, its cargo already loaded. Te Kooti had forewarned that there would be two ships on the appointed day: it was the sign the Whakarau were to look for.’⁸⁵

The detainees began to unload the *Rifleman*’s cargo. Thomas noticed only that they were volunteering for duty with great enthusiasm. Some lingered around the guardroom, while others, including Te Kooti, went inside. Te Kooti gave the signal – his flag, which was white with a red border, was raised over the detainees’ quarters.⁸⁶

The detainees began to seize and bind the guards and other Europeans. One guard was killed, contrary to Te Kooti’s orders. This was Private Michael Harnett, one of only two guards in the guardroom, who tried to resist the detainees as they took weaponry from the room. Te Kooti was said to be furious about this contravention of his orders. The other guard hid

80. Edwards to Defence Minister, 8 May 1867, AJHR, 1868, A-15E, p17

81. Ibid

82. As noted above, Captain Biggs, who was struggling against Maori opposition to the Crown’s planned land take after Waerenga a Hika, felt that the return of those held on Wharekauri would make things too difficult: doc A38, p 27.

83. Document A38, p 27

84. Tom Ritchie diary, 29 May 1868, Z MSS 36/1/1, p 50, CPL (Binney p 80)

85. Binney, pp 80–81

86. Ibid, p 81

under a table and was not harmed.⁸⁷ Thomas later reported that he did not think the killing of Harnett had been a random act. He noted that Private Elliot (who had previously been demoted for bad behaviour) had also been shot at, and, as he fled, one ball had lodged in the heel of his boot.⁸⁸ As these events unfolded, Thomas instructed the settler Chudleigh to try to stop the detainees from taking the two ships. Chudleigh apparently made it into a boat, but, before he could set off, he was apprehended and nearly killed. His life was saved by one of the detainees who knew him.

On hearing that the redoubt had been taken, Thomas went to investigate. He was seized, bound, and taken to the prison, but he was not harmed. Money (to the amount of £125 1s) arms (31 rifles, five revolvers, and bayonets), and ammunition were taken from the guards and settlers. The escaping detainees also took £397 8s 2d from Thomas's safe.⁸⁹

At the same time as these events were happening on shore, the *Rifleman* was seized by those detainees who were aboard (ostensibly to unload her). Another group of detainees captured the *Florence*, sent her crew ashore, then cut the cables holding her so she was grounded and could not offer chase to the escapees.⁹⁰

Professor Binney described the last moments of the prisoners at Wharekauri. Boats took them out to the *Rifleman*, the women going first. Some were carrying children. In all, 298 people – 163 men, 64 women, and 71 children – left the islands. Four chose to stay behind.⁹¹ At first, the winds were against them, and it took two days for the wind to turn to the east and the schooner to clear the harbour.

Chudleigh had gone around the island warning the settlers and resident Maori, and trying to get together an armed guard. Altogether, the settlers and resident Maori could muster 61 guns, 1050 rounds of ammunition, and 62 men – 40 Maori and 22 Pakeha. Their numerical deficiencies were not tested, however, because by the next morning the ship had left the bay and the immediate threat had passed.⁹² The Crown later held Thomas responsible for the escape, and he was severely admonished.⁹³

The *Rifleman* meanwhile continued to struggle in the strong winds and Te Kooti ordered that all greenstone taonga be cast overboard. This was done, says Binney, because they were 'objects which tied them to their past'.⁹⁴ But the wind still howled against them, so Te Kooti had his uncle, Te Warihi, bound and thrown overboard. Te Warihi did not accept Te Kooti's leadership and had tried to avoid going on the *Rifleman* with the escaping detainees.⁹⁵ Te

87. Document F3, p71

88. Ibid, p71

89. Binney, pp 82–84

90. Ibid, p82

91. Ibid, p84

92. Document F3, p73

93. Haultain to Thomas, 2 September 1868, AD31/16 (as cited in doc F3, p77)

94. Binney, p84

95. Document F3, p74; see also William Greenwood, *The Upraised Hand or the Spiritual Significance of the Rise of the Ringatu Faith*, 3rd ed (Wellington: The Polynesian Society, 1980), p23.

Kooti clearly doubted that he had Te Warihi's support. Removing him not only removed any possibility of rearguard action on the part of his uncle but also helped foster cohesion in the group. The kohuru, or murder, showed Te Kooti as a strong leader: his action was analagous to that of the leader of an ope (war party) who must protect the tapu of his warriors as they approach battle by killing any who cut across their path, and thus endanger the tapu – even if they are of their own whanau. The mission of the ope on behalf of all those who depended on it could not be jeopardised by one individual. Yet, that did not change the essential nature of the action against Te Warihi. It was a kohuru.

On Thursday 9 July 1868, after a journey of four days, the Whakarau sighted the mainland. They were off the East Coast; Hikurangi maunga was clearly visible. They headed for Whare-ongaonga, which is well hidden from both land and sea, and made their landfall there. After landing and unloading the ship, the crew were allowed to leave on it. Te Kooti gave them £6 each and sent with them a letter exonerating them from any involvement in the escape. They sailed immediately for Wellington.⁹⁶

We pause now to consider the arguments advanced by the Crown and the claimants in respect of the detention and escape.

5.3 CROWN AND CLAIMANT CASES ON THE DETENTION OF THE WHAKARAU

5.3.1 The Crown case

It was common ground between the Crown and the claimants that those transported to and detained on Wharekaui had not been charged, tried, or convicted of any offence.

The Crown argued that the detention on Wharekaui was designed to achieve two purposes: punishment for rebellion and the pacification of the Turanga district by removing the 'worst offenders'. The punishment aspect consisted, in addition to detaining many of those captured at Waerenga a Hika, taking some or all of the land of 'those who had rebelled'. Taking the land would assist with the pacification of the district and would also defray the costs of 'suppressing the rebellion'.⁹⁷ The Crown conceded that the detention had no statutory basis. In essence, the Crown argued that (whatever their legality) these two objectives were reasonable in the circumstances and therefore consistent with Treaty principles. It was also argued, though far less confidently, that the state of emergency that existed in Turanga at the time meant that martial law applied and that the usual legal processes could lawfully be suspended. There was, in short, no legal requirement in the circumstances that those arrested be charged and tried before being deported and detained.⁹⁸ (We addressed some of these arguments in chapter 3.)

96. Binney, pp86–87

97. Document H14(4), pp4–5

98. Ibid, p18

Though the Crown argued that the initial arrest and detention was justified in Treaty terms, it was accepted that the duration of the detention could not be so justified, at least without a trial. This was a significant concession, which assisted us in better focusing on the matters at issue between the parties.⁹⁹

The Crown explained how in its view the detention of the prisoners became unjustifiably extended in breach of the Treaty:

The two objectives listed above were blended over time so that officials advanced as on-going justification for the continued detention of people on the Chatham Islands the fact that the land question remained unsettled. People would be released from the Chatham Islands after the return of peace to the district and on demonstrating good (personal) behaviour. In their [the Crown's] minds, because the confiscation of land was unsettled, the district was still unsettled. If anything the work of Biggs as Crown negotiator was probably not contributing to resolution of the situation. A circle of reasoning emerged.

In that circle, officials lost sight of the fact that with the passage of time detention on the Chatham Islands began to assume the character of indefinite detention without trial. This could only be justified if there was a compelling necessity to keep the detainees in custody. Administrative inconvenience could not in itself excuse delay in either trying or releasing the detainees. Earlier indications of release were replaced with very limited evidence of the Government consciously weighing the ongoing need to detain these people because of the security risk at Turanga.¹⁰⁰

The Crown further conceded that the detainees should have been tried at some point before they made their escape.¹⁰¹

It followed from the forgoing that it was proper for the Crown also to concede that it was reasonable for the detainees to have escaped from Wharekauri.¹⁰² Curiously, the Crown maintained that, while escape was reasonable, it was not lawful. The Crown argued that the Whakaraui ought to have resorted to due process: 'The appropriate remedy for unlawful detention was habeas corpus and all proceedings for false imprisonment resulting in damages. No applications for habeas corpus were brought.'¹⁰³

5.3.2 The claimants' case

The claimants pitched their argument on the legality of the arrest and detention at two levels. At the highest level, they argued that, since there had been no rebellion, there was no basis for martial law to be imposed. In chapter 3, we accepted that there was no rebellion in accordance

99. Document H14(4), pp11–12

100. Ibid, pp5–6

101. Ibid, p5

102. Transcript 4.25, p68

103. Document H14(6), pp11–12

with Professor Brookfield's definition. In the absence of a martial law justification, the claimants argued that the arrest, deportation, and detention without charge or trial was unlawful and therefore in breach of the Treaty.

At a second level, the claimants argued that, even if that was wrong, the suspension of civil rights and due process could be justified in law only while a state of emergency existed. The moment the emergency had passed, ordinary legal process was revived. Thus, it was argued that, even if there had been a legal justification for the imposition of martial law, the emergency which underpinned it had evaporated on the surrender of those in the pa. Even by the Crown's own argument, before they were deported, those arrested ought by law to have been charged with and tried for such offences as the Crown considered appropriate. The failure to take these steps rendered the detention and deportation illegal and in breach of article 3 of the Treaty.

The fact that those who were arrested were never charged or tried was, according to counsel, the best evidence that they had done nothing wrong to start with, and the colonial government knew it.

There were speeches in the House of Representatives about the legality of detention. As William Travers (the member for Christchurch) said in the House in July 1868:

was [it] justifiable or judicious to take the prisoners to the Chatham Islands and detain them there? Where they to be regarded as British subjects and rebels, or as prisoners of war? If they were to be regarded as rebels and British subjects, then it is just that they should have been tried by and received their punishment at the hands of the judicature of the country. If, on the other hand they were to be regarded as prisoners of war then they were entitled to their liberty directly peace was concluded with the tribes to which they belonged.¹⁰⁴

Counsel for Ngai Tamanuhiri argued that, while, as the Crown argued, the writ of habeas corpus was theoretically available, it could not have been a practical option for the detainees. They were unable to contact the outside world and so could not apply for a writ themselves.¹⁰⁵

Counsel for Nga Uri o Te Kooti Rikirangi also reminded us that Te Kooti in particular requested due process in writing before his removal to Wharekauri. He was also 'never charged with any crime nor brought to trial before any Court to warrant that detention'.¹⁰⁶ Accepting the fact of detention, the claimants also highlighted the harsh conditions to which the Whakarau were subjected.¹⁰⁷ Rutene Irwin, a Te Aitanga a Mahaki kaumatua, spoke about the experiences of his great grandmother Meri Puru, who as a child went with her parents, Hori and Wikitoria Puru, to Wharekauri:

104. NZPD, vol 2, 22 July 1868, pp 88–90 (doc H2, p 27)

105. Document H2, p 32

106. Document H4, p 5

107. Document H2, p 28; doc H4, p 6

After the fall of Waerenga a Hika, they were caught and taken as prisoners. My great-grandmother was a girl of about seven or eight when she was taken to the Chatham Islands together with her mother and father . . . They spent the whole two years there. Her mother Wikitoria had been pregnant when she went over there, and the baby was born, and the baby died and is buried there.

Sometimes on rainy nights we would sit inside our kauta, and she (my grandmother) would do her karakia . . . She talked mostly about the food and the rongoa, and they were always hungry and partly starving. And she would cry and we would cry with her.¹⁰⁸

In her narrative, Binney also provided some insight into the detainees' own view of detention on Wharekauri. They found the islands very cold, she stated, and were inadequately clothed for life there. Growing food was difficult, as was fishing because the sea was so rough. At first, they had no ploughs and, though early in 1868 they were given some, they had nothing to pull them with. Instead, they had to harness themselves to pull the ploughs. 'They hated the indignity so much that they regularly broke their tools.' Many of the people got sick, and some died.¹⁰⁹ Such conditions exacerbated the 'original grievance of unjust imprisonment', and around 15 per cent of the detainees died while being held on Wharekauri. Counsel said that, in the circumstances, where the Whakarau were 'held against their will and without due legal process', the loss of life and suffering was 'both deplorable and unnecessary'.¹¹⁰

The claimants concluded that Te Kooti and the Whakarau were 'quite justified' in the circumstances in taking the necessary steps to procure their freedom.¹¹¹

5.4 TRIBUNAL ANALYSIS AND FINDINGS

Our findings in respect of the arrest, deportation, and detention can be dealt with relatively briefly.

We have already found that the Crown was the aggressor at Waerenga a Hika. We found that the claimants were not in rebellion as defined by Professor Brookfield. It follows that the arrest, deportation, and detention of the Whakarau after the conflict were clearly unlawful. If there was no justification for the suspension of ordinary legal process, then the principles articulated by Professor AV Dicey in respect of the rule of law applied with full force: 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner, before the ordinary courts of the

108. Mr Irwin was brought up by his great-grandmother: 10 December 2001 hearing, tape 3

109. Binney, p 63. Note Edwards says above that she does not know where Binney gets the figure of 28 deaths from.

110. Document H4, p 6

111. Ibid

land.”¹¹² Dicey could trace this principle to the Magna Carta itself: ‘No free man shall be taken or imprisoned . . . but by lawful judgement of his peers or by the law of the land.’¹¹³ British law required that each of the Whakarau be charged with an offence, tried, and convicted before he could be detained on Wharekauri. But, as the claimants argued, they were not.

We also accept the claimants’ argument that, even if we are wrong and those at Waerenga a Hika were in rebellion, their right to a fair trial could have been suspended only for the duration of the emergency. Once again, Dicey makes the legal position clear: the introduction of martial law can be justified ‘only by necessity’ – ‘its continuance requires precisely the same justification of necessity; and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence’.

In our view, the emergency ended when the pa surrendered. The Crown was entitled thereafter to a reasonable time within which to lay charges and conduct civil trials. Even if there had been a rebellion, there could have been no legal justification for the deportation to Wharekauri at all, even pending trial, let alone for an indeterminate period without any prospect of trial. There is no question but that this failure to adhere to fundamental principles of the rule of law and the process breached the equal treatment guarantee in article 3 of the Treaty.

It is to be remembered that Te Kooti twice sought a trial while in custody, clearly believing that a simple mistake had been made. He complained that, if he were only given a trial, his innocence would be obvious. But he received no response from the Crown.

In Turanga, the Whakarau were removed not because their continued presence in Turanga posed a threat to the security of the colony but because the Crown wanted to push through the confiscation of Turanga land so as to solve the ‘Native question’ in the district once and for all. Te Kooti and the Whakarau had to be removed on some pretext or other because the continued presence of such a large group of dissentients threatened this wider political objective. And, as we have said, the fate of the Whakarau was left hanging in the balance during a patch war between superintendents McLean of Hawke’s Bay and Whitaker of Auckland. From this stemmed their indefinite detention. This fact exacerbates the severity of the breach. Not only were the Crown’s actions unlawful, and therefore inconsistent with the article 3 equal protection guarantee, but they were also dishonourable: dishonourable in the sense that the Crown demonstrated that it did not wish the rules binding everyone else to apply to itself where that was inconvenient. The unlawful arrest, deportation, and detention of the Whakarau was not an inadvertent or technical breach of the rule of law – it was a calculated strategy, the constitutional implications of which were known to all. William Travers’ speech in the House, to which we have referred earlier, makes that clear. Once the Crown ceased to be a principled sovereign acting in accordance with the law, the whole basis for the Treaty was undermined. An arbitrary or capricious Crown is the absolute antithesis of that which the Treaty promised.

112. A V Dicey, *Law of the Constitution*, 8th ed (London: Macmillan and Company Ltd, 1915), pp183–184

113. *Ibid*

Were the Whakarau then entitled to escape from unlawful detention? The Crown argued that, though escape may have been reasonable, the lawful avenue for redress was to apply for a writ of habeas corpus. The effect of this would have been to require the Crown to justify its detention of these detainees.

In theory, the Crown is correct. We are, however, inclined to the view that, though theoretically sound, this option was impractical. The Crown accepted in evidence that the conditions endured by the Whakarau on Wharekauri were harsh and were intentionally so. These conditions had been endured for over two years, with the hope of release fading with the passage of time. There was no Supreme Court on Wharekauri with jurisdiction to entertain an application for habeas corpus, and the Whakarau appeared to have no champion for their cause on the mainland who might have sought legal standing to apply on their behalf there. Even if any of them had heard of habeas corpus (and we doubt that), their experience thus far would not have taught them to differentiate between the Crown as Executive and the courts. It certainly would not have taught them to have the slightest faith in either as a means of achieving release.

We consider that the actions of the Whakarau in making good their escape were lawful and Treaty consistent.

We note that, even at the time, the moderation of the Whakarau in effecting their escape was commented on in an official review. GS Cooper wrote:

Instead, however, of slaughtering right and left, and burning and pillaging all before them, as might have been expected, the Hauhaus spared their captives' lives and molested no women or children, and though they looted arms and cash from every house, neither damaged nor took any other articles.¹¹⁴

However, we do not consider that the grievance so created by the Government gave any justification for the killing of Private Michael Hartnett during the escape. The killing of Hartnett seems to have taken on an aspect of personal revenge – the prisoner concerned held Hartnett responsible for interfering with his wife – and it was unnecessary and unlawful.¹¹⁵ But while we hold the individual who killed Hartnett responsible for his death, we consider the overall actions of the Whakarau in escaping to have been reasonable, and we are struck by the overall restraint (with this exception) shown in doing so. We note also that Te Kooti's instructions were that no one was to be killed. Nor do we consider that such an escape should have come as a surprise to the Government, unless it expected 300 people to accept totally unreasonable detention on isolated islands where it seemed the authorities had forgotten about them, or had no reason to relieve their misery.

¹¹⁴. Cooper to Richmond, 4 August 1868, AJHR, 1868, A-15, p12 (doc F3, p76)

¹¹⁵. Binney, p82

5.5 THE WHAKARAU AND TURANGA**5.5.1 The Whakarau return to Turanga**

*Kei Turanganui he mata pu
 Hei patu i te tangata kia mate.
 Na te maungarongo hoki ra i haere ai i te ara . . .
 Karokaro i te tae-turi o o koutou taringa kia areare ai
 Me te whakarongo mai ki nga ki atu kaua ahau e patua.
 Moku anake te arai o Turanga
 Te matenga o Mahaki i mau ai te rongo patipati
 Whiti ke mai koe ki i rainahi nei
 Te ai o mahara ka mate au i Waerenga a Hika.
 Te ki mai koe me whakawa marire
 Hopu ana koe i ahau kawea ana ki Wharekauri.
 Ka manene mai au ki ro te wai
 Ka u ana ko Whareongaonga.
 Ka pa ko te waha o te Kawana.
 E hika ma e! Ina ia te kai.
 Toia ki uta ra haehaetia ai
 Tunua hai te manawa ka kainga ka pau,
 Mo Koro timutimu, mo Tauranga koau.
 Ko ia te riri poka noa,
 Ka kai ki te waipiro ka kai ki te whakama ki te mau a hara,
 Me whakarere atu ena mahi kino e hika ma e!*

*In Turanganui are bullets for guns
 The purpose of which is to kill people.
 But it was in peace that I travelled the pathways . . .
 Gouge out the wax from your ears
 That you may be able to hear clearly
 You will then be able to ascertain the pleadings for me not to be punished.
 Mine alone was the reason Turanga was placed under martial law
 Wherein Mahaki endured wretched suffering and a designing peace was made
 You, you have only just arrived
 You mistakenly thought that I would perish at Waerenga a Hika.
 Why did you not order a directive for me to be judged fairly by trial
 Instead you seized me and shipped me to Wharekauri.
 I returned as a stranger by way of the water
 Making landfall at Whareongaonga.
 The Governor's voice was heard saying,*

*My friends, here is food.
 Let us drag it ashore so that we can cut it to pieces
 Cook the heart and eat it till it is all consumed,
 For Koro timutimu and Tauranga koau.
 This needless strife,
 Rising out of the consumption of liquor
 Followed by shame and hatred
 We must abandon these evil ways, my friends.*¹¹⁶

Before releasing the *Rifleman* and her crew, the Whakarau carefully unloaded it. It took until noon on 10 July before that task was complete, and the Whakarau fasted throughout. The ship was then sent on her way. The crew carried a letter of exoneration, in which Te Kooti also asked that the people be left in peace and not be pursued. Few of the inhabitants of Whareongaonga were present when the Whakarau landed: most of the men were out hunting and the women had fled. Five men were seized, though Te Kooti instructed that no one was to be killed and only arms were to be taken. Te Kooti made a sacrificial offering in thanksgiving for their safe landing, but first he set another loyalty test for his followers. He ordered that all the newborns of the group should be tied to firewood: this was, said Binney, 'the sacrifice of Abraham that he demanded'. After his followers had passed the test, and Te Kooti's authority over them had thus been proved, a pig and a fowl were sacrificed in place of the children.¹¹⁷

The first response of the Turanga authorities to the escape was to gather an armed force of 50 settlers of the Turanga Volunteers and 53 Maori and to march to within a mile and a half of Whareongaonga.¹¹⁸ From there, Captain Biggs, the commander of the local forces, sent the first in a series of messengers to demand that the Whakarau give up their arms and await the Government's decision. The messengers who sought their surrender were Paora Kate, the younger brother of Raharuhi Rukupo, Wi Mahuika, a detainee who had been released from Wharekaui early, and Renata Whakaari, a Turanga rangatira.¹¹⁹ The Whakarau refused, stating that they did not wish further messengers to come because they intended to hold no communication with Turanga Maori, whether 'Loyals or Rebels'.¹²⁰ According to his own statement, Biggs had intended to attack the Whakarau at once if they refused to give up their arms, but he changed his mind when he discovered that they would be more than a match for

116. Waiata 53, MSS C-35, AU (Binney, pp378–379). We give our own translation into English.

In this waiata, Te Kooti is addressing himself to the Government. In the first three lines, he accuses the Government of failing to allow him to proceed towards his objective (Taupo) after the Whakarau landed at Whareongaonga. Instead, he was pursued by armed forces. Later, he charges the Governor with wishing to capture him and break up the Whakarau, thus (in metaphorical terms) cutting his heart out, and destroying his mana.

117. Binney, p90

118. Biggs to under-secretary, Colonial Defence Office, [15] July 1868, AD68/2624, Archives NZ

119. Binney, pp90, 92. Paora Kate had also been on Wharekaui, but Edwards says that it was not clear in what capacity – though Binney and Stirling say that he had been a guard: doc F3, p24; Binney, *Redemption Songs*, p90; doc A23, p176.

120. Binney, p92

his hastily assembled force. He asked the Government to send a force at once to 'retake the prisoners'. His chief fear, having discovered that the Whakarau practised 'a new religion', was that they might quickly gain 'numbers of converts'.¹²¹

Meanwhile, the Whakarau began visiting the area around Whareongaonga, looking for arms. They captured four Maori from the Maraetaha area. These prisoners were released when the Whakarau departed Whareongaonga on 14 July.¹²² The progress of the Whakarau was slow; they were travelling with women, a large number of children, and their belongings. Te Kooti's intention was to cross the Urewera into the King Country, with their final destination being Tauranga, on the shores of Lake Taupo. This was the village where Rongowhakaata chief Anaru Matete had sheltered after he had led his people out of Te Waerenga a Hika rather than surrender. There, Te Kooti would establish his 'Tapenakara' (tabernacle) and a religious community.¹²³

On 15 July, Wi Pere managed to catch up with some of the stragglers of the Whakarau, and on 17 July he and a small delegation of Turanga rangatira overtook the main body when it stopped to rest and regroup at Te Puninga. According to a later account by Pere, he delivered a letter 'from the Europeans' that said that the Whakarau would not be harmed and could return to Turanga to live if they gave up their arms. However, Pere said that Te Kooti had angrily replied that he would not listen and that 'the Almighty was directing his actions'. Pere was forbidden from returning to see the Whakarau.¹²⁴

Though Biggs had not mounted an immediate attack on the Whakarau, he soon decided to act against them. He had not yet heard from the Government, which evidently did not reply to his request for immediate action until 9 August. There is no indication that the Government acted on his request for assistance; his 'promptness' was approved, in light of his limited resources.¹²⁵ Nevertheless, on 14 July Biggs resolved to try to cut the Whakarau off at a range beyond the Te Arai River.¹²⁶ By this time, his information indicated that the Whakarau intended to head towards the Urewera, and he knew which route they had to take through the ranges to get there. Biggs split his force into two: mounted 'whites' would head up the Te Arai River towards the ranges, while a substantial party of local Maori who were working with Biggs, would follow from the rear and 'attack them simultaneously'.¹²⁷ By 19 July, the Whakarau were nearly at the river. That evening, Te Kooti's scouts spotted the camp of volunteers at Paparatu in the Arai Valley: the force comprised 66 men under the command of Captain Charles Westrup and Lieutenant J Watson. The Whakarau met in council that night and the decision was made to attack. Te Kooti said that he had expected to be pursued 'after

121. Biggs to under-secretary, Colonial Defence Office, [15] July 1868, AD68/2624, Archives NZ

122. Binney, p92; doc A23, p177

123. See also extract of account of Peita Kotuku, James Cowan collection, MS papers 0039-41A, ATL

124. Binney, pp93-94; doc A10, p309; doc H14(6), pp14-15

125. Biggs to under-secretary, Colonial Defence Office, [15] July 1868, AD68/2624, Archives NZ.

126. Binney, p95

127. Arthur Kempthorne, *Journal of Events in Poverty Bay (1868)*, 14 July 1868, p4, M92/5, Hawke's Bay Museum

my refusal to surrender our arms and selves again to the Government . . . The taniwha lies across our path, and we must kill it or ourselves be killed.¹²⁸ Preparations were made to ambush the Government forces.

The ambush was mounted on 20 July. Te Kooti split his men into two kokiri (attacking parties) and succeeded in dividing the volunteers into two groups, pinning down half of them on a nearby hill and mounting an attack from the rear on those who remained in the valley.¹²⁹ By the end of the day, the volunteers had been put to flight, abandoning their camp and all its stores, including 10 rifles, ammunition, and 80 horses with their saddles and bridles.¹³⁰ Two men had been killed and several wounded. The 22 kawanatanga reinforcements from Rongowhakaata had failed to offer much practical support to the volunteers at all.¹³¹ In the wake of the ambush, we may note that Colonel Whitmore, who had arrived with 70 Napier men to take command of the colonial forces, wanted to pursue Te Kooti, but the men refused. Whitmore berated them, calling them ‘cowards and curs’.¹³² From this point on, relations between Whitmore and the Turanga Volunteers were icy at best. Whitmore himself was stalled, though in the meantime he ordered Captain W Richardson and his Wairoa force to move against Te Kooti.¹³³

In this first encounter with the Government forces, the Whakarau had lost three men, but they had gained additional weapons and greatly increased their mobility by securing so many horses. Most importantly, Westrup’s column had failed to recapture the Whakarau or divert them from their purpose. Next day, they left Paparatu.

On 22 July, the Whakarau received important reinforcements. They were joined by Ngati Kohatu from Te Waihou, further inland from Whareongaonga. This hapu had already suffered raupatu in the Mohaka–Waikare confiscation and thus deeply resented the Crown; they had whanaunga among the Whakarau, who had been sent to Wharekauri after the Napier conflicts in 1866. Ngati Kohatu also brought information that a new Government force, led by Captain Richardson, had set out from Wairoa to intercept them. On the evening of 22 July, near Te Waihou, Te Kooti’s scouts captured Paku Paraone, who was running messages for the Crown. Paraone was the son of William Brown and Hine Whati o Te Rangi, close kin to Kahutia. Te Kooti knew him well; his brother Komene had married Paraone’s sister Mere. The Government messages that Paraone carried were read and translated and he was closely questioned. Te Kooti then ordered his death. His body was left unburied to be found by some of his kinsmen who were with the Government forces.

128. *Auckland Star*, 4 April 1914 (Binney, *Redemption Songs*, p95)

129. Binney, p95; James Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: Auckland University Press, 1986), p222

130. Kempthorne stated ‘upwards of 100’ horses fell into the ‘enemy’ hands: Arthur Kempthorne, *Journal of Events in Poverty Bay (1868)*, p8, M 92/5, Hawke’s Bay Museum.

131. Binney, p95; see also Belich, pp221–223. Kempthorne commented several times on the less than enthusiastic support of the various Maori parties who travelled with the Volunteers.

132. Belich, p223

133. *Ibid*, pp222–223

On 23 July, news reached Te Kooti from Ngati Kohatu of Te Reinga that the Wairoa Government force had made it that far. Te Kooti called this new challenge ‘another tooth of the Taniwha’.¹³⁴ The next day, the Whakarau prepared another ambush, this time on the high ridge called Te Koneke, and Richardson and his force were caught in the valley below. Richardson had a force of 25 volunteers and 100 kawanatanga with him, but most of the latter evidently maintained their distance from the fighting.¹³⁵ Richardson and his force retreated with the loss of one man, while two or three of the Whakarau were killed, and one man, Hotoma, was captured.¹³⁶

The Whakarau then crossed the Hangaroa River and were welcomed by Ngati Kohatu at their village of Whenuakura. There, they were joined by the Ngati Kohatu chief Korohina Te Rakiroa and some 15 to 20 of his men. Te Kooti preached a message of God’s deliverance, and, for the first time, he spoke also not only of journeying inland but of turning on their oppressors.¹³⁷ Te Kooti wrote to Nama and Te Waru, the two senior chiefs of Whataroa village. Both had been involved in the conflicts of 1865 and had had land confiscated as a result. From them, Te Kooti sought further support.¹³⁸ Te Waru replied with a tiwha, asking Te Kooti to accept a take with which he had been entrusted by Raharuhi Rukupo. The take was the killing of Pita Tamaturi by Major Biggs at the Ngati Porou battle of Hangahangatoroa in 1865 (see ch3).¹³⁹ Tamaturi was a tukunga (protégé) of Rukupo.¹⁴⁰ Te Waru sent two gifts – a famous greenstone mere named Tawatahi and his own daughter, Te Mauniko, as Te Kooti’s wife. In accepting these gifts, Binney explained, ‘Te Kooti accepted the take, or cause, for which his help was sought’. Biggs would be made to pay for his wrongdoing. The sources for this explanation are Wi Pere and Te Kani Te Ua. The story of Te Waru’s tiwha is therefore undoubtedly factually correct.¹⁴¹

From Whenuakura village, Te Kooti continued inland, now with the support of Ngati Kohatu.¹⁴² The next stage of the journey was a difficult one. They had first to cross the ranges

134. *Auckland Star*, 4 April 1914 (Binney, *Redemption Songs*, p97)

135. Richardson claimed to have had only 20 men with him, including four Maori: Binney *Redemption Songs*, p97. See also Belich, p223.

136. Binney, p97; Belich, p223

137. Our source here, following Binney, is leading Ringatu tohunga Eria Raukura, who came to have a close association with Colonel Thomas Porter. Porter published a biography of Te Kooti in serialised form in the *Auckland Star*, in 1914. His notes of this period of the Whakarau history were written down from statements made by Eria Raukura, himself a Whakarau, two years after the period they spent at Puketapu: Colonel Porter, ‘Te Kooti Rikirangi,’ *Auckland Star*, 11 April 1914. Porter also relied on a statement written down seven years later by one of the Whakarau (whom he had captured) and a manuscript notebook of Te Kooti’s dating from the same time: Binney, *Redemption Songs*, p103.

138. Binney, p97

139. The defeat of the Pai Marire party in these battles, with great loss, marked the final defeat of the ‘Hauhau’ on the East Coast. Prisoners taken here were sent to Wharekauri in two groups: the first comprised 52 men, and 8 women; the second 21 men, 12 women, and 7 children: Binney, pp56, 64.

140. Binney, pp97–98

141. *Ibid*, p98; Leo Fowler, *Te Mana o Turanga* (Auckland: Penrose Printing and Publishing Company Ltd, 1974), pp6–7

142. Binney, p98

to the Ruakituri River and then cross the river while it was in flood. Te Kooti made his way to the ancient hilltop pa known as Puketapu, which bordered the Urewera. The pa had been used earlier by those Rongowhakaata who had refused to take the oath of allegiance. Te Kooti intended now to refortify it. He too had rights to this land.¹⁴³

Meantime, the local military authorities were stepping up their military response to Te Kooti's presence. On 31 July, Colonel Whitmore assembled a second force, about 250 strong, at Te Arai. It included Napier Volunteers and kawanatanga Maori as well as a force under Major Fraser which had arrived from Opotiki.¹⁴⁴ Snowstorms made their progress difficult, and the tension between Whitmore and the Turanga volunteers erupted. The men were ordered home, and a small force of Turanga Maori, as well as a Ngati Porou party, went with them. Whitmore thus entered the Ruakituri Valley on 8 August with a substantially reduced force of just over 100 Volunteers and 40 to 50 Maori.¹⁴⁵ Te Kooti had taken up a strong position in the gorge of the river in order to trap the Volunteers, and his ambush was again successful. Whitmore retreated, and earned himself a new nickname too: 'Witi Koaha', or 'Witless', reflecting how unpopular he was with his own forces. But again the Whakarau lost men (between three and eight), and Te Kooti himself was shot in the ankle.¹⁴⁶

It is possible that at this point, just as the fighting ended, instructions were received from the general government. Certainly, no further columns set out in pursuit of the Whakarau after this. It also appears that a month later, in mid-September, Father Euloge Reignier was sent as a secret emissary to negotiate peace. Reignier was a French Catholic priest well known to Hawke's Bay Maori.¹⁴⁷ Belich suggested that one of the reasons why the Government was prepared to settle with the Whakarau by this time was that the war against Titokowaru in Taranaki was going badly for the Government and it needed to be able to concentrate all its forces on the west coast of the North Island.¹⁴⁸

It is not clear whether any news of the first Government offer reached Te Kooti; Reignier set out but turned back. In fact, the first definite information about the Government's terms was not recorded until early October. The following terms were authorised by Defence Minister Haultain: 'What the Government requires from the escaped prisoners is that they shall surrender themselves and give up their arms. No further proceedings will in that case be taken against them. Land will be found for them to live on.'¹⁴⁹ Whitmore was authorised to send Reignier to deliver these terms.

143. Binney, p99. In 1890, Te Kooti was included in the list of owners for Tahora 2C1 and 2F, by Wi Pere, when the Tahora 2 block was partitioned: doc A37, p20.

144. Arthur Kempthorne, *Journal of Events in Poverty Bay*, 1868, p11, M92/5, Hawke's Bay Museum

145. Arthur Kempthorne, *Journal of Events in Poverty Bay*, 5 August 1868, p17, M92/5, Hawke's Bay Museum

146. Binney, p99

147. Reignier was also well known to those of the Whakarau who had been captured at the battles of Omarunui and Petane in Hawke's Bay in October 1866.

148. Belich, p225. For a brief description of Titokowaru's campaign, see Waitangi Tribunal, *Taranaki Report: Kaurapa Tuatahi* (Wellington: GP Publications, 1996), p98.

149. Pollen, for Defence Minister, to Whitmore, 9 October 1868, AD8/1, Archives NZ

On 13 October, Reignier set out from Napier to travel inland and make contact with Te Kooti. At Te Pohue, he learned from a Government dispatch rider named Hope that the Mohaka River was in flood and that he would not get through. More importantly, he was informed that none but 'Hauhau' would be allowed through to Te Kooti. Reignier decided instead to entrust the mission to Hope, who undertook to send the dispatches through. According to Binney, the dispatches were in fact sent through to Puketapu, some of Te Kooti's men carrying them the last stage. Belich also considers that some messages probably got through.

On Reignier's return to Napier on 17 October, he learned that four Maori messengers had been executed near Te Waru's settlement, Whataroa. (Te Waru was absent at the time.) Based on this, 'Reignier's loss of nerve will have probably seemed justified to him'.¹⁵⁰ The men, who were all men of rank within Ngati Kahungunu, had been sent from Wairoa to intercept and turn Te Waru and Nama before they committed themselves to Te Kooti. They had been killed in their sleep, but the motive for their murder was not clear. Binney suggested that they were considered spies.

Since the hostilities of 8 August, Te Kooti and the Whakarau had remained at Puketapu. More support was arriving; Te Waru and Nama reached Puketapu in September. Te Kooti was said to have spoken to the Whakarau of his anger at the Crown's pursuit not long after the Ruakituri hostilities in August. If their faith was strong, he said, God would deliver the Pakeha and the Government into their hands.¹⁵¹ Te Kooti wrote to Turanga asking the chiefs to remain 'outwardly loyal' to the Government but to gather more arms for him when he came down 'in the summer'.¹⁵² But his preoccupation at this time was securing permission to enter the Urewera and the Rohe Potae (King Country). He wrote letters to Tawhiao and to the Tuhoe leadership. Tawhiao sent a reply in September with his emissary, Wirihihana Te Koekoe: Te Kooti was not to fight or renew the wars.¹⁵³ The response, though not a flat refusal, could best be described as cool. Tuhoe likewise withheld permission for the passage of the Whakarau in the meantime. In October, they held a meeting at Ahikereru, one of their largest villages, which a number of the Whakarau attended: 'it was accepted that they could remain where they were, in the "upper wairoa" on the border of Urewera'.¹⁵⁴

As it became obvious from the latter part of September and into October that the signals from the Kingitanga and Tuhoe were not encouraging, a major dilemma loomed for Te Kooti. At the same time, news from Turanga itself inevitably reached the Whakarau at Puketapu, and some of it was disturbing. Captain Biggs had continued to press for the cession of Turanga lands to the Crown; he had also been substantially involved in the forcible removal of the Rongowhakaata wharenui Te Hau ki Turanga, which had been carved by Raharuhi

150. Binney, p101

151. Porter, 'Te Kooti Rikirangi', *Auckland Star*, 11 April 1914

152. Biggs to Colonial Defence Office, 1 September 1868, AJHR, 1869, A-4A, p3 (Binney, p102)

153. Binney, p102

154. *Ibid*, p103

Rukupo from Orakaiapu. And he was now living on land at Matawhero whose ownership and sale had been contested within Rongowhakaata.

For Te Kooti himself, the loss of this land must have been very important. He was among those who had rights to land in this area, and he had lived and cultivated crops there. He had in the past been involved in two separate disputes about adjoining pieces of land. Both were the subject of internal contest within Rongowhakaata and competing settler claims. Both also involved the territorial ambitions of the region's most determined land purchaser, George Read. On one of these pieces (which came to be known as Matawhero 4), Read had fenced in his whole claim in 1866, and begun to build a military redoubt. Captain Biggs was one of those settlers who had built his home on Read's disputed land.¹⁵⁵

The loss of whanau and hapu lands in such circumstances, and the prospect of a much larger cession, undoubtedly added to Te Kooti's sense of grievance stemming from the circumstances of his detention. He had still received no answer from the Crown as to why he had been denied a trial or whether it intended to remedy its oversight. Turanga chiefs wrote twice in protest about the treatment of the Whakarau during this period, and their strongly worded letters reflect an understanding of the grievances of the Whakarau:

This is about the escaped prisoners. That fault is not ours, but it is the fault of you (the pakehas). They came out of your hands, and arrived at Turanga. The law did not intervene to investigate their crime, for, what matter what their crime was, the law ought to have looked into it; but no, it was left for the sword . . . Why did not the law investigate . . . ? The desire of Te Kooti was to return here to Turanga; he had no desire to fight; it was from here the fighting emanated; he would not even turn to fight, but only warded off the blows (acted on the defensive) . . . as the matter stands, the Government alone are to blame for following up those prisoners in a resentful manner.¹⁵⁶

Towards the latter part of October, when Te Kooti's circumstances and plans had had to change, he refocused on Turanga.¹⁵⁷ By then, Te Kooti commanded in the order of 250

155. In the first dispute, involving the rich land which formed the boundary of a block that came to be known as Wainui 2, Read disputed possession with William Greene. Te Kooti had been among those involved in the gift of land to Greene's children who were of dual descent. Te Kooti upheld the gift and the addition of the riverbed to it, but resisted the attempts of Greene to double the size of the block and purchase the riverbed land by paying cash. The land had nevertheless been sold by others after he had been sent to Wharekauri. The second dispute involved land called Te Toma (Otoma) within the block known as Matawhero 4 which was claimed by Read. Te Toma too had been gifted (in 1843) to Harris; legally the transaction was void, but Harris had then sold the land to Read. Both transactions left a legacy of discontent; the first because some owners had received no payment from Harris (in the form of the offspring of the mare he had given in payment); the second because Read's claimed ownership of the block in such circumstances was a considerable source of tension among Rongowhakaata: Binney, pp109–114.

156. Paora Matuakore and 'all of us' to JW Preece, published in *Daily Southern Cross*, 20 November 1868, probably Preece's translation (Binney, p117)

157. A Taupo settler, Frederick Helyar, had learned by the end of October of information both that King Tawhiao had refused to assist Te Kooti, and that Te Kooti had decided before continuing on to Taupo, to turn back to Turanga.

men, including the recent arrivals from the upper Wairoa.¹⁵⁸ In mid-October, the Whakarau made a sortie to Wairoa in an evident attempt to get arms. Rumours as to their intentions abounded; there were fears of an attack by Te Waru. But, by 21 October, it was reported that the 'main body' had in any case been a number of miles from Clyde and was no longer close.¹⁵⁹ This attack caused great alarm, and, though it failed to produce more weapons, it may have served as a feint, concentrating Government forces there. On 24 October, Te Kooti held a council of his principal chiefs and told them of his decision to strike at Turanga.¹⁶⁰

5.5.2 The Whakarau attack Turanga: Patutahi, Matawhero, and Oweta

The Whakarau left Puketapu on 26 October to journey back towards Turanga. By early November, sufficient news of their movements had reached Turanga that the possibility of an attack was being discussed in the community. Biggs had been told by Keita Wyllie (James Wyllie's wife) on or before 5 November that the route was to be through Patutahi. On 6 and 7 November, the local settlers there kept a watch at the track and crossing at the Patutahi Ford, though Biggs did not consider it necessary. On 9 November, Biggs was again warned by Leonard Williams, who had received detailed information via his brother Samuel.¹⁶¹

Biggs himself appears to have discounted these warnings. On 9 November, he wrote to McLean and mentioned that there were often alarms about the closeness of the Whakarau to Turanga. He had his own scouts out, who had seen fires, and he concluded that the Whakarau were cutting a road through the bush. He went on to discuss the meeting he was to hold with the chiefs in a day's time to discuss the cession of land that the Crown sought. In other words, Biggs saw no reason to panic.¹⁶² We note that Biggs had himself suggested locating a force in the district at the beginning of September, but around the same time he had decided not to call out his militia for service because he did not think the expense was justified. Only when the Under-Secretary for Colonial Defence insisted, did he do so.¹⁶³

On 8 November, the Whakarau, with the new allies they had gained at Puketapu, entered Te Pukepuke, at the head of the valley leading to Patutahi – just as Keita Wyllie had said they would. Sixty were mounted on horses, the rest were on foot. Here the final details of the attack were planned. A kokiri was also sent to the Whanau a Kai kainga Patutahi, where men, women, and children were seized.

158. Porter stated that 400 men were with Te Kooti by this time, including Ngati Kohatu, Tuhoe and some from Rongowhakaata and Te Aitanga a Mahaki: *Auckland Star*, 18 April 1914. This number seems rather high.

159. Deighton to McLean, 18 October 1868, and J C St George to Ormond, 21 October 1868, AJHR, 1869, A-4A, pp 6, 7

160. Binney, p 115

161. Ibid, pp 116–118

162. Ibid, p 118

163. Haultain to Biggs, 7 September 1868 and Biggs to Haultain, 1 September 1868, AJHR, 1869, A-4A, p 3

Te Kooti gave most the choice of joining him or being killed. He selected three men, however, who were taken away and shot.¹⁶⁴ The prisoners were then taken five miles up the valley to Te Pukepuke. This was a strategic move. It secured control of the village beside the ford across the Waipaoa River and gave 'a warning (and a choice) to his kinsmen'.¹⁶⁵ At Te Pukepuke, Te Kooti secured detailed descriptions of all the houses at Matawhero from Karepa, who was found at Patutahi.¹⁶⁶

On the night of 9 November, Te Kooti's kokiri of 100 men crossed the Patutahi ford. The rest remained guarding the valley. The kokiri was split into two groups: one led by Nama, which was to strike first at the house of Captain Wilson (who had commanded the attack on Waerenga a Hika), the other led by Te Kooti, which was to strike at Biggs' house. In Te Kooti's words, Biggs was 'the chief of the Pakehas'; Wilson, the 'lesser chief'.¹⁶⁷ Both men and their families were killed, though Wilson's eight-year-old son James survived by escaping into the bush, while Alice Wilson survived for another few weeks, though terribly wounded.¹⁶⁸

The attackers swept on through Matawhero. That night, between 29 and 34 settlers (men, women, and children, and young people of dual descent) were killed. Te Kooti had instructed that 'silent weapons' be used, so as not to raise the alarm.¹⁶⁹ Most were either tomahawked, shot, or bayoneted.¹⁷⁰ The 13 Pakeha men killed were militiamen. More than 30 other settlers, such as James Wyllie, escaped with their families. Most of those who escaped were warned by Maori living in the area, heard the gunfire, or saw the attackers in time to react, and fled across the river in time.¹⁷¹ Wyllie attributed the survival of three families to the fact that Tutere Konahi and Miriama Whakahira refused to inform the Whakarau as to which way they had gone. Konahi was killed for not cooperating.¹⁷² In the meantime, panic spread through the area. Some settlers fled from Matawhero to Muriwai during the night. There, they were given refuge, but the settlement of Muriwai had few arms and little protection to offer and itself sought relief from Turanga.¹⁷³ Settler women and children from Turanga and other settlements who survived the night were immediately shipped out to Napier or Auckland.¹⁷⁴ Meanwhile, Te Kooti ordered that the houses be stripped of all useful articles and burnt. At Matawhero and Makaraka, some 30 homesteads and all their outbuildings were burnt to the ground, and another dozen were ransacked but left standing.¹⁷⁵

164. Porter, 'Te Kooti Rikirangi', *Auckland Star*, 18 April 1914

165. Binney, p119

166. Ibid, p120

167. Porter, 'Te Kooti Rikirangi', *Auckland Star*, 18 April 1914

168. Binney, pp120–121; see also James Hawthorne, *A Dark Chapter from New Zealand History by a Poverty Bay Survivor*, 2nd ed (Christchurch: Capper Press, 1974), pp21–23

169. Porter, 'Te Kooti Rikirangi', *Auckland Star*, 18 April 1914

170. Alice Wilson died later of her wounds: Porter, 'Te Kooti Rikirangi', *Auckland Star*, 18 April 1914.

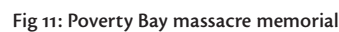
171. Mackay, *Historic Poverty Bay*, pp258–261; Binney, p121

172. *Weekly News*, p9, 12 December 1868.

173. Binney, p126; see also Hawthorne, pp26–27

174. Hawthorne, p27

175. *Weekly News*, 9 January 1869



176. Binney, p 121n; Belich, p 228; doc A10, p 318; doc A23, pp 188–189

The first of the Maori taken during the night of 9 November were executed at sunrise. Among them were Piripi Taketake and his wife of high rank, Harata Poharu, who had been closely involved in the disputed land transactions at Matawhero. Their children were also executed. They were shot and then stabbed with a bayonet or a sword. The Psalm 63:10 ('They shall fall by the sword') was sung, as Te Kooti ordered.¹⁷⁷ Their bodies were deliberately left unburied, according to biblical injunctions, 'as a portion for foxes'.¹⁷⁸ In this way, Te Kooti made it clear that it was God's punishment which was visited on the victims.

In the days after Matawhero, there were more executions. As Te Kooti stayed in the area, chiefs who were his own kin visited him. On 12 November, Paratene Turangi (Pototi) and Te Waaka Puakanga and other Rongowhakaata chiefs came to see Te Kooti to urge him to make peace. On 13 November, Te Kooti had three captive chiefs killed – Natana, Himiona, Wi Rangi Whaitiri, and Paora Te Wharau.¹⁷⁹ Then he went to Oweta, where Paratene Pototi had returned to. As the people of Oweta saw Te Kooti approach, some women and children got away across the river. Tamihana Ruatapu also escaped. But 'Old Paratene Pototi waited, deliberately unarmed', with some of his chiefs. Te Kooti seized eight of them, including Pototi and Te Waaka Puakanga, who was father to Te Kooti's first wife, Irihapeti. Pototi, who had taunted Te Kooti as he was sent on the boat to Napier, was executed that same day. Binney says that this act was 'quite calculated and it has never been forgotten'. Four of the remaining seven were shot and Puakanga was taken prisoner. The remainder of the Oweta people were also taken prisoner, though Raharuhi Rukupo was permitted to leave and was given a watch and a sword.¹⁸⁰ Te Kooti had threatened Rukupo (one of his own leading chiefs) with death for choosing not to support him, but he did not go any further. Wi Kingi Te Paia, who joined the Whakarau at Oweta, said that fear now bound them all together.

But, during these days, more joined Te Kooti. The success of his extreme actions, said to have been committed under divine protection, had gained for him the mana that his birth did not provide. His instructions to execute chiefs (for Te Kooti did not himself kill) underlined to the people that his own authority was grounded differently; it came from God.

On 19 November, Te Kooti set off inland again, up the Wharekopae valley, heading initially for an old pa, Makihoi.¹⁸¹ With them, the Whakarau took 300 prisoners. The whole party was now very large; it must have been close to 700. Te Kooti's decision to take so many additional people can be explained on a number of levels. First, he wanted his church to grow, for it could not be sustained only by the numbers of the Whakarau. By then, he must have been confident

177. Binney, p122

178. Ibid, p122

179. Binney stated that the execution of four chiefs was ordered; the life of the fourth, Natana, was saved at that time by Maata Te Owai: Binney, pp124–125.

180. Te Kooti had originally sent this silver watch to Rukupo after landing at Whareongaonga, but Rukupo had returned the watch to him, but Rukupo had returned the watch to him, 'in place of the sword that Te Kooti had asked for as confirmation of his support'. Te Kooti returned it to him at this meeting. Binney, pp126–127.

181. Binney, p131

of his ability to incorporate newcomers into the Whakarau group. Secondly, a larger number of people would give him greater access, through their relationships, to the supplies of villages further inland. And, thirdly, he left many of the villages of his own people behind him half empty. Thus, Te Kooti's leadership was stamped not only within the Whakarau but within his iwi, Rongowhakaata.

Having traced the journey of the Whakarau from Whareongaonga up to Puketapu, back to Turanga, and now back up into the hill country, it is appropriate to pause and consider the arguments of the parties in respect of these events.

5.6 CROWN AND CLAIMANT CASES ON THE RETURN OF THE WHAKARAU AND THE ATTACKS AT MATAWHEREO

5.6.1 The Crown case

Crown counsel argued that the Crown response to the return of the Whakarau was measured and cautious.¹⁸² The Crown was sensitive in its dealings with the Whakarau and sent various delegations of Turanga Maori to persuade them to give up their arms. These delegations were unsuccessful. On the other hand, the Whakarau captured all the arms and ammunition they could on escaping from Wharekauri, and on landing at Whareongaonga. They also captured prisoners on their arrival, though they were released again two days later. Despite professing peaceful intentions, the Crown argued that 'these actions were hardly a manner of arrival that is likely to ensure the local population, or the Government, of a pacific intention'.¹⁸³

Ultimately, the Crown argued, it was Te Kooti who fired the first shot:

The Whakarau ambushed and killed members of a military encampment at Paparatu. This was the first military engagement. Certainly, the camp they attacked was a military encampment of 66 volunteers that was embarking upon a military response to the Whakarau, and certainly, in the fighting two members of the Whakarau were also killed. However, the actions of the Whakarau at this time prevented any dialogue occurring prior to the commencement of hostilities on that day, dialogue that may have averted further hostilities.

Te Kooti ordered the first calculated execution of the campaign when he instructed Maaka Ritai to execute Paku Paraone, a member of Te Kooti's own tribe who was captured while running messages for the government.¹⁸⁴

Te Kooti had clearly chosen a path of war. Binney, the Crown noted, said that by late July or early August 1868, while at Whenuakura village, Te Kooti had decided that 'we will turn again

182. We note that the Crown did not offer any independent evidence on Matawhereo, though counsel did refer in submissions to the work of Binney and others.

183. Document H14(6), p13

184. Ibid, p16

upon our oppressors; all the land shall be ours'. By this point, the Whakarau had staged two successful ambushes, but, instead of using them to continue inland, Te Kooti 'again committed himself to a path of war'.¹⁸⁵ Crown counsel continued:

This commitment took place well before (six to eight weeks before) Te Kooti received news that his overtures to Tuhoe and his challenge to the King had been rejected. The claims made by Binney that the rejection of Te Kooti by those parties at that time forced Te Kooti to turn upon Turanga cannot be considered compelling. Te Kooti had made his choice well before he received this news. Further, even if this thesis is true, the fact that two powerful and highly autonomous Maori polities rejected Te Kooti cannot be held against the Crown. As Binney herself states, Te Kooti intended to challenge the King, 'it was a clash of mana, a struggle for religious authority'.¹⁸⁶

In contrast, said counsel, the Government had shown considerable constraint and sensitivity in attempting to find non-military resolutions to the situation. However, it was reasonable for the Crown to make a military response after the Whakarau refused to surrender their arms or to enter a dialogue, and continued actively to seek arms.¹⁸⁷

Moreover, though Te Kooti may have had some particular reasons for the attack at Matawhero, 'it does not necessarily follow that they were a principal motivation for those events, nor would it provide justification for the means Te Kooti employed'.¹⁸⁸ Those methods 'could never have justified the extreme steps taken'. The evidence of the time labelled the events at Matawhero as an atrocity, not a reprisal. 'There was ample evidence available at the time to justify that conclusion'.¹⁸⁹

The Crown argued that there was no question but that the Crown had every justification to attack the Whakarau after Matawhero, when 'it had a particular serious law and order issue to deal with'. The Crown, therefore, 'properly sought to bring them to justice'.¹⁹⁰

5.6.2 The claimants' case

The claimants argued that, since the Whakarau were justified in freeing themselves from false imprisonment, the Crown had no legal justification for attempting to restrain them on their arrival home, nor for pursuing them 'at the point of a bayonet'. On the contrary, the claimants argued, none of the Whakarau had been tried, convicted, or sentenced for any offence, so they 'were free to move to wherever they wished and could use reasonable force to resist false imprisonment or act in self defence or in defence of property'.¹⁹¹

185. Binney, p98 (doc H14(6), pp17, 20)

186. Document H14(6), p17

187. Ibid, p17

188. Ibid, p20

189. Ibid, pp20-21

190. Ibid, p22

191. Document H2, pp39-40; doc H4, p6

The claimants' argument was that the initial pursuit of the Whakarau by Major Biggs forced him into taking pre-emptive action once his pathway to Taupo was blocked off.

As for the attack on Matawhero itself, the claimants emphasised the carefully planned and clinical nature of the assault. They submitted that it was not a wanton massacre without reason or purpose – the attack of the Whakarau was very deliberately focused on certain individuals, being mainly those who had been instrumental in their deportation or who had targeted their ancestral lands. The attack was not unprovoked. Binney, Stirling, and O'Malley all argued that the victims were very carefully chosen. Binney, for example, said that:

The killings at Poverty Bay over the five days 10–14 November were not random massacres. They were, as the evidence has shown, very specific. The European males who were killed died because of their previous military roles; all of them had served in the militia forces. Some, most certainly Biggs, had been involved in the execution of prisoners. But they and their families were also killed because they were living on land which had belonged to Te Kooti and from which he had been dispossessed during his exile . . . The Maori who were killed were those who had fingered him as disloyal, or who had dispossessed him during that exile by seizing the opportunity to attempt sales or by their readiness to co-operate with the government's land schemes. Women and children were killed as members of the family – usual in warfare. However, some Maori women were chosen for death – and others exempted – because of who they were and how they had acted in these issues.¹⁹²

Counsel argued that, if a 'massacre' had been intended, then 'many more might have died, both during this instance in November 1868 and on many other occasions when such action was within Te Kooti's power'. Counsel reminded us that Te Kooti did not have a monopoly on acts of brutality: 'The victims of Rangiaohia, [Orakau], Matata, Waiapu and Ngatapa all bear witness to that fact. Yet none were so vilified, defamed and maligned as Te Kooti.'¹⁹³ Counsel considered that 'Few if any individuals have been pursued and hunted with such vigour and single-minded determination in the history of Crown–Maori relations in the nineteenth century.'¹⁹⁴

Claimant counsel acknowledged in response to a question from the Tribunal that it was inevitable that an armed response from the Crown would follow the attack at Matawhero. But, they said, due process should have been followed, arrests made, and charges laid. This happened at Opotiki and Whakatane and elsewhere (after the killings of Völkner and Fulloon and others), so there were precedents that could have been followed.¹⁹⁵

192. Binney, pp120–121, 129–130; doc A10, pp318–319; doc A23, pp188–189. Binney says 10 November rather than 9 November because the accounts suggest that the killing occurred after midnight of that evening.

193. Document H3, pp40–41

194. Document H4, p7

195. Paper 2.26, pp87–88

5.7 TRIBUNAL ANALYSIS AND FINDINGS**5.7.1 Findings of fact**

We have set out above an account of the escape of Te Kooti and the 300 people with him from Wharekauri, their landing at Whareongaonga, south of Turanga, their progress inland to the mountains, the choice of Puketapu as their base, and their final decision to turn back to launch an assault on settler and Maori communities at Turanga. The crucial questions are when and why Te Kooti and his advisers made that decision. Were their intentions warlike from the outset? Did they always intend to attack Turanga? If not, what were the factors that led to that decision? We set out our findings of fact here.

The evidence is that when the Whakarau left Wharekauri Te Kooti's intentions were peaceful. The generally careful way in which his jailers and the crew of the *Rifleman* were treated speaks clearly to this. Te Kooti's stated preoccupation was to lead the people back to the mainland, and to keep them together as a cohesive group under his control. In themselves, the Whakarau were not a cohesive group; they were of different iwi and different hapu. Not all were even from Turanga – over 70 had been taken prisoner in battles in Hawke's Bay, and they came from Ngati Kahungunu, Ngati Tuwharetoa, Tuhoe, Wanganui, and Taranaki.

Te Kooti's spiritual leadership had already drawn the Whakarau together as a religious community that shared faith both in God's protection of them and in Te Kooti as God's mangai (mouthpiece). The Whakarau observed the spiritual transformation in Te Kooti and listened to the predictions that he received from God; they saw in him the power of a prophet. On Wharekauri, they shared worship in the first Ringatu services. They focused on and took hope from the Old Testament promise of God to the Israelites, a people also oppressed by an alien state (the Egypt of the Pharaohs). The promise was that, if they kept His Covenant, the Ten Commandments, they would be His chosen people and He would deliver them from bondage.

The escape of the Whakarau was itself a crucial moment in their commitment to Te Kooti's leadership. The safe arrival of such a large body of people on the mainland, and their success in a highly risky but meticulously planned venture, vindicated that commitment. Te Kooti was not just a prophet; he was an astute leader too.

Te Kooti's vision when he landed at Whareongaonga was to build a religious community far inland. He sought a pathway through the interior, ultimately to Taupo, which he saw as his sanctuary. There, he had connections: the village of Tauranga, on the shores of the lake, which had already sheltered the Rongowhakaata chief Anaru Matete after Waerenga a Hika; his own visit there with the missionary TS Grace, and his relationship with Rangitahau, a chief of Ngati Tuwharetoa and Ngati Hineuru, who was among the Whakarau. Like Moses, Te Kooti believed that he would lead the Israelites (the Whakarau) out of Egypt (Wharekauri) to Canaan, the promised land (Tauranga, at Taupo), and there he would set up the tabernacle for the Ark of the Covenant: 'Te tapenakara mo te aka ki Taupo, tikarere tataui ki reira, a ki te tu

taua tapenekara[sic] kaore he pakanga'. ('The tabernacle for the ark will be at Taupo; we shall go directly there, and if that tabernacle stands there will be no fighting'.¹⁹⁶)

From the time that the Whakarau landed at Whareongaonga until the local forces commenced their pursuit, there is no evidence of hostile intent on the part of the Whakarau. They searched for guns before they set off inland, and evidently in the course of this they took four Maori prisoners – perhaps to prevent them from raising any alarm – but they were released soon afterwards. We do not consider the search for guns to be evidence of an aggressive purpose; weapons were vital for the protection of the Whakarau during their journey. A Government force was already mobilised against them, and later events would confirm that the acquisition of weapons was a sensible precaution. Certainly, there was nothing in this action which justifies an inference that their purpose was other than defensive.

Above all, the Whakarau did not approach Turanga. Whareongaonga is about 20 kilometres south of Turanga. It was probably chosen as a landing place for three reasons. First, it was close enough to Turanga to be familiar. Secondly, it provided access into the interior. Thirdly, it was sufficiently distant from the settlers and the militia to be safe in the short term. The path that the Whakarau took towards the Urewera (skirting around the Turanga flats) showed they were intentionally giving the Turanga settlement a wide berth.

A large group of armed people travelling in such circumstances would have always aroused the concern of the Crown. The Crown had a right to keep the Whakarau under surveillance and to investigate what terms they sought. But, given the the Whakarau's long illegal detention, this should have been done with a mind to negotiate a peaceful settlement with them, not to pursue them aggressively.

The first response that the Whakarau met with from the authorities was cool and aggressive. The local resident magistrate and military commander, Biggs, took a force of 100 men to within a mile and a half of Whareongaonga and dispatched messengers at least twice. He demanded that the Whakarau give up their arms and surrender while the Government decided their fate. Given the circumstances, this was an unconsidered approach; there was no reason why people who had managed to escape from a lengthy period of detention at the hands of a capricious Government should immediately again entrust their fate to that Government without some assurances. Te Kooti probably did not trust Biggs anyway; he knew that in the East Coast fighting Biggs had shot Pita Tamaturi, tukunga of Rongowhakaata chief Raharuhi Rukupo, in cold blood after he had surrendered. It is very likely that Te Kooti had by this time also learned that Biggs was now in occupation of his own whanau land at Matawhero.

At the same time, Biggs was preparing for hostilities. And, in quick succession, within the first month of their landing, three separate expeditions set off in pursuit of the Whakarau: one from Turanga, one from Wairoa, and one from Napier. The last of these was the biggest,

196. Biddle, MSS 1, p197 (Binney, p93)

and it was led by the highest-ranking officer of the colonial forces, Colonel George Whitmore. The Whakarau responded on each occasion with pre-emptive strikes. But, again, this is not conclusive evidence of an aggressive disposition from the outset. Did the Whakarau have any strategic alternatives? They had many women and children with them, and they faced forces who were fully mounted, better armed, and unimpeded by non-combatants. Nor, as we have said, did they trust the Crown generally, or Biggs personally. It made no sense to wait until an attack was launched. By striking first, they could pick the location of the hostilities, remove their women and children from danger more effectively, and gain the tactical advantage. The alternative to fighting, possible recapture, was unthinkable after the Whakarau had come so far, and Te Kooti's spiritual mission had yet to be fulfilled. We do not consider that the attacks by the Whakarau on the pursuit forces show an intention to act aggressively towards the Turanga community. As far as we know, it was only after the Crown forces overtook them that Te Kooti spoke of his anger against the Pakeha and the Government.

The Whakarau remained from early August at their newly established base on Puketapu mountain. On the evidence before us, the final decision to turn back to Turanga was not taken until the last week in October, nearly three months later.

A crucial factor in this decision was the failure of their approaches to the Kingitanga and Tuhoe leadership to seek passage to Taupo through their respective territories. Te Kooti had sent letters to Tawhiao and to the Tuhoe chiefs after reaching Puketapu, but their replies brought little comfort. In September, Tawhiao's interim reply was cool. Te Kooti was not to fight or to bring about a renewal of the wars. By the end of October, however, Te Kooti had explicitly been refused permission to enter the Rohe Potae. An interim refusal by Tuhoe seems to have been conveyed towards the end of September. It seems that Tuhoe had decided that this was a tribal matter and that further consultations were needed before a decision could be made and communicated. Then, in October, Tuhoe held a meeting at Te Ahikereru, near Te Whaiti, which a number of the Whakarau attended. In other words, negotiations had been opened between Tuhoe and the Whakarau. But, though there was no opposition to the Whakarau staying where they were, they were not given permission to enter Tuhoe lands. Neither the Kingitanga nor Tuhoe were certain as to Te Kooti's purpose (in the case of the Kingitanga, he had seemed to issue both a political and a spiritual challenge), and in both cases the leadership was anxious about the soldiers who might follow in his wake.

Thus, during the course of October it became increasingly clear to Te Kooti that the path inland was blocked. He was meticulous in not crossing tribal boundaries without permission. Apart from the normal courtesies expected of a manuhiri (guest), he could not afford to be fighting his hosts to the front and the Crown to the rear.

Though we cannot be certain exactly when Te Kooti reached the decision to turn back and launch an attack at Turanga, it seems clear that it was during the latter part of the Whakarau's stay at Puketapu. It is true that he did accept the tiwha or request to avenge Biggs' killing of Pita Tameturi in July, but this did not mean that he had to return to Turanga to confront

Biggs. He could have met him in the field. The acceptance of the tiwha was not the point at which Te Kooti resolved to turn back. We do not agree with the Crown submission that Te Kooti had decided to turn back to Turanga six to eight weeks prior to the Tuhoe and King Country refusal of passage – the evidence of his actions speaks to an entirely different plan. Te Kooti waited between two and three months for word from the inland tribes before turning back. If he had been determined to attack Turanga in August, he would have done so. But do these words spoken in anger, and in religious anger at that, signify a settled plan of action? We do not think so; there must have been an intervening event. We deal with this below.

Though Te Kooti's decision to turn back to Turanga was not formally taken until he was certain that his path inland was blocked, it is safe to assume there was a flow of information reaching Puketapu that reinforced the early warnings he had received from the interior. He may have discussed the Turanga plan with his closest advisers during October, as the prospects for going forward diminished. He may also have used his preaching to prepare the Whakarau for the possibility of an alternative outcome to their journey. But the runanga at which the decision was formally taken and announced appears to have been held on 24 October, by which time Te Kooti had run out of choices anyway.

Meanwhile, as the Whakarau waited at Puketapu for a clear path forward, other factors also contributed to a shift in Te Kooti's thinking. Though he was focused on his spiritual journey, human pressures began to intrude as the weeks passed. Once the Whakarau returned to their own takiwa, after all, they were no longer cut off from their whanaunga. They had returned home after a long time away. Messages were carried through to them about recent events in Turanga, and inevitably some brought pain and anger.

The Whakarau learned of the attempts by Crown agent Biggs to secure Turanga lands for the Crown; they very likely also learned that agreement for cession was in the offing. The possibility, as provided for under the East Coast legislation, that a process might be put in place systematically to strip the Wharekauri detainees of their lands and award them either to the Crown or to 'loyal' Maori would have incensed the Whakarau. For Rongowhakaata, particularly Ngati Maru and Ngati Kaipoho, there was also the blow of the forced 'acquisition' of Te Hau ki Turanga, which had been carried off from Orakaiaapu by Crown officials (see ch10).

An added goad to Te Kooti directly was Biggs' residence at that time on Matawhero land – Te Kooti had contested the transfer. The strength of Te Kooti's feeling against Biggs is evident in his decision to kill Paku Paraone (a man of his own whanau), who was Biggs' dispatch messenger, and in his decision personally to lead the kokiri that targeted Biggs' house at Matawhero.

There was also the crucial practical consideration of how to keep such a large group of people fed. The arrival of supporters from upper Wairoa, and inland of Napier, had added nearly 100 more to their number, and, though this had also given them increased access to provisions from the various Ngati Kohatu settlements, those settlements would have been reaching the end of their winter stores. The Whakarau had left Whareongaonga nearly four

months earlier, in winter. They had travelled far inland, into an increasingly inhospitable environment and at a time when bush foods would not have been plentiful. There would have been no chance to plant any gardens with a prospect of imminent harvest. The shortage of food, in other words, was doubtless a consideration in the final decision to turn back.

Add to all of these factors the facts that the Whakarau had been falsely imprisoned for over 2½ years in a hostile environment and that, on their return, they were pursued by three separate forces, each time leading to conflict and loss, and the sense of grievance must have become unbearable for them.

It is true that the Crown did eventually attempt to negotiate with the Whakarau after it thrice failed to capture them and bring them in. But by then it was too late. The Whakarau were cornered and angry. In the Turanga claims, as we have said, we are enormously advantaged by the legacy of song poetry which Te Kooti left behind. This legacy provides us with a rare window into his inner thoughts and feelings in relation to these events. One of his most famous compositions is an adaptation of the Ngati Kahungunu waiata *Pinepine te Kura*. In Te Kooti's version, he describes in very traditional terms his deep distrust of the Crown:

Ka pa ko te waha o te Kawana

E hika mae! Ina ia te kai!

Toia ki uta ra haehaetia ai

Tunua hai te manawa, ka kainga ka pau

[At Whareongaonga] the Governor's voice was heard saying

My friends, here is food

Let us drag it ashore, so that we can cut it to pieces

Cook the heart, and eat it till it is all consumed.

Te Kooti believed that the Governor saw the Whakarau as his food and that the Government intended from the outset to consume them. He made it perfectly clear that he trusted neither Biggs nor the Crown. There was considerable evidence to indicate that his distrust was justified.

We therefore find that the Whakarau returned to Whareongaonga with peaceful intentions but that, owing to a combination of factors, those intentions changed. The majority of these factors (1–4 below) were the result of Crown decisions, and one (5) resulted from direct action by a Crown officer:

1. Deep distrust of the Crown and its intentions born of the experience at Waerenga a Hika and on Wharekauri.
2. The failure of the Crown to engage appropriately in negotiations with Te Kooti by sending an individual trusted by him – for example, the missionary TS Grace – with the authority to negotiate.
3. Provocation by the Crown in the form of three separate pursuits.

4. The events that had occurred in Turanga during the years of their absence, including:
 - (a) the forcible acquisition of Te Hau ki Turanga;
 - (b) the advantages enjoyed by those of their whanaunga who had not been exiled;
 - (c) the occupation by Biggs of the land of Te Kooti's whanau; and
 - (d) the possibility that all of the Turanga (and Wairoa) lands of the Whakarau might be confiscated.
5. The refusal of passage through the Urewera and King Country to their intended destination.
6. Scriptural support for the Whakarau's resistance and their eventual deliverance from the bondage of their oppressor.
7. Te Waru's tiwha in respect of the death of Pita Tamaturi at the hands of Biggs.

From Te Kooti's growing anger against the State and those who did its work or assisted its policies came a battle plan that reflected his religious vision. Before the Whakarau left Puketapu, Te Kooti preached from Joshua 23:5–6: 'And the Lord your God, he shall expel them from before you, and drive them from out of our sight; and ye shall possess their land, as the Lord your God hath promised unto you.'¹⁹⁷

In Te Kooti's Old Testament vision, the dispossessors were to be justly dealt with and the Whakarau would be repatriated. God's anger would be turned against the colonial state of New Zealand and its agents, and He would kill the inhabitants of Turanganui, Wairoa, and Napier (the homes of those who had been held on Wharekauri) and 'give them all the land when the Government people were dead'.¹⁹⁸ Auckland, Wellington, and Napier (the three centres of Government power) would ultimately fall too.

Te Kooti's take stemmed ultimately from the impact of the Crown's policy of pacification of the East Coast, and from the heavy-handed way in which the colonisation of Turanga had been undertaken.

5.7.2 Application of Treaty principles

We commence our application of the Treaty to these findings of fact with our conclusion. No level of provocation could justify the atrocities that Te Kooti and the Whakarau perpetrated at Matawhero and elsewhere in Turanga from 9 to 14 November 1868. Even if it could be demonstrated that Te Kooti had a reason for the murder of each of the 50 or so victims of that five-day period, we can think of no reason that could provide a justification for them. Even if Te Kooti had a right to feel rage at the things that some of the victims had done against him personally or the Whakarau more generally, the evidence shows none the less that many were completely innocent of any such wrongdoing. These people, such as the families of Biggs and Wilson, were guilty only of being related to the wrongdoers. However, tikanga Maori might

¹⁹⁷. As quoted in Binney, p115

¹⁹⁸. Porter, 'Te Kooti Rikirangi,' *Auckland Star*, 25 April 1914

have treated guilt by association, the day when tikanga provided a justification for the murder of these innocents had long passed. The Treaty itself signalled an end to these old ways.

Yet, our condemnation of these actions is not unmitigated. The evidence also shows that Te Kooti and the Whakarau were driven to the excesses of the Turanga murders by the legacy of Waerenga a Hika and Wharekauri; by a Crown which was itself acting in a lawless and ruthless manner; by a local militia which, in the name of the Crown, had an overweening view of its military role and capabilities; by the proposed introduction of a process for the systematic theft of the Whakarau's land, and, finally, by the rubbing of Te Kooti's nose in the dispossession of his own land interests. These factors help us to understand why the murders happened, even if they go no way to justifying them.

Above all, these things demonstrate clearly that the Turanga tragedy need never have happened. Even accepting the incarceration on Wharekauri, if the Crown had released the detainees after a year; if Crown forces had not aggressively pursued Te Kooti once he had returned to the mainland; if the Crown had attempted to broker his passage through the Urewera and the King Country; if the Crown had acknowledged the just grievances of the Whakarau and delivered terms for peace through a credible spokesperson; if Biggs, the key Government official, had not settled on Te Kooti's land; and if the final resolution of the land question in Turanga had not been likely to have involved the complete dispossession of the Whakarau – if any one of these possibilities had come to pass, Turanga might have been left in peace.

In an almost prescient speech delivered in the House on 16 September 1868, nearly two months prior to the Turanga tragedy, Premier Stafford bemoaned the fact that events had overtaken the Government:

Perhaps . . . it might have been better not to have attempted the recapture of those prisoners, but it was one of those cases in which the Government had no discretion, as initiatory steps were taken, before the Government heard of their escape, by Captain Biggs and Westrup to intercept them between the peninsula and the interior, while other parties were getting ready to strengthen those officers with a view of getting the Natives to surrender quietly, which was the intention. The instructions of the Government when we heard of the ex-prisoners having landed were to induce them to surrender, by telling them that nothing would be visited against them with relation to the past, except against such as might have committed any atrocity, but that the rest would be unconditionally pardoned. But events accumulated from time to time, and before the Government knew anything of it the escaped prisoners had attacked the settlers who tried to intercept them, and then it was the duty of the Government to reinforce the district with as strong a force as it could.¹⁹⁹

199. NZPD, 16 September 1868, p 380 (doc A10, pp 312–313)

5.7.3 Was Te Kooti in rebellion?

We turn finally to the question of whether Te Kooti was in rebellion when he attacked Turanga. Was he engaged in concerted action against the Crown for the purpose of subverting or overthrowing by armed force the authority of Her Majesty's Government? It will be recalled that we referred, in chapter 3, to the legal opinion of Professor Brookfield on the question of rebellion. We draw assistance again from his work here. Brookfield cautioned that any right of self defence which the Whakarau may have had could not extend to 'attacks launched quite independently of the Crown's original aggression, even if ultimately consequential upon it'.²⁰⁰

Given Te Kooti's various references to the fall of Napier, Auckland, and Wellington, and to God's displacement of the 'Government people' at Turanganui, Wairoa, and Napier; given his description of Biggs as 'the chief of the Pakehas' and to Wilson as the 'lesser chief'; and given also that his adult male settler victims were militia members, it must be the case that the attacks at Matawhero were at first blush at least partly acts of rebellion even if, at a more personal level, they also had an element of reprisal or retribution.

How, then, do we make sense of the extreme provocation to which Te Kooti and the Whakarau were subjected when assessing whether he was in rebellion? Even if this attack was disproportionate and ultimately unjustifiable, were the Whakarau justified in rebelling at all? In short, was this rebellion a righteous rebellion fought against an immoral and oppressive regime? Professor Tony Honoré argued that international law does recognise a right to rebel in certain limited circumstances.²⁰¹ Though his article was written in 1988, 120 years after these events, still there is value in considering the principles he applies, since, if they are sound, they ought to apply as well in 1868 as they do in 1988.

Honoré argued that, if the State breaches a fundamental duty to its citizens, and if that breach is 'weighty, crucial, and severe', such that in sum the citizen's situation 'becomes unendurable', then a right to rebel may be the only remedy left for the citizen to exercise.²⁰²

Honoré described rebellion in these terms:

I mean then by the right to rebel the right of an individual or group to resort to violence, if necessary on a large scale, in order either

- a) to secure on behalf of individuals or groups conceived as exploited or oppressed a change in the government, structure or policies of the society to which they belong (radical rebellion), or

200. Brookfield, 'Opinion for the Waitangi Tribunal on Legal Aspects of the Raupatu (Particularly in Taranaki and the Bay of Plenty)', report commissioned by the Waitangi Tribunal (Wai 46 RO1, doc M4A), p12

201. Tony Honoré, 'The Right to Rebel,' *Oxford Journal of Legal Studies*, vol8, no 1 (Oxford: Oxford University Press, 1988), pp34-54

202. *Ibid*, p51

- b) to resist on behalf of individuals or groups who are attached to their way of life a change in the government, structure or policies of their society which the rulers of the society intend to bring about (conservative rebellion), or
- c) to secure on behalf of a group conceived as distinct the right to independence from the society to which it at present belongs (rebellion in aid of self-determination).²⁰³

Honoré's argument is that the State's dereliction of its obligation to its citizens must relate to matters which are important (weighty) in the society in question and which are felt to be central (crucial) to his interests by the individual who suffers from being deprived of them, who must also be affected to a serious (severe) extent, so that in sum the situation of the citizen becomes intolerable: 'In the upshot it is oppression and exploitation that may justify rebellion and disqualify the defence of a tyrannical way of life.'²⁰⁴

In the end, Honoré argued that there must come a point where the oppressed citizen is morally, and perhaps legally, entitled to strike back rather than suffer further oppression. Otherwise, one is bound to conclude that, the more complete the oppression and the more completely the organs of State collude in it, the more impotent the law is in protecting the citizen. That conclusion, Honoré argued, cannot be correct.

As we have said, the list of Crown duty breaches in respect of the Whakarau is a long one – commencing with arbitrary arrest and detention and ending with armed conflict – and all of it, or at least all of it prior to the attack on Matawhero, was illegal. In our view, the treatment that the Whakarau received entitled them to resist attempts by the Crown to exercise authority over them through the arbitrary use of force. Life under the oppressive regime imposed upon them by the Crown, had, for the Whakarau, become unendurable. By that principle, they ought to have been entitled to resist both the pursuit and attempts to confiscate their property. They ought to have been entitled not just to act in limited self-defence – things had gone too far for that – but to strike back, at least at military targets because they were themselves in the intolerable position of being under constant attacks without justification. How else could they survive and discourage the State from harassing them?

Honoré is careful, however, to circumscribe the ambit of the right to rebel:

Hence the rebels are not bound to use force only when the law allows them to do so or when the state unlawfully uses force against them. To them *all state force is now unlawful force*. They may therefore treat it as hostile force, and meet it as they see fit, whether by way of defence, pre-emptive strike or counter-attack, while respecting the same restraints as they would be bound to observe if the rebellion were a war between states. They must do this because they are at war not with their fellow subjects who have broken no duty towards them but only with the state and its officials; and the fact that the same person may be both a

203. Honoré, p36

204. Ibid, pp51–52

fellow subject and a state official must not be allowed to obscure this distinction, though it sometimes makes it more difficult to respect in practice. [Emphasis added.]²⁰⁵

The military action taken by the Whakarau did not comply with these constraints. The attack was disproportionate and not restricted to military targets. It was, by this measure, indiscriminate. Thus, as we have said, it is not possible to justify the extent and nature of the Turanga killings even on this extended measure of the right to rebel, and even accepting that the oppression of the Whakarau had become such that a right to rebel could be clearly argued for.

Te Kooti left many legacies. The Turanga murders were his most cruel and infamous. As Belich noted sagely: ‘students of Te Kooti will have to reconcile his great and essentially constructive contribution to the history of his people with the unnecessary killing of harmless non-combatants’.²⁰⁶ For our part, we take the view that, no matter how dire the circumstances, Maori had Treaty responsibilities as well as Treaty rights. Even under the burden of unendurable provocation, the Treaty continued to speak for reasonableness, moderation, and ethical behaviour. Even where the circumstances justified rebellion against an aggressive regime, that rebellion could be against only the regime itself, not innocents. To take any other approach would be to surrender to lawlessness.

What it did ensure was the continuation of the cycle of retribution and violence that began at Waerenga a Hika and was cemented with the detention on Wharekauri.

5.8 NGATAPA, JANUARY 1869

5.8.1 Matawhero: the Government response

News of the killings at Matawhero reached the outside world on 11 November 1868, after a small vessel picked up and took to Napier some of the settlers who had fled by boat to Mahia. As details of Te Kooti’s attack emerged, people throughout New Zealand reacted to the news with horror.

The Governor, Sir George Bowen, described the attack as a ‘massacre’, adding that ‘nothing more horrible took place during the Indian mutiny of 1857’. He suggested that ‘the massacre at Poverty Bay has excited throughout New Zealand and the Australian Colonies feelings similar to those excited by the massacre at Cawnpore throughout India and the United Kingdom’.²⁰⁷ The New Zealand press expressed similar horror: ‘The wildest imagination could hardly have conceived of a more terrible calamity. In all the annals of the struggles of

205. Ibid, p54

206. Belich, p230

207. Copy of dispatch from Bowen to Buckingham and Chandos, 7 December 1868, BPP, vol15, p296

civilization against man in his natural savage state, nothing more appalling in degree if not in extent has ever been recorded.²⁰⁸

There was no immediate official report of the events at Matawhero, because, as the Governor explained to the Colonial Office, the resident magistrate, Major Biggs, had himself been killed.²⁰⁹ In the absence of an official report, the Governor thus transmitted to London a press account compiled from statements made by survivors.

The account detailed the unexpectedness of the attacks, the attack on the Biggs household (which was witnessed by a boy named Charles James, who escaped from the house and hid in the scrub), and the virtually simultaneous attack on the Wilson household (which James saw being set alight, also from his hiding place). Later press news contained the story of Alice Wilson, the wife of Captain Wilson, who lay badly wounded in hiding for six days until her small son succeeded in reaching help. She was taken to Napier, where she at first seemed to rally but soon passed away. On 18 November, according to the *Hawke's Bay Herald*, a funeral party went out to Matawhero and buried 24 victims, in the process finding that most of the children had been decapitated.²¹⁰

In the wake of Matawhero, the responsibility for coordinating a military response was assumed at a local level by Donald McLean, in his capacity as agent of the general government on the East Coast. McLean at once entered into intensive telegraphic communication with Wellington, relaying fresh information to the Government, giving advice, and receiving instructions. He also dispatched 70 volunteers within a day of receiving the news of Matawhero. The initial military response appears, however, to have come from Ngati Porou; in the first reports that came through, Henare Potae and perhaps 80 of his men were stated to be at the Turanganui stockade. Seventy Ngati Kahungunu from Mahia also went to Turanga. As news was received that Te Kooti had remained near Turanga and had killed some Turanga chiefs, Ngati Kahungunu 'demanded to be at once sent to the front', and 220 of them left Napier by steamer.²¹¹ Captain Westrup took command of the district.

In fact, it was not until 28 November, over two weeks after Matawhero, that the Government ordered substantial reinforcements from its own forces to Turanga. From September 1868, its forces had been under considerable pressure on the west coast of the North Island from the Taranaki leader Titokowaru. Titokowaru had scored successive victories against the colonial forces at Te Ngutu o Te Manu in September 1868 and at Moturoa, near Wanganui, on 7 November 1868. News of the defeat of Colonel Whitmore at Moturoa reached Wellington hours before the news of Matawhero, and the Government was preoccupied with the threat

208. *New Zealand Advertiser*, 16 November 1868 (Belich, p254)

209. Copy of dispatch from Bowen to Buckingham and Chandos, 7 December 1868, BPP, vol15, p296

210. Copy of dispatch from Bowen to Buckingham and Chandos, enclosures 1 2, 7 December 1868, BPP, vol15, pp298–303

211. Memorandum, Haultain to Minister for Colonial Defence, 7 December 1868, BPP, vol15, p305



Fig 12: Armed Constabulary, Gisborne massacre, 1868. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (F-38564-½). We presume that the members of the constabulary had fought at Ngatapa.

that Titokowaru appeared to pose to the town of Wanganui and to outlying settler communities to the north and south of it.²¹²

From the outset, therefore, the Government had held off sending reinforcements to Turanga. On 12 November, Native Minister Richmond advised McLean that he must divide his 'European' force between Wairoa and Turanga and rely on 'Natives' to bring each force up to 200. If this proved impossible, he would have to pull out of Turanga and concentrate his men at Wairoa, where there were more settlers.²¹³ On 13 November, Richmond, in a conference with McLean, asked if Maori would undertake a campaign alone and, if they would, whether they would prefer to go alone or have a small colonial party with them. McLean replied that he thought that such a campaign would be 'willingly' undertaken and that the involvement of colonials would depend on the kind of service involved. He suggested that the type of officers who might be sent most effectively at 'pa attack' were 'a few dashing Europeans; other field work better alone'.²¹⁴

212. Belich, pp 241–255

213. Richmond to McLean, 12 November 1868, AJHR, 1869, A-4A, p 25

214. Copy of Conference with Ministry and McLean, 13 November 1868, AJHR, 1869, A-4A, p 26

By 28 November, McLean's expressed irritation at what he saw as a slow response from Wellington produced an equally irritated reaction from Haultain. But McLean also finally received news that 350 men under the command of Whitmore were on their way from Wanganui, along with another 40 men who had enrolled from Christchurch.²¹⁵ They reached Turanga in two vessels on 4 and 5 December 1868.²¹⁶

5.8.2 The pursuit of Te Kooti

Te Kooti had left Turanga on 19 November with the 300 Maori prisoners in his ope.²¹⁷ From now on, with Ngati Kahungunu, Ngati Porou, and Whitmore's Armed Constabulary in his pursuit, he would be on the defensive. Ngati Kahungunu engaged Te Kooti first, and, in the hostilities that followed, he began to sustain considerable casualties.

By 22 November, the Whakarau had reached Te Karetu (Makaretu), on the junction of the Wharekopae and Makaretu Rivers. The following day, the Ngati Kahungunu force, accompanied by a contingent of Ngai Tahupo (Ngai Tamanuhiri) from Muriwai, caught up with them there. An attack on the Whakarau ensued but was repelled from the valley. Ngati Kahungunu lost the high-born chief Karauria Pupu, a nephew of Renata Kawepo, in the attack. Binney says that for Ngati Kahungunu his death created a take that would 'almost be impossible to expiate'.²¹⁸ In addition, the Whakarau captured Pupu's banner, a 52-foot long, triangular, red-silk banner made for him by Catholic nuns and featuring a crescent moon, a cross, a snow-covered mountain, a pierced and bleeding heart, and the six-pointed star of David. Te Kooti thereafter used the banner as his war standard until it was recaptured in 1870. Ngai Tahupo also lost their spiritual leader, Hamuera Toiroa. In a stalemate, the Ngati Kahungunu–Ngai Tahupo force withdrew to the ridge tops around Te Karetu and began a blockade of the Whakarau. Despite the blockade, Te Kooti was able to command a raid on Patutahi on 27 November in which mounted Whakarau captured powder, ammunition, and rifles from the new Government arms store. He also received some reinforcements at this time from Tuhoe; 30 men from Maungapohatu.²¹⁹

In early December, 180 Ngati Porou under Rapata Wahawaha joined the Ngati Kahungunu and Ngai Tahupo force. They attacked at Te Karetu on 2 December and took the position, only to discover that it had been held by a rearguard of just 80 men, around half of whom they had killed. The rest of the Whakarau and their prisoners had moved on to Ngatapa, which

215. Haultain to McLean, 28 November 1868, AJHR, 1869, A-4A, p30

216. *The Weekly News*, Supplement, 19 December 1868

217. Binney, p127

218. Ibid, p132

219. Ibid, pp132–134

Te Kooti had already chosen as his defensive position.²²⁰ According to Binney, it was not a strategic choice: as a fortress, it was near impregnable, but its defenders were vulnerable to being starved out by a besieging force.²²¹

A number of prisoners had managed to escape by this time, including Wi Pere, Maria Morris, and Ema Katipa. (The latter two gave evidence in the trials of Hamiora Pere and others in 1871. Both had lost members of their families at Matawhero.²²²)

The pursuing forces pushed on to Ngatapa on 3 December. But Wahawaha of Ngati Porou and Tareha Te Moananui of Ngati Kahungunu (who had both played a role at Waerenga a Hika, though in different capacities) had a serious disagreement over the fate of two prisoners that Te Moananui had captured, one of whom was closely related to him. To Wahawaha's frustration, Te Moananui refused to kill them. Ngati Kahungunu then withdrew from the field, and Ngati Porou began an attack on Ngatapa on 4 December. As Wahawaha was down to 150 men and was short of powder, he abandoned the attack on 4 December. He and Ngati Porou then also left the field, to replenish and reorganise.²²³ On 6 December, on their way back from Ngatapa, they met Whitmore and Major Fraser with the colonial forces; Whitmore failed to secure their agreement to change their plans.²²⁴ Te Kooti and the Whakarau, and those of their prisoners that had not yet managed to escape (more escaped from Ngatapa during this early December attack) remained at Ngatapa. Te Kooti embarked on a campaign to spread false information suggesting that they had in fact abandoned Ngatapa and left the area. He needed a chance to regroup – in addition to the escape of prisoners during this period, the Whakarau had lost 65 men since 23 November, among them Te Kooti's brother Komene, and were carrying wounded.²²⁵

In the meantime, Te Kooti wrote to others to seek their support – or to threaten them to leave him alone. Then, from 12 to 14 December, Te Kooti personally led a second, ill-planned, raid on Turanga, which had as its aim the retrieving of ammunition cached near JW Harris's house. The raid cost the lives of four Turanga people, including William Wyllie, the eldest son of Keita and Thomas Wyllie, and it was in any case a futile exercise – the ammunition had already been found and removed by Wilson. This attack might be counted a major strategic mistake, for it came just as Ngati Kahungunu, Ngati Porou, and Whitmore had decided that the threat that Te Kooti had posed had subsided. Mere days before, on 8 December, based on

220. Ibid, pp134–135. It was at the fall of Te Karetu, not Ngatapa, that Nama died; Binney stated that he was caught, tied with ropes and dragged through a fire until he was dead. Binney's source is Hukanui Watene, who fought with Te Kooti at Te Karetu: Binney, p135n. Nama was killed at Te Karetu, not at Ngatapa. A contemporary newspaper account stated that his body was burnt.

221. Binney, p132

222. Ibid, p134

223. Ibid, pp136–139

224. *The Weekly News*, supplement, 19 December 1868

225. Whitmore to Haultain, 11 December 1868, AJHR, 1869, A-12, p14 (doc F33, vol6, p01904). They also lost 60 rifles: Binney, p139.

information from Ngati Porou and Ngati Kahungunu, Whitmore had decided to give up the pursuit, at least until Te Kooti attacked again, and he had begun embarking his force to return to Wanganui. However, the raid proved that Te Kooti was still in the area, and so Whitmore immediately turned back and took off in pursuit, with the trail leading directly back to Ngatapa. More of Te Kooti's prisoners escaped at this time, including his wife, Irihapeti Puakanga, and his son Wetini, who, on Richmond's orders, were sent to live with Ngati Porou.²²⁶

5.8.3 The siege of Ngatapa

Organisation now began for a new assault on Ngatapa, with Whitmore leading the Crown forces. On 24 December, he moved slowly forward from Fort Fraser at Patutahi, establishing small defensible posts as he went. His forces, ultimately numbering around 680, comprised 313 Armed Constabulary, which included Number 8 Division of 60 Arawa under a Pakeha officer and 370 Ngati Porou led by Rapata Wahawaha and Hotene Porourangi.²²⁷ The second assault on Ngatapa began on New Year's Day 1869.²²⁸ Just over a week before, on 24 December, Te Kooti had predicted the outcome of the assault that he knew was coming:

Ko nga tamariki katoa o te pae ka tukua atu ki te ringaringa [o] o tatou hoariri. E toru nga mate e pa mai ki a tatou.

Ko etahi mate Hoari.

Ko etahi mate Kai.

Ko etahi ka whakaraua atu.

Ahako hui te motu nei, e kore ahau e mau i a ratou, e kore hoki ahau e mate kia puta mai rano te tangata mo muri i au, maana ahau e hopu a, ka haereere ano ahau i tona aroaro a, mate iho ki raro i ona waewae.

²²⁶ Binney, p141

²²⁷ Whitmore to Haultain, 5 January 1869, BPP, vol 15, p343. Binney cited St John to the effect that the force was 701 strong: Binney, p143n.

²²⁸ It is remarkable that the primary sources do not agree as to the dates of the beginning and end of the siege at Ngatapa. Colonel Whitmore's official account stated that his force marched on Ngatapa, and took the 'Crow's Nest' on 31 December 1868; he gave 5 January as the date he took the pa. As Binney noted, Whitmore relied on Major St John's narrative; she states that St John lost track of the dates. (Binney, p143). Kempthorne and St John were out of step at the outset, as a comparison of their dates and the events that took place on those dates, shows (despite the fact that New Year's Day was a crucial date for the siege). Kempthorne gave 1 January 1869 as the date when the full force marched and the 'Crow's Nest' was fortified, but ended the siege on the morning of 6 January. We have drawn on newspaper sources to assist. The reporter of the *Hawke's Bay Herald*, who was stationed initially at Turanga redoubt, quoted Henare Ruru of Te Aitanga a Mahaki, as returning from the front on 2 January, and reporting the force marching to take up its position the day before. He also recorded that Ngati Porou had not joined Whitmore by 30 December; Kempthorne (who gave 1 January as the start of the siege) stated that Ngati Porou joined them on 31 December. The sources in general (except Kempthorne) gave 5 January as the day when Ngatapa was evacuated by Te Kooti, and occupied by the Colonial and Kawanatanga forces. The *Hawke's Bay Herald* reporter, who returned from Ngatapa to Turanga on 4 January, set off back to Ngatapa the morning of 5 January. On this journey, he met a man who told him Te Kooti and his people had escaped from the pa before daylight: *Hawke's Bay Herald*, 12 January 1869.



Fig 13: James Richmond, *Ngatapa from the East*, 1869. Te Kooti's Fortified Pa in Summit of Mountain [Ngatapa].
Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (A-048-011).

All the children of the region shall be given up into the hands of our enemies. There are three deaths which will strike us.

Some shall die by the sword.

Some shall die by starvation.

Some shall be taken captive.

*Although this land gathers together, I shall never be seized by them, neither shall I die until the man to follow me appears. He will capture me and I shall go about in his presence and die under his feet.*²²⁹

Ngatapa Pa was an old pa on a 'single cone-shaped mountain', which, at some 600 metres high, soared above the surrounding hills. A triple line of fortification protected the apex of the hill, and Whitmore described the pa as 'the most difficult and strongest' that he and his forces had ever seen.²³⁰

But, though the pa was impressive, Te Kooti had made basic mistakes in its defence. Binney and Belich both suggested that Te Kooti had little experience in pa warfare and that this form of fighting was not where his military skills lay.²³¹ Whitmore laid siege to the pa. On the first day, he took possession of 'the Crow's Nest', a cone only 200 metres from the pa, and positioned sharpshooters there. The pa was then surrounded on three sides by Crown forces, the

229. Wilson MSS, p141, quoted in Binney, pp142–143. Binney stated that this kupu whakaari has been copied down in many Ringatu books; she gave the text as recorded by Ringatu tohunga Tawehi Wilson. Binney recorded, in *Redemption Songs*, p135, that the mantle of the 'One to come' was taken up by Rua Kenana (though this was contested by others), whose own father was killed at Te Karetu, before Rua was born.

230. Whitmore to Haultain, 30 December 1868, extract from the *Gazette*, 16 January 1869, BPP, vol15, p342

231. Binney, p143; Belich, pp261, 267

north side being left unguarded only because Whitmore considered it too steep for escape. Te Kooti had clearly not been able to provision the pa adequately, and the people inside were said later to have been weakened by hunger. The outer defences proved vulnerable and were taken by Arawa and Ngati Porou forces on 4 January. Whitmore attempted to gain the element of surprise through the use of vertically firing cohorn mortars, which he did not think had been used before in 'Maori warfare'. The mortars seem to have caused considerable damage, exploding numbers of shells inside the pa.

The siege lasted several days. Early on 5 January, before daylight, a woman (Meri Karaka) called out to the attackers: the Whakarau had escaped down the unguarded northern face.²³² After some initial hesitation on the part of some of the men (who suspected treachery), there was a 'general rush to gain an entrance first into the pa & to secure the best of the loot'.²³³ Only 20 or so people – men, women, and children – remained in the pa. Kempthorne, who fought with the Turanga militia, wrote in his journal that they had 'refused to accompany the Hauhaus in their flight'.²³⁴ Binney says that some of the remaining 20 had been Te Kooti's prisoners. The kawanatanga forces now set out in pursuit of the escaping Whakarau and their remaining prisoners. Whitmore stated later that Wahawaha undertook the pursuit 'stipulating that no Europeans should be employed as his men were accustomed to bush work, amply numerous, and as they could go almost naked might not be distinguished from the enemy by Europeans'.²³⁵

According to Whitmore, Te Kooti had only about an hour's start, and, since he had women and children and supplies with him, 'in a very short time his rear was overtaken'. In the pursuit, it is clear that some rearguard fighting took place, in which some Whakarau, some of their allies, and some of their prisoners may have been killed. Many who escaped from the pa were captured and brought back to Fort Richmond, to the east of Ngatapa, or to Ngatapa itself. A high casualty rate was reported in official sources. However, some of the Whakarau did evade capture. Among them was Te Kooti, whose protection would have been paramount to his people. By 27 January 1860, he was in the Waioeka Gorge with 30 of the Whakarau.²³⁶

The claimants accorded great importance to the treatment that was received by the Whakarau at Ngatapa and by those who had been taken prisoner by Te Kooti. We were provided with detailed evidence from both the Crown and the claimants on what happened at the siege and during the bush pursuit. There were significant differences of opinion as to the number of Whakarau that were killed and the manner in which they died: particularly at issue was how many were summarily executed by Crown forces.

232. Whitmore says 5 January. We rely for the 5 January date on the evidence as discussed above.

233. Kempthorne, diary, December 1868–January 1869, [5] January 1869, Williams family papers, ms copy micro 0677-09, ATL (doc F33, vol 6, p01988)

234. Ibid

235. George Whitmore, *The Last Maori War in New Zealand* (Christchurch: Kiwi Publishers, 1995), p 86

236. Binney, pp148–149

The Crown acknowledged that some of the Whakarau were executed following their recapture. Mr Goldstone, a specialist military historian and the Crown's leading witness on this subject, acknowledged that between eight and 30 of the Whakarau were summarily executed. The claimants set the figure executed at up to 120 of the approximately 136 killed. This difference is considerable. The evidence was controversial and emotionally charged, and, in the circumstances, we have come to the view that this matter is of such importance that we should try to resolve the difference between the Crown's and the claimants' positions here.

We turn now to consider the arguments advanced by the parties.

5.9 CROWN AND CLAIMANT CASES ON NGATAPA

5.9.1 The Crown's case

The Crown's stance was that, once the Turanga massacres had occurred, a firm military response from Crown forces was logical, reasonable, and inevitable. The serious issue in contention between the Crown and the claimants related, therefore, not to the appropriateness of a military response but to the level of the response. The Crown argued forcefully that the claimants' figure of 120 deaths by execution was grossly inflated. According to the Crown, up to 58 were killed in the siege itself; up to a further 60 were killed 'during the pursuit' (the evidence was insufficient for greater precision); and between eight and 30 (by the most reliable sources) were executed.²³⁷ As to the executions, the Crown conceded as follows:

Although the Crown and claimants differ on the extent and the location, executions of unarmed prisoners by agents of the State without due process occurred after the battle at Ngatapa. The execution of unarmed prisoners by the State without due process constitutes a breach of the principles of the Treaty of Waitangi.²³⁸

Mr Goldstone underscored for us the gravity of the breach:

the shooting of prisoners was almost universally regarded, in European war, as being almost an atrocity. Unfortunately it happened . . . There were no war crimes trials or anything like that prior to the 20th century.²³⁹

In addition to arguing that fewer were executed than was alleged by the claimants, the Crown offered a second, more subtle, argument in mitigation. The Crown argued that the executions were carried out by Ngati Porou auxiliaries under the direction of their leader Rapata Wahawaha. They were effectively independent allies of the Crown rather than Crown troops:

237. Document H14(6), p33

238. Ibid, p7

239. Ibid

The executions were carried out by some Ngati Porou. Rapata Wahawaha, and perhaps a council of Turanga leaders, determined who would be executed. It was commonly accepted that those Ngati Porou who fought with the government were effectively, *independent allies* of the government. [Emphasis added.]²⁴⁰

The Crown continued:

Nevertheless, Rapata Wahawaha was supposedly under government orders, and he was commissioned shortly afterwards. Both Richmond and Whitmore stated that the prisoners were not to be killed, and Rapata Wahawaha appears to have been aware of this. There is no evidence that any government officers sanctioned the massacre of prisoners, but at least some officers were aware of the execution[s] and did nothing to stop them.²⁴¹

Thus, the Crown argued essentially that its culpability was in failing to step in to prevent the executions, not in carrying them out. That was an action of Wahawaha's forces without Crown authority. Those forces were independent of the Crown, even if operating under the Crown's command. The Crown argued in further mitigation that, prior to the executions, both Whitmore and Richmond had directed that the prisoners not be harmed but that the directions remained unheeded.

Finally, the Crown accepted that a bounty of, first, £500, then £1000 was offered by J C Richmond for Te Kooti, dead or alive. His action was retrospectively affirmed both by Parliament and by the Governor. Similarly, Richmond also offered £5 rewards for the live capture of those who fought at Ngatapa. Government permission was not sought, but the Crown accepted that, 'To the extent the government did not criticise Richmond's actions, it sanctioned them.'²⁴²

5.9.2 The claimants' case

The claimants also accepted, to some extent at least, that following Matawhero a military response by Crown forces was inevitable. What was really in contention was the nature and intensity of that response. The claimants argued that the Crown's response was vicious, unprincipled, and, ultimately, in grievous breach of the principles of the Treaty. They focused on the evidence of Professor Binney that, of the 136 killed at Ngatapa, 120 were executed following their capture. The claimants argued that the Crown had fundamentally misconstrued the evidence when Mr Goldstone had concluded that the death toll by execution was only between eight and 30 individuals. Counsel posited that Mr Goldstone had wrongly excluded clear eyewitness evidence unambiguously indicating that the number was far higher than 30.

240. Document H14(6), p35

241. Ibid, pp 35–36

242. Ibid, pp 23, 26

(These accounts were, according to Mr Goldstone, overly colourful, ‘jingoistic’, and lacking in neutrality.) It was difficult to see, counsel for Te Whanau a Kai argued, how a description of the execution of unarmed prisoners on this scale could be anything other than colourful and emotional. In addition, the claimants argued, the Crown made the mistake of treating multiple reports by different witnesses as evidence of the same execution event. The claimants argued that the various accounts were cumulative; it was not a matter simply of using the report of the greatest number of executions (excluding the colourful reports) and treating that as the upper limit of the death toll.

As to whether Wahawaha’s forces were acting by or on behalf of the Crown, the claimants argued that the suggestion that Ngati Porou were independent Crown allies was wrong in fact – the following account from Whitmore to Haultain on 8 January 1869 demonstrated that Whitmore commanded the Ngati Porou forces: ‘Although the women fought and excited the men by their cries, I am happy to say that, in obedience to my orders, they and the children were spared.’²⁴³

Though the Crown argued that Wahawaha had been specifically ordered by Whitmore not to kill any of the prisoners, the claimants challenged the credibility of that contention. He had, after all, been warmly complimented on his performance at Ngatapa: in the 8 January letter to Haultain, Whitmore wrote, ‘To no other *officer* was I more indebted than to the chief Rapata [Wahawaha]’ (emphasis added).²⁴⁴ Wahawaha, the claimants reiterated, was commissioned shortly thereafter. The lack of criticism in any official report of his refusal to follow orders and his subsequent promotion to a commissioned officer all suggest that no such order was given. Thus, the claimants argued that the Ngati Porou forces had fought in fact as a Crown force, not as an ally. They were under the direct control of British officers.

In any event, counsel argued that it was clear that the Crown sanctioned the executions. The claimants referred to Richmond’s statement that Ngati Porou were ‘intent on exterminating “iwi kohuru” (the murdering tribe): I thought it right, and in accordance with the wishes of the Government and country, not to withhold their hands’.²⁴⁵

5.10 TRIBUNAL’S ANALYSIS ON NGATAPA

The issue of the conduct of hostilities by the Crown at Ngatapa, particularly during the pursuit of Te Kooti’s people that followed the taking of the pa, assumed considerable importance in this inquiry. It is thus necessary that we address the painful issues of the number of people killed after the taking of Ngatapa; the number killed who were themselves prisoners of Te

243. Whitmore to Haultain, 8 January 1868, BPP, vol 15, p 345

244. Ibid, p 346

245. Document H2, p 44n

Kooti, as opposed to the Whakarau and Te Kooti's allies; and the extent to which executions took place.

We turn first to the question of the Crown's responsibility for such executions as may have taken place at Ngatapa, and whether the Crown's actions were reasonable in the circumstances.

We begin with an analysis of each stage of the hostilities at Ngatapa: the siege itself, the taking of the pa by colonial and kawanatanga troops once the defenders had decamped from it, the pursuit of those who had escaped into the bush, and the aftermath of the pursuit. We also attempt an assessment of the number of Te Kooti's people who were killed at each stage.

The primary sources we relied on were written mostly by those who were part of the besieging forces; they range from official reports to journal entries by participants, newspaper reports, private letters written later, and reminiscences recorded years after the battle. Some oral information from those inside the pa was available, and there was also a Ngati Porou account of the siege.

5.10.1 The siege of Ngatapa Pa

It is difficult to be clear as to exactly how many of those inside the pa were killed during the investment, as opposed to those killed in other phases of the hostilities.

On 1 January 1869, Whitmore and his forces occupied a rise 200 metres distant from Ngatapa and on the same ridge. From that time, fire was exchanged between the investing force and those inside the pa. The next day, the artillery brought up the cohorn mortar, which fired shells into the pa, albeit somewhat intermittently, both because of the rain and because of the danger that the mortar posed to Whitmore's own men. Whitmore himself sounded somewhat doubtful as to the weapon's effectiveness: 'The mortar, doubtless, did us some service; but it also produced a moral effect'.²⁴⁶

According to official sources, 100 shells were expended.²⁴⁷ We know that the shells undoubtedly inflicted casualties on those in the pa. The later evidence of Mere Karaka Rerehorua (who did not join those evacuating the pa) was that: 'she and several women were in a whare when a shell fell through the roof, exploded, and killed or wounded all but her . . . upon her removal to another whare a similar thing occurred'.²⁴⁸

We have some approximate figures from Major St John's account of the numbers considered by his force to have been killed. On 2 January, he gave an estimate of 25 to 30 men killed, plus one man on the first day.²⁴⁹ Whitmore noted in addition that on 3 January some 'small

246. Whitmore to Haultain 5 January 1869, BPP, vol 15, p 345

247. Ngatapa journal, St John, Hawke's Bay Museum (cited in doc F33, vol 6, p 01916)

248. Lieutenant-Colonel Porter, *History of the Early Days of Poverty Bay: Major Ropata Wahawaha, NZC, MLC – The Story of his Life and Times* (Gisborne: Poverty Bay Herald Company, 1923), p 30

249. Siege of Ngatapa, December 1868–January 1869, 2 January 1869, Whitmore papers, Hawke's Bay Museum (cited in doc F33, vol 6, pp 01940, 01945)

parties' tried to break through their lines, and were killed.²⁵⁰ If we put these figures together, we might assume that about 40 were killed, but, if we add the casualties from the mortar shells, we have to increase this figure, without being able to do so at all accurately.

St John noted that, over two days from the time the pa was taken, 'the friendlies discovered a number of graves, and the whole pah, especially that part near Fraser's attack, gave out a horrible stench'. As well, 'parties prowling about found out a number of corpses lying at the foot of the cliff', some of which may have been the bodies of people who fell during their perilous descent of the cliff as they attempted to escape.²⁵¹

We estimate that Te Kooti's casualties during the siege may have been something over 60, and we consider it likely that more men were killed than women; perhaps 50 men. In fact, this is not inconsistent with a report from the *Hawke's Bay Herald* of 9 January, which stated that: 'Sixty of the enemy were left dead in the trenches, a good many of whom were killed by shell'.²⁵² And Leonard Williams recorded Towgood's statement that 58 bodies were 'found in and about the pa'.²⁵³ (As this statement was recorded after the taking of the pa, it is possible that not all those found dead and referred to here were victims of the hostilities during the siege.)

5.10.2 The taking of the pa

Early on the morning of 5 January, as noted above, from inside Ngatapa a woman's voice called out that Te Kooti had gone. After some initial suspicion as to whether this might be a trap, the colonial and kawanatanga forces rushed into the pa. All the accounts agree that they found inside some who had not joined the escape and had stayed behind. The accounts differ both as to how many people were there and as to what became of them.

Arthur Kempthorne, who was with the Turanga militia (and who was described by the *Hawke's Bay Herald* as a 'Maori linguist'), kept a daily, very matter-of-fact, journal of the siege.²⁵⁴ Kempthorne began his account of the rush into the pa by colonial and kawanatanga forces by noting the discovery of 20 men, women, and children inside; some of the men he knew and he gave the names of five of them, adding that there were others whom he did not know.²⁵⁵ He commented, rather defensively, that the men had 'loose cartridges on their persons, which of course proved that they had been bearing arms against us'.²⁵⁶ He reported

250. Whitmore to Haultain, 5 January 1869, BPP, vol15, p345

251. Siege of Ngatapa, December 1868–January 1869, 4 January 1869, Whitmore papers, Hawke's Bay Museum (doc F33, vol6, p01953)

252. *Hawke's Bay Herald*, 9 January 1869 (doc F33, vol6, p01976)

253. W L Williams, Diary, 10 January 1869, ATL (doc F33, vol6, p01994)

254. *Hawke's Bay Herald*, 12 January 1869

255. Kempthorne diary, December 1868–January 1869, [5] January 1869, Williams family papers, ms copy micro 0677-09, ATL (cited in doc F33, vol6, p01988)

256. Ibid

that all these people were ‘marched into the Ngatiporou camp and strictly guarded’.²⁵⁷ He made no further mention of the fate of the men. He recorded the discovery of a young Tuhoe woman lying badly wounded in one of the whare (she may have arrived at Ngatapa with the Tuhoe supporters); she was moved into the camp by Captain Gundry, the officer of 8 Company of the Armed Constabulary (Te Arawa).

We have several other sources on the fate of the men inside the pa. The first is an extract from a lengthy Ngati Porou account of the hostilities on the East Coast:

Katahi ka whakaekea te pa e te ope, a ka mau ki roto o te pa e whitu tekau makere – e whakaraia ana ki waho o te pa. Katahi ka tu he runanga na nga rangatira maori o te ope. mea ana etahi kia whakamatea, mea ana etahi kia whakaorangia – katahi ka whiriwhiria, ko nga tangata kino, whakatupu raruraru, i whakamatea ko nga mea ano na te whakaraia ana a te Kooti i uru atu ai ki roto o taua raruraru ka whakaorangia ano, a ko ratou te hunga i tokomaha.

Then the pa was attacked by the party. Seventy were captured in the pa and were taken outside the pa. The Maori leaders went into discussion. Some were saying ‘just kill them [all]’. Some were saying, ‘No, don’t’. And it was decided upon that the worst offenders who created all the trouble, they were killed. And those who were Te Kooti’s captives were allowed to live, they were the majority.²⁵⁸

This account gives a higher number than Kempthorne did for those found inside the pa. We note that it distinguished between the Whakarau and their prisoners taken at Turanga, and stated that those who were prisoners were saved. A newspaper source, the *Hawke’s Bay Herald* of 12 January 1869, also referred to 76 ‘prisoners of Te Kooti’ being found inside the pa, ‘of whom six only were men’.²⁵⁹ In light of the details that Kempthorne gave, it is clear that more than six were men, the figure being perhaps closer to eight or 10. We also have one other account written by an officer close to Ngati Porou, one Lieutenant-Colonel Porter. Porter’s recollections were originally published as a series of articles in the *Poverty Bay Herald* in 1897 as a tribute to his friend, Major Rapata Wahawaha. In them, he wrote that ‘as it is ever customary in Maori warfare the Ngatiporou were soon running through the pa and dispatching the wounded. It may not be out of place to mention here that in all Maori warfare wounded are never spared’.²⁶⁰ The Ngati Porou source and Porter’s account appear to be contradictory on the question of deliberation, but they are in some agreement as to the outcome – at least some of those captured were executed.

257. Kempthorne diary, December 1868–January 1869, [5] January 1869, Williams family papers, MS copy micro 0677-09, ATL (doc F33, vol 6, p01988)

258. AS Atkinson, ‘Maori account of the campaign against the Hauhaus on the East Coast, 1865–1870’: MS papers 1187-006A, p 69, ATL. We give our interpretation of the text into English.

259. *Hawke’s Bay Herald*, 12 January 1869 (correspondent’s entry, 5 January) (doc F33, vol 6, p01977)

260. Lieutenant-Colonel Porter, p 29. The articles were later issued in book form.

A further account of the rush into the pa is that by WC Tomkinson of the Armed Constabulary. He wrote to his sister on 7 April about his experiences with the constabulary at Ngatapa. He referred to the taking of the pa in these words: 'after the pah was taken and we had shot all the prisoners we had a look round and could then see how formidable a place Kooti had chosen'.²⁶¹ For other reasons (to which we refer below), the Crown argued that his account was sensationalist and should be discounted. It is true that there are some passages in this letter (particularly those relating to 'Hauhau') which are sensationalist. But much of the letter is very matter-of-fact, and we are not inclined to discount its value as a source. We consider that Tomkinson probably meant 'all the male prisoners', since all the accounts agree that, with one exception, women and children were not killed.

We conclude from a study of the sources that the men left inside the pa were shot, whether immediately (as two of the sources state) or only after some consideration of their fate (as the other two sources imply). At least eight men were shot; there may have been more. One woman was also shot: the young Tuhoe woman, who was executed a day or so later. Kempthorne recorded that several of the men wanted to take her back to Turanga a day or so later and had prepared a stretcher but were ordered at the last minute to leave her behind. Having got as far as Fort Richmond, they were ordered to return to Ngatapa; at that point they discovered that the young woman had been shot since their departure.²⁶² This killing was confirmed by an account in the *Hawke's Bay Herald*, which added the details that, during the siege, her foot and a part of her leg and thigh had been blown off by a shell.²⁶³

5.10.3 The pursuit

The pursuit of those who had escaped the pa is the most disputed aspect of the taking of Ngatapa. It seems clear that most of the men who were killed at Ngatapa were killed after the pa was taken. Here, we try first to assess the numbers involved. We will return below to the question of how many men were executed.

We begin with the account of the senior officers, Colonel Whitmore and Major St John. Whitmore's description is found in his correspondence to Defence Minister Haultain of 8 January 1869:

we learned that the enemy was escaping . . . Te Kooti had made off, lowering his men and some women down the steepest and therefore least guarded part of the cliff. The escape had scarcely been finished when we entered the fortification, and the enemy were so weakened by insufficient food and prolonged watching that I was confident of overtaking the fugitives.

261. WC Tomkinson, 7 April 1869, MS 1270, Auckland Institute and Museum (doc F33, vol6, p02014)

262. Kempthorne diary, December 1868–January 1869, [5] January 1869, Williams family papers, MS copy micro 0677-09, ATL (cited in doc F33, vol6, pp01989–01990). Kempthorne noted that the medical officer had dressed her wound and pronounced it serious but not life-threatening.

263. *Hawke's Bay Herald*, 30 January 1869

A large part of the Native force was at once in eager pursuit. By sundown the number killed, either in the pa or in the pursuit, had reached 120. By night the following day most of the pursuers had returned, bringing two of Te Kooti's wives, and 136 of the band were killed . . . but I am generally informed that more were killed than have been recorded, and many of the wounded must have died in the mountainous forest which extends for many miles in every direction in rear of the fortress.²⁶⁴

St John also recorded the fate of those whom the pursuing forces caught up with:

Every hour brought forth intelligence of Hau Haus overtaken and shot. One party of Uriwera, eighteen strong, was met by the Ngatiporou, and fifteen fell before the fire brought to bear upon them. Still Te Kooti was not brought in, although his most influential chiefs had bit the dust. Nikora and Rangiaho [of Tuhoe] were both dead and with them a number of the blinded fanatics who had followed their prophet's banner. Meanwhile bands of pursuers returned at intervals, few of them but were laden with loot, bringing with them women and children. It is much to the credit of the native allies that they did, although bent on massacre, refrain from following out their old Maori customs, and that in every instance women and children were spared. As for the men, they met their fate boldly.²⁶⁵

The official figure for enemy losses was thus 136. Whitmore, however, wrote that 'more were killed than have been recorded'.²⁶⁶

Kempthorne, whose journal we have already referred to, gave an overall figure for casualties of 'altogether some 150' men who were 'supposed to be killed' up till the time when the Armed Constabulary left Ngatapa (7 January).²⁶⁷ His figure thus sits without difficulty alongside the official figures. We will return to some of the details of these accounts shortly.

We note also that, in St John's account, 15 Tuhoe men were recorded as being killed in bush fighting after a party of 18 'was met by' Ngati Porou. The Tuhoe ope was not referred to as being 'overtaken', and it was perhaps coming to assist Te Kooti rather than escaping from the pa.²⁶⁸ It was the only party referred to as having engaged with the pursuing forces in this way. It may be that these 18 men ought not to be included in the count of men inside the pa, but we cannot be certain of this, since we know that some Tuhoe had joined Te Kooti before Ngatapa.

Finally, the Ngati Porou source recorded the bush pursuit as follows:

264. Whitmore to Haultain, 8 January 1869, AJHR, 1869, A-12, p19 (doc F33, vol6, p01909)

265. Siege of Ngatapa, December 1868–January 1869, 4 January 1869, Whitmore papers, Hawke's Bay Museum (doc F33, vol6, p01953)

266. Whitmore to Haultain, 8 January 1869, AJHR, 1869, A-12, p19 (doc F33, vol6, p01909)

267. Kempthorne diary, December 1868–January 1869, [5] January, Williams family papers, MS copy micro 0677-09, ATL (doc F33, vol6, p01990)

268. Siege of Ngatapa, December 1868–January 1869, 4 January 1869, Whitmore papers, Hawke's Bay Museum (doc F33, vol6, p01953)

A, katahi, ka rapua e te ope ki te ngahere, ka mau e toru tekau e 20 tekau [sic], e 50 tekau [sic]. Ko etahi i tae mai ki te puni, ko te nuinga i patua atu ki te ngahere, a, ko nga mea i patua ki nga mea i whakaorangia – ka whati haere te nuinga o nga Hauhau i te ngahere noa atu kaore i tino kaha te whai a te ope.

Then the Ngati Porou force searched in the bush for them. They caught 30, then 20, then 50. Some were returned to the camp, but the majority were killed in the bush, as compared to those who were allowed to live. A large number of Hauhau scattered through the bush, and no great effort was made to pursue them.²⁶⁹

According to this source, 100 people were captured in the bush, and most of them were then killed. Some were allowed to live; many were left to flee and were not pursued.

5.10.4 The executions: a study of the evidence

We turn here to the most difficult question before us. The sources available to us are of two kinds. First, there are those which record particular incidents witnessed by an observer. Secondly, there are more general accounts, which give us a broader picture of what was happening. We do not consider that any one of these accounts is a full record of the events that took place after the siege. That is not surprising. Eyewitness accounts or reminiscences of military engagements are generally recognised to present particular difficulties to historians trying to reconstruct them, because such accounts may well reflect each author's intense experience of such engagements rather than constituting a full narrative.

We do consider, however, that by setting the various accounts alongside one another, we can come to a clear understanding of the way in which the events after Ngatapa unfolded. It is difficult to reach an exact number for those who were executed, but we can be certain about the range of numbers.

We begin with the accounts written by those who witnessed or recorded particular executions after the taking of the pa. We have already referred to Kempthorne's account of the men found when the pa was taken. He implied that eight to 10 men taken away were guilty of being actively involved in the hostilities, and, when we consider this alongside other sources, we think that it can be concluded that they were shot.

Kempthorne's account of the pursuit is quite detailed. He stated that the pursuit was started by 'Many of Ropata's men' within an hour of the besieging forces' entrance into the pa:

before very long we heard several vollies fired in the gullies beneath, which convinced us that our natives were engaging them & before long, an old woman was brought in, who was greeted with loud jeering; soon after a man named Karaitiana led in a halfcaste woman,

269. AS Atkinson, 'Maori account of the campaign against the Hauhaus on the East Coast, 1865–1870': MS papers 1187–006A, ATL, pp 69, 71. We give our own interpretation of the text into English.

daughter to Sturm of Napier, whom he had found in company with her husband a great chief of Urewera, named Nikora [Nikora Te Whakaunua, one of the Whakarau], he being wounded in the arm, was not strong enough to make his escape & our man shot him: on learning that he was dead, great excitement existed in the camp, as this man was known to be a very desperate character: he was ordered to return & bring the man's head into camp so that there might be no doubt about his identity: in a short time the man returned with it, & all who knew him recognized it at once as being the head of that individual. Another chief Rangiaho, belonging to the Urewera was also captured & shot & several more prisoners & loot were brought in, so that towards the middle of the day their number amounted to about 60 men, women & children.

Two old men, one of them Hamuera, lived opposite to my place, were brought in about one o'clk & as arms were found on them, they were led out & shot.²⁷⁰

Kemphthorne also recorded that later that day, when the men (under Major Westrup) were on their way back to Fort Richmond, they met some Maori who informed them that Ngati Porou had taken prisoner a 'great many more Hauhaus, & that 8 had been that morning shot in camp'.²⁷¹ It appears that Ngati Porou had escorted most of the prisoners to Fort Richmond, but that the eight men referred to were killed at the Ngatapa camp; on Kemphthorne's return there with his force, 'we saw the bodies of the 8 men killed in the morning, lying out in a row'.²⁷² Kemphthorne recognised two of the men. It was on this occasion that they also discovered the injured Tuhoe woman had been shot.²⁷³

Kemphthorne thus testified to 13 executions (including that of one woman), and also to an order having been issued to decapitate one of those killed in the bush, the Tuhoe chief Nikora Te Whakaunua.²⁷⁴ It is not clear who issued this order, or who shot the two 'old men' who were brought back to the camp. The 'loud jeering' which greeted the arrival of an 'old woman' conveys something of the hostile atmosphere in the camp.

A further account by Major Frederick Gascoyne (as he later became), published only in 1916, referred to what was evidently a different execution in a different place. As the colonial forces departed for Turanga, he saw between 20 and 30 prisoners drawn up near the track about half a mile from Ngatapa: 'They seemed a fine lot of young men and I was told that they were to be shot. Afterwards I heard that the sentence had been carried out on the spot where I had seen them'.²⁷⁵ One had tried to escape, and, according to Gascoyne's account, he was

270. Kemphthorne diary, December 1868–January 1869, [5] January 1869, Williams family papers, ms copy micro 0677-09, ATL (cited in doc F33, vol 6, pp 01988–01989)

271. Ibid (p 01990)

272. Ibid. The *Hawke's Bay Herald* reporter dated these killings on 7 January; he reached Fort Richmond that day: *Hawke's Bay Herald*, 12 January 1869.

273. Kemphthorne diary, December 1868–January 1869, [5] January 1869, Williams family papers, ms copy micro 0677-09, ATL (cited in doc F33, vol 6, p 01990)

274. Te Whakaunua also had connections to Ngati Hineuru and Ngati Kohatu

275. Frederick Gascoyne, *Soldiering in New Zealand: Being Reminiscences of a Veteran* (London: TJS Guilford and Company Ltd, 1916) p 75 (doc F33, vol 6, p 02018)

pursued and tomahawked by young Ngati Porou men.²⁷⁶ This is not an eyewitness account of an execution, but it combines a hearsay account of one with Gascoyne's own observation shortly beforehand. The evidence is detached and matter-of-fact. It is highly probable that this execution took place; it is possible that the young men may have been among the group referred to by Kempthorne as having been escorted to Fort Richmond the day before and left there.

We turn now to more general accounts of the capturing and killing of prisoners in the pursuit and its aftermath.

We note, first, the report of Colonel Whitmore on the pursuit, which recorded the killing of 136 men over two days. Writing about the second day, he recorded, 'By night . . . most of the pursuers had returned, bringing two of Te Kooti's wives, and 136 of the band were killed. Although the women fought, and excited the men by their cries. I am happy to say that in obedience to my orders, they and the children were spared.'²⁷⁷ Whitmore's implication is that most of the men were killed in the pursuit. There is, however, one ambiguous phrase in his report. Discussing the first day of the pursuit, he wrote, 'By sundown the number killed, either in the pa or in the pursuit, had reached 120.'²⁷⁸ How many of the 120 were killed 'in the pa'? Did this include those killed after capture as well as those killed during the siege? Whitmore says nothing more than this.

Secondly, we note that both Whitmore and St John (in his account quoted above) contrasted the fate of the men with that of the women and children. (Whitmore said that the women and children were 'spared', and St John added that the pursuers returned, 'bringing with them women and children'.) St John stated that the men 'met their fate boldly'.²⁷⁹ This seems to us a very graphic phrase. St John tells us, in effect, that the women were spared and the men were not. An 'occasional correspondent' of the *Weekly News* (who may have been St John) wrote of the events after the pursuit started:

It is no use describing this part of the work. We remembered the scenes we had lately witnessed; we thought of our murdered fellow settlers, and the cry was 'Vengeance!' [*sic*]. Even had it been wished, I doubt the possibility of restraining the pursuers under Ropata . . . no woman was killed except by accident . . . With the men it was different. They were served, and rightly too, as the murdering Sepoys were in India – all found escaping from the pa were shot.²⁸⁰

Two Maori sources confirmed that many who were captured were then killed. First, we have a statement by Peita Kotuku, recorded by James Cowan in his account of Ngatapa in his

276. Gascoyne, p75 (cited in doc F33, vol6, p02018)

277. Whitmore to Haultain, 8 January 1869, AJHR, 1869, A-12, p19 (doc F33, vol6, p01909)

278. Ibid

279. Siege of Ngatapa, December 1868–January 1869, 4 January 1869, Whitmore papers, Hawke's Bay Museum (doc F35, vol6, p01953)

280. 'Te Kooti's Escape from Ngatapa', correspondent reporting from Fort Richmond 9 January 1869: *Weekly News*, 23 January 1869, Auckland Public Library.

two-volume *History of the New Zealand Wars* (first published in 1922), for which Cowan interviewed many Maori and Pakeha combatants. Kotuku, one of the Whakarau who escaped with others from the pa, said: 'I escaped into the deep forest, but many of our people were captured and shot.'²⁸¹ The Ngati Porou source also referred to the capture of some 100 people in the pursuit, the majority of whom were killed in the bush. The killings clearly occurred after the capture.²⁸² The sources disagree only as to the site of the killings.

A further general account is that by JP Ward, who was in a company of the Armed Constabulary:

In all some 130 odd of the defenders of Ngatapa were captured in the bush and gorges below the pa where they lay asleep having had neither sleep nor water for 2 days. They were marched up the hill side again under the outer wall – as it were – of the pa they had defended so long and so heroically stripped of every vestige of clothing they possessed and SHOT – shot like dogs. There was no mention of a trial or if any or all of them had participated in the PB [Poverty Bay] Massacre. That did not matter to us one straw. They were shot and their bodies left to swelter and rot under the summer's sun and bones to bleach to this day. And all this – and very much more – as done beneath the meteor flag of Mighty England.²⁸³

The tone of this account is an odd mixture of bravado and, perhaps, remorse. It may be that Ward was the 'Armed Constabulary scout' quoted by James Cowan in his *History of the New Zealand Wars*. The scout stated: 'All the men taken were despatched. We just stood them on the edge of a cliff and gave them a volley.'²⁸⁴

Before we comment further on these statements, we refer again to Lieutenant-Colonel Porter's account. Of the pursuit through the bush, Porter wrote that: 'Many skirmishes and hand-to-hand engagements took place . . . and many prisoners were brought in – to the number of about 120 in all.' He continued:

Before this Colonel Whitmore was on his return march, leaving Ropata to await the return of the pursuing parties. As each detachment came in with its batch of prisoners, Ropata rather unsparingly ordered them for execution, particularly those known to be escapees from the Chathams and also those who had participated in the massacre. The place of execution was upon the verge of a cliff, where the prisoners were stripped, then ranged in line and shot down by the firing parties, their bodies falling over the cliff. The retribution lasted for

281. James Cowan, *The New Zealand Wars and the Pioneering Period*, vol 2 (Wellington: Government printer, 1983), p279

282. The earlier passage in the Ngati Porou document refers to a deliberate decision-making process that took place at the pa. If we read the two passages together, we do not think they are inconsistent with the other accounts we have.

283. Account of JP Ward, MS papers 1006–19, ATL (doc F33, vol6, p02008)

284. Cowan, *The New Zealand Wars*, vol2, p281

three days . . . Ropata, among many of the Natives of this district and his own people, is rather blamed for this act of stern justice, if it can be so called.²⁸⁵

Porter added that some of the chiefs urged clemency in the case of one of the last prisoners brought in, the Turanga chief Renata Tupara, but he was shot too.²⁸⁶

It seems to us that Porter's account must be accorded very considerable weight. Though he wrote long after the event, he fought both at Ngatapa and, subsequently, alongside Wahawaha throughout the Urewera campaign.²⁸⁷ Cowan described Porter as Wahawaha's second in command. We consider that such an important battle, and such dealings with the prisoners, must have been much discussed between them and, indeed, more generally among those involved. Porter's account implies that there was widespread knowledge of what happened. We also consider that, while the manner of the executions was not forgotten by those who were there, it is not necessarily the case that the number is exact. Porter admired Wahawaha's bravery, fearlessness, and loyalty to the Crown. He does not appear to attempt any down-playing of the facts he relates but characterises Wahawaha's orders as 'rather unsparing' or, as above, as delivering 'stern justice'. We note that he stated that Whitmore had set off on the return march to Turanga and that the subsequent 'retribution' lasted for three days. Whether he was anxious to distance Whitmore from the killings, we cannot say.

There is one further general contemporary account of the aftermath of the taking of Ngatapa. It is a report by a third party (a newspaper reporter) of an eyewitness statement and was published in the *Hawke's Bay Herald* on 30 January 1869 in the course of a series of daily entries by a staff correspondent:

Sergeant-Major Butters, who witnessed the execution of very many prisoners, has told me that as soon as they arrived before Ropata, that chief, whose countenance is a good index to the stern determination within, searched each man for some proof of complicity. The least sufficed for Ropata – a cartridge, thimble, bullet, money, or articles plundered from settlers' houses, all were taken as evidence. A nod and a word from Ropata and the prisoner was stripped, in order that his blood might not tapu his garments, a few shots, and all was over. Some of the doomed men died without any appearance of fear or agitation. Nikora betrayed no emotion whatever; others, however, showed considerable terror, and a few trembled excessively. Now and then, some chief was addressed in concise but cutting terms by their conqueror.²⁸⁸

This account provided no overall number of those executed; it did, however, refer to 'very many prisoners'. We consider the details given in this account to be telling, and consistent

285. Lieutenant-Colonel Porter, p29. The articles were later issued in book form.

286. Ibid

287. Document F7, p9. Goldstone stated in evidence that Porter was not present. In cross-examination, however, he said he had revised that view and now believed that Porter was in fact present: transcript 4.13, p13.

288. *Hawke's Bay Herald*, 30 January 1869 (doc A10(a), vol4, p2238)

with details given in other accounts (such as Porter's and Ward's): a brief decision-making process conducted by Wahawaha, a search for evidence of guilt, the removal of clothing of those about to be executed, and the killing of Nikora Te Whakaunua. This is evidence, not of isolated executions but of a generally applied process.

We conclude from the range of accounts before us that executions of prisoners undoubtedly took place.

In our view, the accounts of Kempthorne, Gascoyne, and Butters show that, after the pa was taken, a number of those captured were shot before the colonial forces had left the vicinity of Ngatapa. We know that some Ngati Porou (and perhaps some Te Arawa) did not leave with the colonial forces on 7 and 8 January. According to St John, 'Ropata remained out scouting with a party for two more days but failed to overtake Te Kooti. He brought however a number of prisoners, chiefly women.'²⁸⁹

The *Hawke's Bay Herald* report recorded the arrival of Rapata and the 'last batch of prisoners' at Turanga on 12 January.²⁹⁰ It seems that executions must have continued over two or three days.

5.10.5 How many were executed?

(1) A minimum range

As we have indicated, a mechanical adding up of the deaths reported in each (credible) account will not, in our view, produce an accurate figure for those of the Whakarau, their allies, and their prisoners who were executed. This is because the accounts (with the exception of two to which we will refer) did not purport to provide an overall picture of what transpired; they simply detailed what the individual writers, or their sources, actually saw. They can therefore be illustrative only.

The only way to get an accurate and objective count of those executed is to determine as precisely as possible how many male prisoners were brought into Ngatapa or Fort Richmond following the bush pursuit and to subtract from that the number of male prisoners finally dispatched to Turanga. The difference between the two can be explained only by execution since there is no record of escapes after the pursuit and capture. This figure would not take account of any executions that may have occurred in the bush pursuit before the prisoners were brought in, but it would provide at least a minimum figure. It is not clear to us, for example, whether that figure would include the 20 to 30 prisoners referred to by Gascoyne as having been executed on the track about half a mile from Ngatapa, so the range we arrive at must necessarily be a minimum only.

²⁸⁹. Siege of Ngatapa, December 1868–January 1869, 6 January 1869, Whitmore papers, Hawke's Bay Museum (doc f33, vol 6, pp01953–01954).

²⁹⁰. *Hawke's Bay Herald*, 30 January 1869

Two accounts give a general figure for the prisoners brought in. Ward, it will be remembered, set the number at '130 odd'. Porter's assessment was 'to the number of about 120 in all'. We are inclined to think that these estimates are roughly accurate. First, they are close one to the other. Secondly, they are close despite their very different styles – Ward's uses colourful and somewhat emotional language; Porter's is more descriptive and matter-of-fact. Ward appeared to imply, as we noted, that all '130 odd' were shot, but a careful reading of his account indicates that he was more preoccupied with the fact of executions than whether all the prisoners in fact met that fate. We do not think that his account should be read literally as suggesting that all were killed. By contrast, Porter makes it clear that a sorting process was undertaken by Wahawaha and that some were spared. Butters' account supports this. Crucially, this is also confirmed by the fact that some prisoners left Ngatapa in captivity but alive.

How does this compare with the final and formal muster of prisoners? St John's figure for men taken prisoner was 22, while Richmond reported to Governor Bowen that 'about 14' were.²⁹¹ The *Hawke's Bay Herald* reporter recorded the arrival of 'the last batch of prisoners' at Turanga on 12 January. The prisoners brought in by Wahawaha included 'about a dozen men'.²⁹² These men may or may not have been included in St John's figure of 22; his summary is undated.²⁹³ It is possible that this could account for the gap between Richmond's and St John's figures.²⁹⁴

If we take St John's figure (the higher figure for men who survived) and add the 12 reported by the *Hawke's Bay Herald*, we reach a figure of 34. Taking Porter's figure of 120 (as the lower of the two given for those brought in), from the pursuit, this would mean that 86 men were executed. If we assume instead that St John's figure of 22 includes the 12 mentioned in the *Hawke's Bay Herald* (or, alternatively, that the 12 prisoners were captured after the original muster of 120 was completed, increasing the original number captured by 12 anyway), the number executed would be 98. We conclude therefore that the minimum number of men executed was between 86 and 98. This figure is much higher than that postulated by the Crown (namely, between eight and 30), but it is a more believable toll given Ward's indication that the sorting and killing took place consistently and systematically over two or three days. On the other hand, it is still significantly lower than the claimants' estimate. Since it is not now possible to know whether Porter's estimate of those brought in of 120 included the 20 to 30 referred to by Gascoyne as having been killed half a mile from Ngatapa, the maximum number could be as high as 128.

291. Ngatapa journal, St John, Hawke's Bay Museum (cited in doc F33, vol6, p01914)

292. *Hawke's Bay Herald*, 30 January 1869. Seven of the 12 were said to be Whakarau (five, therefore, were not). The Ngati Porou source outlined Wahawaha's later search for 'Hauhau' in the bush, and the finding of several parties, who were brought into Turanga: Atkinson papers, MS papers 1187–80B, ATL (cited in doc F33, vol6, pp02033–02034).

293. St John's figures are with a sheaf of papers in his 'Ngatapa Journal'. The 'Return of Ammunition' with the same papers is dated 18 January 1869. The Order of the Day which follows these papers is dated 8 January: Ngatapa journal, St John (cited in doc F33, vol6, pp01914–01917)

294. For completeness, we note that five prisoners were actually tried for treason or murder (or both) following capture at Ngatapa. They were Hamiora Pere, Wi Tamararo, Matene Te Karo. The trials are dealt with in chapter 11.

(2) How many prisoners of Te Kooti were among those killed?

Finally, we turn to the question of how many of the prisoners taken by Te Kooti at Turanga were killed at Ngatapa.

The sources on this important point are not clear. Binney, in *Redemption Songs*, and Belich, in his seminal work *The New Zealand Wars*, both say that, although an unknown number of the 300 prisoners had escaped by the start of the siege at Ngatapa, others remained, and bore the punishment inflicted after Ngatapa. An important part of the claimants' argument is that, as the case was stated by Belich outside the forum of these hearings, 'The occupants of Ngatapa included many Maori prisoners from Poverty Bay . . . There can be no doubt that many were caught and killed by the government forces. Poverty Bay was "avenged" partly on its victims'.²⁹⁵

Beyond this, the claimants and the Crown were both unable to assist. We are therefore left to conclude that it is almost inevitable that Te Kooti's own prisoners formed a proportion of those killed by the Crown's forces at Ngatapa. The weapons used by the Crown during the siege could hardly have differentiated between the Whakarau and their prisoners. Those who attempted to escape during the siege and were killed were most probably Te Kooti's prisoners, and those who remained in the pa when the majority evacuated it were also probably prisoners.²⁹⁶ As for the bush pursuit, as we have suggested, it is likely that few were killed in the pursuit itself – the only casualties to which direct reference was made were the 15 Tuhoe from a party of 18 and, separately, the Tuhoe chief Nikora Te Whakaunua. It is possible that others were killed during the initial pursuit in the bush, though we have no evidence as to numbers beyond the 18 Tuhoe.

We think that, if more were killed in this phase, they numbered probably fewer than 12. Otherwise, this phase of the fighting would figure more significantly in the records that do remain. Instead, there appeared to be some tacit understanding that those men caught in the bush and not offering resistance would be returned to Ngatapa to be 'sorted'. They would be killed not in the bush while fighting but after capture. That certainly would explain why the live captives were such a large proportion of the fighting force within the pa – 120 to 130 out of perhaps 250 men in the pa.²⁹⁷

Our reasons are as follows: first, most of the sources indicated that a large number of women and children – in the order of 200 – were taken prisoner after the siege. Some would

295. Belich, p266 – as we have set out above, claimant counsel argues this, and both docs A10, p325 and doc A23, p194 cite Belich and say many of the prisoners were killed.

296. Whitmore to Haultain, 5 January 1869, BPP, vol15, p345. The fact that Kempthorne knew a number of those inside the pa supports this view, as it is unlikely he would have known any of the Whakarau, who had been away so long; he also knew some of the eight executed later, and we consider these too would have been prisoners of Te Kooti.

297. It is difficult to state with certainty how many people were in Ngatapa Pa. Professor Binney wrote that there were probably about 300 people in the pa at the start of the siege: Binney, p143. We believe, however, that the figure must have been much closer to 500 people, if the combined total of the number of men killed or executed, and women and children taken prisoner by the Colonial and Kawanatanga forces, is taken into account.

have been killed during the siege, and we know that one was executed. We therefore estimate that approximately 210 women and children were in the pa at the start of the siege.

Secondly, we take into account the ranges of figures that we have arrived at for the number of men killed or executed. A conservative estimate suggests that there were, in all likelihood, between 217 and 310 men at the pa at the start of the siege. We calculated these figures as follows (giving the range from lowest to highest possible figure in each case):

Numbers of men killed during the siege:	48–53
Numbers executed:	86–128
Those killed in pursuit:	16–30
Those taken prisoner and returned to Turanga:	22–34

(We have omitted some figures of possible deaths of which we are not certain, such as those who may have died of hunger in the bush.) To these figures, we add 45 to 65 male Whakarau survivors who escaped with Te Kooti. When this figure is combined with the number of women and children we estimate to have been in the pa, it is more likely that at least 450 people were in the pa at the start of the siege.

Determining the overall numbers of people in the pa is important for two reasons. First, the figures give a rough idea of the proportion of men who were killed. This proportion, which is in the order of $\frac{3}{5}$ to $\frac{4}{5}$ of all the men in the pa at the start of the siege, is very high whichever range of figures is taken. Secondly, the figures indicate the number of Te Kooti's prisoners who could have been killed along with the Whakarau men. We note, however, that this remains a highly speculative exercise. If there were around 450 people in the pa, and over 300 of these were Whakarau or their allies, then perhaps as many as 125 prisoners (and women and children) remained. We cannot be certain that the 45 to 65 escapees did not include some men taken prisoner by the Whakarau. Therefore, it remains a possibility that some of any remaining prisoners could have been included in each of the categories of men killed (that is, during the siege, during the abandonment of the pa, in the bush pursuit, or by execution), men taken prisoner by kawanatanga forces after the siege, or men who escaped.

It may be that the sorting process was specifically designed to separate the Whakarau from their prisoners so as to ensure that only the former were executed. If that was its purpose – and the Ngati Porou source states that it was – then it seems to us that the summary nature of Wahawaha's examination, as described by Porter and Butters, was well short of precise.

Porter wrote that among those chosen 'unsparingly' by Wahawaha for execution were 'particularly those known to be escapees from the Chathams and also those who participated in the [Matawhero] massacre'. The sense given was that these were particularly targeted, but they were not the only ones executed. This is confirmed by Butters' account given in the *Hawke's Bay Herald* report. It appears that Wahawaha personally searched each man for evidence of complicity – 'a cartridge, thimble, bullet, money or articles plundered from settlers' houses, were all taken as evidence'. It was not just those known to be Whakarau who

received Wahawaha's rough justice; it seems to us highly likely that prisoners of the Whakarau were themselves shot as being found guilty by association. However, it is now impossible to know how many were so treated.

We are left to find in general terms therefore that prisoners of the Whakarau were very likely to have been killed in combat at Ngatapa and to have been executed in its aftermath. We are unable to be more precise than this.²⁹⁸

5.11 TRIBUNAL FINDINGS

5.11.1 The death toll at Ngatapa

We find that between 150 and 194 men of the Whakarau, their allies, or their captives were killed by Crown forces.²⁹⁹ Perhaps 11 or 12 women and children were also killed. For the Crown, one officer and 10 non-commissioned officers and men – a total of 11 men – were killed: five of these were Ngati Porou, one was Te Arawa. Eight were wounded. Of the adult males of the Whakarau, their allies or their captives who were killed, between 86 and 98 at a minimum were summarily executed following their capture by Crown forces. This figure does not include those injured who were executed when the pa was rushed. It may also not include the 20 to 30 male prisoners that Gascoyne reported were executed about half a mile from Ngatapa. It is not possible to be sure of this. If it does not, then the maximum of summary executions could range from between 128 and 134.

Of the adult males of the Whakarau, their allies, or their captives who were killed, between 86 and 98 at a minimum were summarily executed following their capture by Crown forces. In light of Gascoyne's report about the 20 or 30 executed in the bush, the maximum number of summary executions. These figures do not include those injured who were executed when the pa was rushed. Nor do they include the woman who was executed after the pa was rushed.

298. We have two letters written at about the same time (mid February 1869) by William Mair at Opotiki, which tend to confirm our general conclusion, that prisoners were among those killed. Mair considered, in his first letter, that 'a great many of those killed by Ngatiporou in the pursuit were the unarmed Turanga natives': Mair to Pollen, 15 February 1869 (doc F33, vol6, p2009). In his second letter, he said that: 'at 70 a great number of [Te Kooti's] being noncombatants the slaughter made by Ngatiporou in the pursuit were principally unarmed Turanga natives who had been taken prisoner by Te Kooti, they knew that if captured there would be no chance for them with the indiscriminating Arawa or Ngatiporou, and had no option but . . . [illegible]': 12 February 1869, Mair family papers, ms papers 93–04, ATL (doc F33, vol6, p02012). Mair's source was clearly rumours brought back to Opotiki, and we have to treat his account with some care. But Kempthorne's journal entries also support the contention that Te Kooti's prisoners were among those killed. We do not consider Mair was particularly well informed on total casualties at Ngatapa, given other sources and our own calculations.

299. This range is in fact a minimum range. That is, it is distinctly possible that more than 194 men were killed, but the hard evidence available produces this range. We know that additional deaths occurred as a result of escapes down the scarp and there is evidence of at least five skeletons being subsequently found in the bush, thought to be the bones of those who died of hunger. These potential additional casualties have not been included in the count, as we prefer a cautious approach to these figures.

5.11.2 Crown action?

It will be recalled that the Crown accepted before us that unarmed prisoners were executed by ‘agents of the State’, and that this was in breach of the principles of the Treaty. The agents of the State referred to here were, of course, Wahawaha and the Ngati Porou force. Some of the force of that concession was reduced by the Crown’s claim that: ‘There is no evidence that any government officers sanctioned the massacre of prisoners, but at least some officers were aware of the execution and did nothing to stop them.’³⁰⁰

Thus, the argument appears to be that the Crown’s error was one of omission, not commission, in the failure to step in to prevent the killings. Clearly, the Crown is right that the senior commissioned colonial officer (Colonel Whitmore) and the senior politician present (JC Richmond) knew of the killings and did nothing. Richmond made this unambiguously clear: ‘Ngati Porou are off on a long chase to day, bent upon exterminating the Iwi Kohuru. I have thought it right, and in accordance with the wish of the Government and country, not to withhold their hands.’³⁰¹

Twenty years later, Richmond denied knowledge of the executions and claimed that he had prohibited them.³⁰² His denial so late in the piece, and after a near-contemporaneous admission, singularly lacks credibility, and we are not prepared to give it any weight. Whitmore points to the obvious reason why he and Richmond knew of the execution but did nothing: ‘Thus the murders of our unfortunate countrywomen and their helpless children have been avenged on this spot chosen as the strongest in a very rugged forest country by the wretches who perpetrated these crimes.’³⁰³

We find, therefore, that the Crown’s concession in these terms is properly made.

Does this approach fully and appropriately deal with the matter? Ought it to be accepted that the Maori auxiliaries were independent allies of the Crown rather than Crown forces in their own right? In our view, it is also important to resolve this matter, notwithstanding the Crown’s concession. This is because, if we find that Wahawaha’s forces were Crown forces, then the nature of the Crown’s wrong changes from an error of omission (a failure to intervene and stop the executions) to an error of commission (the actual carrying out by the Crown of the executions themselves). The distinction is clearly relevant to the Crown’s culpability.

300. Document H14(6), p36

301. Richmond to the Governor, [date unknown], encl in Bowen to Buckingham and Chandos, 10 January 1869, BPP, vol15, p341

302. Richmond, *Reminiscences of a Minister for Native Affairs in New Zealand: Being a Corrected Report in the New Zealand ‘Hansard’ of a Speech Delivered by Hon Mr JC Richmond in the Legislative Council on Wednesday August 1, 1868, in Reply to Defamatory Passages Contained in Rusden’s ‘History of New Zealand’* (Wellington: Government Printer, 1888), p11 (doc F33, vol6, p02025)

303. Whitmore to Haultain, 8 January 1869, BPP, vol15, p346

In respect of argument relating to the attack on Waerenga a Hika three years earlier, the Crown considered before us whether it was appropriate to contemplate the iwi of Turanga as effectively being independent of the Crown. The Crown rejected this argument:

Maori, whether or not represented by a signatory to the Treaty, became British subjects simply by virtue of the annexation which took place as an Act of State by the Proclamations of May 1840. Professor Brookfield states that Maori became in law the subjects of the Crown at this point, regardless of the geographical extent of actual control exercised by the Crown in the territory. Subjects of the Crown owe a duty of allegiance to that Crown.³⁰⁴

The foregoing cannot be consistent with an argument that the Ngati Porou forces were independent allies – effectively citizens of a foreign state – whose actions can only indirectly implicate the Crown in New Zealand. If, in 1865, the Turanga iwi were not entitled to consider themselves independent of the Crown, then the Crown was clearly and logically not entitled only three years later to avoid direct responsibility for the executions on the argument that Ngati Porou were independent.

If, like the Turanga iwi, Ngati Porou were subjects of the Crown and not merely allied to it – and Stafford wrote in 1865 that the term ‘Native allies’ was not to be used³⁰⁵ – then actions undertaken by them while part of a Crown force and in the pay of the Crown must be actions of the Crown.³⁰⁶ The only argument available to the Crown would be that the executions were so outside the ordinary course of the duties of Crown forces as to be beyond Crown responsibility. In this case, however, that defence could not be available because both the officer in command in the field – Whitmore – and the senior politician responsible – Richmond – were clearly aware of the executions and acquiesced (at the very least) in their commission. The Ngati Porou forces were obviously acting with consent, implicit or explicit, at the highest level of command.

We find accordingly that the executions were carried out by Crown forces – and therefore by the Crown itself.

5.11.3 Ngatapa and the Treaty

Clearly, the horrors of Ngatapa were perpetuated in revenge for the horrors of Matawhero, Patutahi, and Oweta. Given the nature and the scale of the murders in Turanga, it is not at all surprising that Crown officials and forces felt driven to vengeance. Thus, the Ngatapa atrocities are at least explicable. But it was of the utmost importance that the Crown did not

304. Document H14(3), pp 26–27

305. Stafford instructed McLean that the term was not to be officially used, reminding him that Maori had just been ‘declared by law’, to be subjects in all respects (ie in the Native Rights Act 1865), and that Maori were not subjects of a foreign power: Stafford to McLean, 3 November 1865, McLean papers, MS copy micro 0535-092, ATL (doc A10(a), vol 2, pp 1234–1235).

306. *Hawke's Bay Herald*, 30 January 1869

succumb to the instinct for revenge. The moral authority of the Crown to require its subjects to comply with a standard of conduct prescribed by law, depended on the Crown itself adhering to the same standard. How else could it claim a legitimate right to govern in the name of all? Thus, while the Crown was entitled to undertake military action against the Whakarau following the latter's attack on Turanga, we find:

- ▶ The military action at Ngatapa failed to discriminate between those who had participated in the Turanga murders and those who were innocent captives of the Whakarau. To that extent, the Crown engaged in careless and indiscriminate military action against innocent people. Though it is not possible to be sure how many captives were killed by the Crown forces, given the magnitude of the Ngatapa casualties, it is inevitable that some were killed. Indeed, it is possible that some were wrongfully executed. These actions by the Crown were dishonourable. They were unreasonable and in bad faith. They failed actively to protect the lives of innocent Maori. They failed to ensure that Maori were accorded all the rights and privileges of British subjects as promised by article 3 of the Treaty. In these respects, the Crown's actions breached the principles of the Treaty of Waitangi.
- ▶ In executing between 86 and 128 unarmed members and prisoners of the Whakarau, the Crown committed acts which were probably in breach of the rules of war then in force in the British Empire. They were acts incapable of justification, no matter what the provocation. To the extent that these executions were effected without civil or military trials, they were unlawful, indeed criminal, acts. It follows that they breached, in the most fundamental way, the principles of the Treaty. To be blunt, the Ngatapa executions are a stain upon the history of this country, and it is long past time for them to be put right.

5.11.4 Conclusions and findings

Finally, we cannot end this section without commenting on the remarkable official silence relating to the events at and after Ngatapa. There was no Government inquiry into the allegations of execution. It is true that the sanitised, official accounts of the siege on the whole gave the impression that the killings were battlefield casualties. Even in official correspondence, however, there were statements that should not have been left unexplained. And newspaper accounts gave disturbing details, which should have aroused Government concern.

It may be that there was an unspoken understanding that the events at Ngatapa were best left to lie. It is certainly apparent that many knew that killings on a horrific scale had occurred there. The Crown ought to have investigated them and tried those implicated in their commission. The fact that this did not occur demonstrates how thin the veneer of the rule of law could be in colonial New Zealand. We are left to conclude with deep regret that the failure to acknowledge the shameful events at Ngatapa and to bring the perpetrators to

account breached the equal protection provision of article 3 of the Treaty and the Crown's obligation of utmost good faith.

5.12 EPILOGUE

After the fall of Ngatapa Pa, Te Kooti and those of the Whakarau who had survived withdrew into the Urewera. Te Kooti's subsequent pursuit by Government and kawanatanga forces ranged over a vast region of the central and eastern North Island; his last engagement with them was fought in February 1872. He sought shelter in the King Country, where he accepted Tawhiao's injunction of peace. In his subsequent years, at Te Kuiti, Te Kooti evolved the rituals of the Haahi Ringatu (Ringatu Church), composing its texts and prayers. His teachings spread, and the Ringatu faith became strongly entrenched in Urewera, Bay of Plenty, and Turanga communities. It remains so today.

In 1883, Te Kooti was included in a Crown amnesty for political offenders of the war years, and the Native Minister visited him in the King Country to assure him that he was not excluded from the amnesty and that he was now safe from arrest for any acts committed during that period. Over the next few years, Te Kooti traveled to a number of communities to strengthen the Haahi and to make peace with his enemies. He had hoped to return to Turanga in 1888 to open Rongopai, a great new meeting house and one of four built in Turanga for him.³⁰⁷ But there was hostility in Gisborne to his visit, and he did not go. The following year, he did set out, and a large number of his followers, men and women, joined him in a peaceful convoy. However, he was arrested at Waioatahe, even though he had already informed the Opotiki magistrate that he was turning back. The Premier himself, Harry Atkinson, arrived at the settlers' request: a committee had threatened to take matters into their own hands. Atkinson brought special constables and artillerymen, and an armed force of 250 men assembled under the command of Porter, the local military commander.³⁰⁸ Te Kooti was arraigned in Opotiki before the resident magistrate, Bush. He was refused legal representation and the evidence against him was not translated as it was given but rather read out by the magistrate at the end of the case. Te Kooti later stated that he understood neither the evidence nor the proceedings against him. He was convicted of unlawful assembly and sent to jail in Auckland. He was required to post three sureties of £500 each, which far exceeded the amounts set for other Maori at the time – Titokowaru had had to pay a total of £1000 in sureties in 1881, while the Taranaki ploughmen and fencers were required to pay £200 each. (These latter sureties

307. Rewi Maniapoto had asked Auckland lawyer, William Napier (Sir George Grey's solicitor) to act as counsel for Te Kooti, even before he was sent to Auckland. Napier was determined to challenge the proceedings of the Opotiki magistrate. His appeal to the Supreme Court was based on the Justices of the Peace Act 1882: Binney, pp 411–412, 414.

308. Several hundred people gathered at Waioeka, where Te Kooti had stayed, were taken by Porter to Opotiki and held there: Binney, pp 392–393, pp 400–401. It will be recalled that Porter was present at Ngatapa and many years later he recorded Wahawaha's story.

were described in Parliament at the time as ‘extraordinary’.) The sureties set for Te Kooti were impossible for him to pay and, ‘accordingly, the order for their payment was effectively a jail sentence’.³⁰⁹

Te Kooti was sent to Mount Eden prison until he could raise the money, but he was released a few days later, after the Crown had organised the raising of the necessary sureties from ‘responsible natives’ in Auckland in return for Te Kooti’s undertaking that he would not seek a lawyer. After his release, Te Kooti appealed to the Supreme Court on the ground that the Opotiki magistrate had no authority to demand the sureties or to imprison him until they had been raised.³¹⁰ The court upheld his appeal, but the Crown appealed against the decision. In May 1890, the Court of Appeal upheld the Crown’s appeal, finding that the settlers’ fears in relation to Te Kooti’s visit to Turanga were not unfounded. The judgment appeared to uphold the settlers’ view of Te Kooti and his plan to visit Turanga, and it was couched in the kind of language which would be difficult to sustain today.³¹¹

Te Kooti never returned to Turanga before his death in 1893.

It is hardly a remarkable observation today that imperial expansion was a double-edged sword. That it brought new opportunities to many peoples – new economic opportunities and technologies, new political relationships, engagement with new world views – is not questioned. Equally, there is general recognition today that the arrival of the colonial State (often) heralded the dispossession and marginalisation of indigenous peoples.

If we do not consider Te Kooti’s leadership in this context, we fail to appreciate its significance. We deceive ourselves if we think that his story is the story of one man’s struggle against injustice. It is that, of course, but it is also an episode in the global confrontation between colonisers and the colonised. Often, that confrontation was resolved peacefully, as indigenous leaders decided on accommodating colonialism rather than challenging it with violent struggle. Violence, it has been argued, is a last resort. But, in colonised societies from Canada to Africa to Indonesia, it has at times of rapid social change been felt to be a necessary resort.

Where discontent and frustration have been ‘so intensely felt that people were willing to kill and in turn risk their own lives in order to alleviate them’, prophetic leaders in many colonies have responded.³¹² They have led armed uprisings in the hope of destroying the colonial regime and (with God’s help) expelling its agents and officials. In place of the regime,

309. Document H4, p17

310. The Amnesty Act 1882 made provision for an amnesty to be proclaimed for ‘offences of various kinds, more or less of a political character’ committed by Maori ‘during . . . or consequent’ [upon] insurrections against Her Majesty’s authority, on the grounds that the ‘state of the colony’ now justified such an amnesty. The Act provided for the Governor in Council to proclaim an amnesty for such offences, the effect of which was to exempt Maori from prosecution from them. But the Governor had the power under section 6 of the Act to determine the fate of ‘any Maori’ as being excepted from the operation of any proclamation issued. *New Zealand Gazette*, 13 February 1883. A proclamation was issued under the Act on 13 February 1883, the day after the Native Minister met Te Kooti; it specified no exceptions.

311. The judgment referred to Te Kooti as a ‘drunken fanatic with the instincts of a savage’: doc A37, p18.

312. Michael Adas, *Prophets of Rebellion: Millenarian Protest Movements against the European Colonial Order* (Chapel Hill: University of North Carolina Press, 1979), p xix

a new order shaped and owned by themselves would arise. The tragedy of such movements is that the confidence and strength the spiritual leaders gave their followers often failed to outlast the resort to violence which it was hoped would bring salvation. For a while, they brought 'new hope, a sense of worth and autonomy', but 'when they turned violent they brought defeat, destruction and renewed despair'.³¹³ Violent protest brought retribution, many deaths, and, for those who survived, the bitterness of the experience of reprisals.

Te Kooti's armed uprising against an oppressive State and against those of his own people considered to have capitulated to the State's objectives has resonances in colonies everywhere. But his story has its own end. His pain at the retribution visited on his followers after his own resistance had failed did not leave him a bitter man. He grieved, and his grief is plain in the waiata he composed. He devoted the rest of his life to building a church in which those who had been dispossessed could find solace. And he hoped that, through faith and the law, a mutually beneficial relationship might yet be developed between Maori and Pakeha:

*Pupuke mahara i roto i to hinengaro
 Ki o kame ka waiho noa iho i te ao
 To whenua kura ka mahue
 To putea te ata taka i runga i to ringaringa
 Me he ua turuki te whikoi i te we moana
 Ko koe anake haere i runga i nga maunga
 E to ana i tona waka i a te Maunga a rongo
 ka puta kai tua kei nga whakaihu ki Maungaroa
 He ripa kawau kei runga kei te taumata . . .
 Nau ano i maka mai to kupu ki te muri ki te tonga
 He whare ko ia tohou i te tohenga
 Ka hohoro te pa ka riro mai a te rama
 Ehara pea i te potiki tauroto waenga Papawharanui
 Nana i hohoro te whetu te marama
 Horahiamai ano e te ture kia takoto i te aio
 Moai rokiroki e . . .³¹⁴*

*The thought must well up in your minds
 Of the goods that have been abandoned in the world
 Of your native land deserted
 Your baskets turned restlessly in your hands
 You are like young ducklings whose necks are stretched in vain
 Wandering on the water
 It as you who wandered about the hills*

313. Adas, p189

314. Personal communication from Ringatu tohunga Rangi Tari and Mihaka Herewini

*Dragging your canoe, the bearer of the good gospel
 Showing beyond the headland at Maungaroa
 Like a row of shags on the sky line
 You cast your words to the north and to the south
 You did have a sheltering house at the time of the struggle
 The struggle was long before the pa fell
 And the light was dimmed
 Perhaps it was not the youngest of Papawharanui
 Who swallowed the star and the moon
 Let your law demonstrate to me
 That matters may now lie in peace
 In utter peace and calm*

5.13 THE CLAIM BY NGA URI O TE KOOTI

The descendants of Te Kooti sought specific recommendations in respect of the legacy, reputation, and property of their ancestor. They sought an apology from the Crown generally for the manner of his treatment during his lifetime and the effect of his stigmatisation on his descendants. They sought specific actions by the Crown in order to restore his standing and reputation amongst New Zealanders generally: namely, an education program and a suitable commemorative structure. They sought the reinstatement of his land entitlements as a member of Rongowhakaata or compensation for the same. They sought the return of such of his personal properties – including manuscripts, maps, flags, and the like – as may have been held by the Crown as its instrumentalities.

As a general rule, we take the view that the construction of a reparation package in this case will be for the descendants of Te Kooti and the Crown to negotiate themselves. There are, however, two things which go beyond the direct interests of the Crown and the claimants in this matter, and these warrant further comment. First, the restoration of Te Kooti's reputation (if not his mana, for that can never be taken away) as a leader in war and in peace and as a spiritual man is an important matter for us all as New Zealanders. A means ought to be found to better inform New Zealanders about the complexities of this man and his life and about his powerful contribution to our national story. In this respect, we can do no more than express the hope that the Crown will understand the benefits to race relations and our sense of ourselves that will accrue from better informing New Zealanders about this aspect of our history.

The second issue is the return of Te Kooti's own property to his descendants. While there is clearly a sound basis for such a claim, we would again express the hope that the Haahi Ringatu be involved in any discussion in this regard, for the church clearly has a vital and direct interest in many of Te Kooti's personal effects. We would also not wish to diminish the interests of

the country as a whole in these matters. No doubt, discussions held in good faith with all those with an interest will produce a result that will protect the mana of all, not least that of Te Matua Tangata himself.

CHAPTER 6

TURANGA DEED OF CESSION 1868/CROWN RETAINED LANDS

I tell them [Turanga Maori] there are three Governments: Kooti's, Ngatiporou's and Sir G Bowens'. I offer them the choice. I don't think they have much doubt but they keep haggling and want to retain the very piece which I proposed to give to the tribes & the defence force. About half the natives have come in to my proposals and the rest will do so when they see me beginning to pack.

—Richmond to Stafford, 12 December 1868

6.1 INTRODUCTION

Following its victory at Waerenga a Hika, the Crown decided that Turanga lands would be confiscated. However, as we discussed in chapter 4, no serious attempt was made to implement that policy until the end of 1866, when the Crown developed custom-made legislation to confiscate East Coast lands through the operation of the Native Land Court. Captain Reginald Biggs was appointed the Crown's representative in the court proceedings. Biggs tried to secure the cession of one large block from the Turanga chiefs before the court sat. The negotiations continued for two years and proved more difficult than Biggs had initially supposed. After a breakdown in the discussions in the first half of 1868, Biggs advised his superiors in November that he was expecting to be offered a cession of 10,000 to 15,000 acres of land. Despite his earlier expressed intention of accepting only a much larger area, Biggs recommended that the offer be accepted.

In July 1868, Te Kooti and nearly 300 Whakarau escaped from their detention on Wharekauri and returned to Turanga, raising tensions in the district. On the night of 9 November, as was discussed in chapter 5, Te Kooti and the Whakarau carried out an assault on Matawhero. Biggs and his family were among the settlers killed that night. Over the next few days, Te Kooti stayed in the area, killing a number of chiefs in the villages. In the wake of his attacks, and the murder of more than 50 people at Turanga, both the settler and Maori communities lived in considerable fear.

In this charged atmosphere, Turanga Maori and Pakeha settlers were told that, unless Turanga Maori provided land for military settlement, the Crown would withdraw its military

and leave the district to its own devices. At the same time, and over the objections of the influential Donald McLean, the settler government continued to seek a negotiated cession of land from Turanga Maori.

In the weeks following 18 December 1868, 279 Turanga Maori signed a deed of cession, an ‘agreement between themselves and the Governor’. In the deed, those Te Aitanga a Mahaki, Rongowhakaata and Ngaitahupo (Ngai Tamanuhiri) men and women who declared themselves loyal to the Crown, acknowledged that some of their number had taken part in rebellion and murder. The signatories yielded to the Governor the land within the boundaries described in the deed. The area amounted to approximately 1.195 million acres, substantially the entire Turanga district (and an area much larger than our inquiry district).¹ Loyal Turanga Maori had three months to make claims to the land within the ceded boundaries. A commission made up of two Native Land Court judges would hear these claims and, where a claim was accepted by the commission, a title would be issued as a Crown grant.

The deed also provided that, prior to the commission beginning its work, the Governor would reserve an area of land, as of then undefined, for military settlement. Where the lands of ‘loyal’ Turanga Maori were included in land reserved for military settlement, those ‘loyal’ Maori would be compensated with grants of ‘rebel’ land of equal value. The commission would also investigate settler land transactions entered into with Maori over the previous decades. The commission referred to in the deed became known as the Poverty Bay Commission, and its work is discussed more fully in chapter 7.

Immediately before the first hearing of the Poverty Bay Commission in June 1869, the Crown and Turanga Maori discussed which lands within the ceded area would be kept by the Crown for itself, as provided by the deed of cession (in return for the waiver of the Crown’s claims on the remainder of the larger area.) On the second day of the hearing, W A Graham (as the representative of Te Aitanga a Mahaki and Rongowhakaata) appeared before the commission and announced that an agreement had been reached. He announced that the agreement was for three blocks of land to be retained by the Crown. The minutes of the commission record that one block was to comprise 5000 acres, while the acreages of the other two blocks would be determined on survey. Graham indicated the boundaries of these blocks on a sketch map before the commission, but the boundaries were not recorded in the minutes. Nor was any written record of the retention agreement made. No survey was carried out until four years later, in 1873. By that time, it was clear that there were different understandings between the Crown and ‘loyal’ Maori over the agreement, the size and location of the blocks to be retained by the Crown.

1. We note that the figure of 1.195 million acres is the amount stated in the statement of issues document, by both the Crown and the claimants – statement of issues, vol1, pp37–38. This amount differs from the 1.1 million written on the historical maps referred to later in the text. We can assume only that the difference between the two relates to different surveying techniques.

The consistently reported understanding of Turanga Maori was that they agreed to give up 15,000 acres, in three blocks of 5000 acres each. The Crown argued before us that the agreement was for the Crown to retain three blocks of 5000 acres each, plus a much larger area of hill country, the boundaries of which, it was submitted, were pointed out to the Poverty Bay Commission on the sketch map in 1869.

After one of the three blocks, Patutahi, was surveyed in 1873 and its acreage calculated, it was clear that the area to be claimed by the Crown would be much larger than 15,000 acres. It was in fact 50,746 acres. Turanga Maori mounted a campaign of protest over the amount of land ultimately retained by the Crown, a campaign that continued in this inquiry. The evidence and arguments presented to the Native Land Court in 1877 and to two commissions of inquiry (in 1882 and 1920) provide us with useful clues as to Maori understandings and expectations surrounding the 1869 deed of cession and perhaps the retention agreement itself.

This chapter will address three key issues that arise with regard to the 1868 cession of Turanga lands. The claimants argued that the Crown forced Turanga Maori to sign the deed of cession. Thus, the first issue we will address is whether Turanga Maori signed the deed freely or whether inappropriate Crown pressure left them with no alternative but to sign. This issue will be dealt with in section 6.2.

The second key issue concerns the authority of those who signed the deed of cession. Despite the deed purporting to cede all of the lands owned by Turanga Maori to the Crown, only 279 'loyal' Turanga Maori signed it. A greater number did not sign it. The issue that arises, therefore, is whether those who signed the deed could cede the interests of those who did not. This issue will be dealt with in section 6.3.

Finally, as we have indicated, the Crown undertook to retain only some blocks of the land given up under the deed of cession. Following execution of the deed, the Crown and Turanga Maori negotiated which lands the Crown would retain from the overall cession and therefore which lands would be handed back to 'loyal' Maori following an investigation of title. The third key issue we will address in this chapter is whether there was any agreement at all between the parties on the lands to be retained by the Crown and, if there was, what its terms were. This issue will be dealt with in section 6.4.

In each of these three sections, we adopt the following structure: a narrative, the crown and claimant cases and the tribunal analysis and findings. Finally, we address two specific claims involving the Muhunga and Patutahi blocks. We begin though with a fuller narrative of the events we have summarised.

6.2 TURANGA DEED OF CESSION, 1868**6.2.1 Why a cession to the Crown?**

From the end of 1865, the Crown had contemplated confiscating land from Turanga Maori as punishment both for failing to comply with the Crown's terms, presented to them in November 1865, and for subsequently fighting at Waerenga a Hika. It seems that Turanga Maori had been prepared to offer some lands to McLean after the hostilities, but McLean, as discussed in chapter 4, had not urged confiscation on the Government during 1866. Only later in the year did the Government proceed to the implementation of confiscation in Turanga. It passed new legislation, the East Coast Land Titles Investigation Act 1866, which bestowed specific powers on the Native Land Court within a defined district to investigate claims of both 'rebels' and 'non-rebels'. Land certified by the court to be 'rebel-owned' was deemed to be Crown land. It is important to note that this confiscation was to be effected through the medium of the land court.

Captain Reginald Biggs (who had fought at Waerenga a Hika and subsequently settled in Turanga), was appointed to represent the Crown in land court hearings to be held under the East Coast Land Titles Investigation Act 1866. Biggs soon came to the conclusion, as we have seen, that it would be very difficult for the court to distinguish between land held by 'friendly' and 'rebel' Maori following Waerenga a Hika, and that it would be better to seek a cession of a large block of land rather than force a confiscation.

Negotiations proved difficult for the Crown, to the point where Turanga Maori refused to meet with Biggs. Then, in July 1868, Te Kooti led the escape of nearly 300 Whakarau from their detention on Wharekauri and returned to Turanga, raising new security concerns. In September 1868, negotiations between Biggs and Turanga Maori resumed. By November, the Crown was preparing to accept an expected offer of 10,000 to 15,000 acres from Turanga Maori, but, on the night of 9 November, Te Kooti and the Whakarau attacked Matawhero; Biggs and his family were among the first victims. Over the next few days, Te Kooti also turned against the chiefs of Turanga communities. Over 50 people were killed: 29 to 34 settlers and young people of dual descent at Matawhero, and between 22 and 40 Maori subsequently. These events were discussed fully in earlier chapters.

It was in this climate that the settler James Wyllie (whose wife Keita was of both Ngai Tamanuhiri and Rongowhakaata²) wrote to McLean in early December 1868. Given that many landowners were dead, had joined Te Kooti, or had remained 'loyal', Wyllie recommended that the entire district be ceded to the Crown, and that 'friendly' Maori and Europeans be provided with Crown grants.³ Wyllie further suggested that it would be helpful for Maori if the Crown distinguished between cession and confiscation: 'This would do away with the confiscation idea, which, in itself, is singularly obnoxious to the Native mind.'⁴

2. On the night of Matawhero, the Wyllies were warned, and were able to make their escape.

3. Document A1, p115; doc A10, p331; doc F18, p83

4. Wyllie to McLean, 5 December 1868, MS copy micro 0535-099 (doc F18, p83; doc A10, p331).

On 9 December, JC Richmond, who was effectively the Native Minister, and Colonel Whitmore, who had arrived to command the Crown forces pursuing Te Kooti, met with the nine chiefs to discuss a cession of land.⁵ By then, Te Kooti had left the area, heading inland and taking 300 Maori prisoners from the villages with him. After the meeting, Henare Potae and Hirini Te Kani wrote to McLean to tell him that Whitmore and Richmond had been persistent about land being ceded to the Crown.⁶ Some of the chiefs appear to have agreed to a cession but others had not. Potae and Te Kani were waiting for McLean before they would conclude the discussions over land. The day after the meeting, Leonard Williams wrote to McLean to confirm that some of the chiefs would rather negotiate with McLean: 'Mr Richmond was having some korero yesterday about the land question in this place & the people – some of them, at all events, would rather manage the business through you and have it well talked over & discussed'.⁷ Wyllie also wrote to McLean after the meeting, stating that, since the chiefs wished to deal with McLean, they were following Wyllie's own advice and were refusing to talk to Richmond and Whitmore.⁸

Shortly after his meeting with the chiefs, Richmond advised Haultain, the Defence Minister, that he hoped to settle the land question. Interestingly enough, Richmond also told Haultain that Wyllie was the only settler in the district opposed to his proposal.⁹ At this time, Wyllie appears to have been positioning himself between the Richmond and McLean camps.¹⁰ In any case, he became actively involved in the cession negotiations.¹¹

On 12 December, the day that Te Kooti personally led a kokiri of 50 men in a raid on Pipiwhakao in which four men – including Wyllie's son – were killed, Richmond wrote to Premier Stafford, advising him that the Government could not afford to provide a standing army to protect the 80 settlers then resident in the district.¹² The district could, however, be defended from any further attacks if members of the Colonial Defence force, Ngati Porou, and Ngati Kahungunu were 'planted' there.¹³ The Crown witness on the deed of cession, Cecilia Edwards, noted that Richmond did not refer to protecting 'loyal' Maori. Nevertheless, he made it clear to Maori that voluntary cession was a prerequisite to continued Crown

5. Among these leaders were Hirini Te Kani, Paora Kate and rangatira of Te Aitanga a Hauiti and Te Aitanga a Mahaki. Rahuruhi Rukupo and Tamihana Ruatapu and others arrived later: doc A23, pp202–203

6. Document F18, p83

7. L Williams to McLean, 10 December 1868, MS copy micro 0535-006 (doc F18, pp83–84)

8. Document A10, p334; doc F18, p84. We may note that McLean had expressed his strong opposition to Whitmore's appointment to Turanga, because of the deep 'prejudice' of Maori 'from East Cape to Napier' against him: McLean to Haultain, 28 November 1868, AJHR, 1869, A-4A, p30 (doc F18, p82).

9. Document F18, p85

10. Ibid

11. Wyllie was appointed an Interpreter under the Native Lands Act, from 1 December 1868; it appears that he was employed to negotiate the deed of cession: doc F18, p85

12. Richmond to Stafford, 12 December 1868, Stafford papers, folder 42 (as cited in doc A23, pp201–202). The purpose of the raid was to secure ammunition. The kokiri encountered the four men, unexpectedly. Young William Wyllie was one of those killed. Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press and Bridget Williams Books, 1995), pp140–141.

13. Document A1, p116; doc F18, p86

protection: 'I have told the settlers if they do not help me in obtaining the necessary cession of land I shall remove all help and leave the place to take care of itself . . . The same argument has great weight with the natives.'¹⁴ He told Stafford that about half of Turanga Maori had agreed to give him the land he wanted, and 'the rest will do so when they see me beginning to pack'.¹⁵ The significance of this pressure will be addressed below in considering the nature and quality of the consent of Turanga Maori to the deed of cession.

However, as we noted above, McLean was opposed to pursuing a cession until the fighting with Te Kooti had ended.¹⁶ On 12 December, he wrote to Richmond advising him against pushing for a cession while tensions and security concerns remained high:

On various grounds I feel fully impressed with the importance of getting the Poverty Bay land question settled, but I feel sure that any attempt to settle the question before the War is needed [*sic*] and while the recent massacres are fresh in people's minds will be attended with unfortunate consequences to the Colony.

The Enemy should be first conquered before settling a question involving so many and such varied interests and I should be sorry that the impression should be conveyed to the natives that the acquisition of land is more sought after than the punishment of the criminals who committed late atrocities and who are still hovering in the district.

I feel certain that to urge the matter at such an inopportune time will be most distasteful to the feelings of a great majority of the Natives and will in the end have greater loss than any temporary advantage to be gained by a cession that will not be regarded as binding or conclusive, a long study of these questions and the consequences flowing from them induce me to express my unreserved views to you on the subject.¹⁷

McLean wrote to Haultain that same day to reiterate his opposition to the cession being pursued: 'I have advised [Richmond] against raising Poverty Bay land question till the war is settled.'¹⁸ And he also wrote to Colonel Whitmore with the same message: 'I am quite anxious to see the Poverty Bay land question settled but it is needless to attempt it till the Enemy is conquered.'¹⁹

But by then, McLean's relationship with the Stafford Ministry was very strained, and the breach between him and Richmond became irreparable. These political tensions meant that Richmond was unwilling to listen to McLean's views. On 16 December, he wrote to McLean advising him the Government would have to either obtain land for military settlements or evacuate the district. Richmond also expressed his anger at settlers who had worked to

14. Richmond to Stafford, 12 December 1868 (doc A1, p117; doc A10, p336)

15. Ibid; doc F18, p86

16. Document A1, p115; doc A10, p332

17. McLean to Richmond, 12 December 1868, MS copy micro 0535-006 (doc A10, p332; doc F18, pp86-87)

18. McLean to Haultain, 12 December 1868, AJHR, 1869, A-4A, p32 (doc F18, pp83, 87)

19. McLean to Whitmore, 14 December 1868, MS copy micro 0535-006 (doc F18, p87)

undermine his efforts to negotiate a cession.²⁰ In his letter, he referred to a few chiefs who had remained reluctant to commit themselves to a cession, and he blamed the situation on ‘the respectable men who call my attempts to secure the only practicable defence for the Bay, “intriguing for land”’.²¹ ‘Intriguing for land’ was in fact how Richmond’s efforts were described in sections of the press, in particular by correspondent for the *Hawke’s Bay Herald*, James Hawthorne. (Both the *Herald* and Hawthorne were considered to be in the McLean camp.²²) On 10 December, Hawthorne had written that Richmond’s ‘intrigue’ for land would fail, and only McLean could reach a settlement.²³

Richmond’s desire to settle this matter without the involvement of McLean, a man he was openly antagonistic to, is all too apparent. In a private letter he wrote to Stafford, Richmond argued that it was of great political importance he should carry his point ‘without McLean or any Maori Doctor.’²⁴ Richmond again wrote to Stafford after signatures of Turanga Maori began to be collected, saying:

We have suffered great loss of influence and position by our agents having failed in this business. Our political enemies have pointed to the failure as showing how incapable we have been where McLean wd. have succeeded . . . To dispose of the thing & without McLean was of some importance.²⁵

It would appear that the settlers referred to by Richmond as undermining his efforts were not doing so because they opposed a cession of land but out of political rivalry.

As we will see, soon after the deed of cession had been signed, Richmond acknowledged on at least two occasions the real motivation for Turanga Maori to sign. In his memo to the Governor of 10 February 1869, he stated:

The chief motive of the cedees was to enable the Government to afford them some protection against the rebel tribes by allotting land to a body of men known as the Hawke’s Bay Defence force, who had had a promise for years past of sections, and a hope held out that they would be at Turanga. Blocks will be at once set apart for them if his Excellency issues the attached notification and also for a small body of Ngati Porou who are anxious to emigrate to Turanga and who will bring the weight of their tribal connection to the support for the place. The settlement of both these bodies of men is very earnestly desired by the European colonists of the place.²⁶

20. Document F18, p87

21. Richmond to McLean, 16 December 1868, McLean papers, folder 534, ATL (doc A10, p333; doc A23, p199)

22. Document A1, 116; doc A10, p338

23. Document A1, p116

24. Richmond to Stafford, 12 December 1868, Stafford papers, folder 42, ATL (doc A1, p116; doc A10, p333; doc A23, p200)

25. Richmond to Stafford, 26 December 1868, Stafford papers, folder 42, ATL (doc A10, p334)

26. Richmond, memorandum to Governor, 10 February 1869, MA62/8 (doc A1, p119; doc F18, p91)

Later that year in Parliament, on 24 August 1869, in Parliament, Richmond again identified the fear of Te Kooti as a crucial motive for Turanga Maori in signing the deed of cession. He told the House that they had ‘expressed themselves in bodily fear of Te Kooti’ and had requested military settlements to defend the district.²⁷

6.2.2 Terms of the deed of cession

A deed of cession was signed at Turanga on, and in some cases after, 18 December 1868, by 279 Maori. W S Atkinson (Wairoa’s resident magistrate) accepted these signatures, and they were witnessed by James Wyllie.

The Maori text of the deed reads:

HE PUKAPUKA whakaaetanga tenei na nga Rangatira me nga tangata Kawanatanga o nga iwi e rua Hangamahaki [sic] me Rongowhakaata me te hapu o Ngaitahupo ki tetahi taha me Ta Hori Pokihini Pouene te Kawana o Nui Tireni ki tetahi taha. Ko aua Rangatira me nga tangata kua whakaaro ki te riringa o etahi atu tangata o aua iwi me nga kohurutanga me nga tahutahunga kua mahia kua oti nei i aua tangata. A kua whakaaro ano hoki ratou ki te oranga noatanga iho o ratou me nga pakeha e ata noho marire ana i runga i nga whenua i taua takiwa o ratou, a e hiahia ana ratou kia whakanuia nga tangata kia homai tangata hei hoa tiaki mo taua whenua. Na ko ratou i roto i tenei pukapuka ka tuku atu nei ka whakapumau atu nei ki taua Ta Hori Pokihini Pouene te Kawana o Nui Tireni katoa nga wahi whenua o ratou o aua iwi e rua Hangamahaki [sic] me Rongowhakaata me te hapu o Ngaitahupo e takoto ana i roto i nga rohe kei muri nei ko nga rohe o taua wahi ka timata ki Paritu ki te taha o te moana ka rere tika atu ki te Reinga haere tonu i roto i te awa Ruakituri tae noa ki te puna wai i roto i nga maunga nui i waenganui o nga wai rere ana ki te taha ki Opotiki me nga wai rere ana ki te taha ki Turanga na ka haere ki runga ki ena maunga ara ki Maungapohatu ki Maungahaumi tae noa ki Tutamoe ka tae ka ahu whaka te moana haere atu ki Pukahikatoa ki Arakihi ki Wakaroa ki Rakuraku tae tika ki te moana ka rere tonu ki te taha o te moana tae noa ki te timatanga o nga rohe ara ki Paritu. A ko taua Ta Hori Pokihini Pouene te Kawana o Nui Tireni o whakaae ana mo te Kuini ki te homaitanga o taua whenua e korerotia nei, a ko nga rangatira me nga tangata katoa o aua iwi ina kua piri ki te Kuini a ka tuhituhia o ratou take ki te whenua i roto i nga marama e toru ma tetahi Komihani ara ma etahi Kaiwhakawa o te Kooti Whakawa whenua o Nui Tireni e whakawakia o ratou take ki etahi pihi whenua i roto i te wahi i whakapumautia nei a ki te mea ka tau tika no ratou ka homai e ia e te Kawana he Karauna Karaati mo aua pihi whenua i whakaaetia o te Komihana Otira ki a te Kawana ano te whakaaro kia whakanoho he pakeha he maori hoki ki runga ki etahi wahi o te whenua i homai nei hei kai tiaki he kai pehi hoki i te kino na ka pupuru a ia a te Kawana etahi wahi o taua whenua i te wa kahore i oti te whakawakanga o te Komihani a ka

27. 24 August 1869, NZPD, 1869, p 681 (doc A1, p117; doc F18, p92)

hoatu ki nga kai tiaki kua korerotia nei ki ia tangata ki ia tangata pakeha maori hoki he pihi whenua mana mehemea ka ki te Komihani na nga tangata kua piri ki te Kuini etahi pihi o aua wahi i puritia ka whakaritea etahi pihi a te Hauhau whenua i roto i taua wahi kia rite te ahua ki tenei kua tangohia nei A ko ratou ko nga rangatira me nga tangata Kawanatanga o aua iwi e rua e tono atu ana ano mo te taha ki nga pakeha kua oti i aua iwi nei te ki i mua o te ra i tuhituhia tenei pukapuka kia hoatu kia hokona ranei tetahi pihi whenua kia whakaotia e te Kawana aua hokonga hoatutanga ranei mehemea ka kitea e te Komihani ka tika to ratou ki. A ko taua Ta Hori Pokihini Pouene e whakaae ana ki tenei inoinga A hei tohu mo te whakaaetanga o aua tangata i whakahuatia nei kua tuhia nga ingoa ki raro nei i te tekau ma waru o nga ra o Tihema 1868.

The English text reads:

This is an Agreement between the loyal chiefs and men of the two tribes Hangamahaki [*sic*] and Rongowhakaata and the hapu of Ngaitahupo of the one part and Sir GF Bowen Governor of New Zealand of the other part. The said chiefs and men have considered the rebellion of some men of those tribes and the murders and burnings committed and done by those men, They have also considered the danger these cause to themselves and the Europeans who are peacefully living on the land in their district. And they wish that the men should be more numerous and that men should be brought in to take care of the land. And they have by this paper given and altogether yielded up to the said Sir GF Bowen Governor of New Zealand all the lands of themselves the two tribes of Hangamahaki [*sic*] and Rongowhakaata and the hapu of Ngaitahupo lying within the following boundaries. – The boundaries begin at Paritu on the sea coast and run in a straight line thence to the Reinga, thence along the River Ruakituri to its source in the high mountains which divide the waters running towards Opotiki from the waters running towards Turanga, thence along the summits of those mountains, that is to say by Maungapohatu and Maungahaumi as far as Tutamoe, thence running in the direction of the sea by Pukahikatoa by Arakihi by Wakaroa by Rakuraku straight to the sea at Turanganui, thence along the sea coast to the beginning of the boundaries at Paritu. And the said Sir GF Bowen Governor of New Zealand assents on behalf of the Queen to this cession of the said lands. And that the said chiefs and all the men of these tribes who have adhered to the Queen and who have sent in their claims to land within three months of the date of this writing shall have their claims adjudicated by a commission of Judges of the Native Lands Court of New Zealand and in case they are found correct the Governor will issue Crown Grants of the pieces found by the the [*sic*] Commission to be correct. But the Governor shall have authority before the adjudication by the Commission to settle Europeans or Maoris as guardians of the peace upon some blocks of the land hereby ceded, and to reserve such blocks and out of them to give each settler whether European or Maori a piece of land for himself, and if the Commission shall decide that any pieces of the blocks so reserved belong to loyal Natives pieces of land of the Hauhau of equal

value shall be awarded in place of the land so taken. And they the loyal chiefs and men of those two tribes request on behalf of the Europeans to whom before the date of this agreement they have promised to give or sell pieces of land that the Governor will finish such gifts and sales if the Commission finds them to be correct. And the said Sir GF Bowen consents to this request. In witness of the assent of the aforesaid parties their names have been subscribed hereto the eighteenth day of December 1868.²⁸

The key points from the text of the deed of cession can be summarised as follows:

- First, the signatories were those Turanga Maori who chose to enter into an 'agreement' with the Crown at this time and who identified themselves in the Maori text as 'nga Rangatira me nga tangata Kawanatanga'. (This is rendered in the English text as 'loyal chiefs and men'.²⁹) The signatories acknowledged the rebellion of 'some of the men of their tribes.' The Maori text states: 'Ko aua Rangatira me nga tangata kua whakaaro ki te riringa o etahi atu tangata o aua iwi me nga kohurutanga me nga tahutahutanga kua mahia kua oti nei i aua tangata.' The English version reads: 'The said chiefs and men have considered the rebellion of some men of those tribes and the murders and burnings committed and done by those men.' Thus the deed of cession, entered into after Te Kooti's attacks on Turanga settlers and Maori, contains the first official reference to 'rebellion' on the part of Turanga Maori.
- Three years earlier, in his proposed terms of surrender of 10 November 1865, McLean had referred to the 'many wrong acts' (nga mahi he), of Turanga Maori.³⁰ And, in his ultimatum of 15 November 1865, McLean had referred to Turanga Maori as 'obstinate in their determination to resist the establishment of order and British law'.³¹ These were the Crown's charges against Turanga Maori at the time of Waerenga a Hika. But the language of the deed of cession now reflected the more terrible recent events at Turanga. The deed stated specifically that those in rebellion included those who had murdered and burnt settler homesteads
- Secondly, it was agreed that part of the ceded land – 'some blocks' – be reserved by the Crown for military settlement or, as the deed phrased it, for Europeans or Maori to be settled as 'guardians of the peace'. The extent and location of this land was left unstated; it remained to be determined before the proposed commission commenced its work.
- Thirdly, we note that in the Maori text, the signatories promised: 'ka tuku atu nei ka whakapumau atu nei . . . nga wahi whenua o ratou.' In the English text, they declared that they had 'given and altogether yielded up' to the Governor all the lands within

28. HH Turton, 'Deed No 490' *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1877, pp 694–699 (doc A10(a), vol 4, pp 2321–2326)

29. We note the large number of women who signed the deed of cession; about one-third of the total.

30. 'A True Copy' of the terms of surrender, copied by FE Hamlin, 'Clerk & Interpreter', Turanganui, 10 November 1865, AGG-HB2/1, Archives NZ. The Maori version is 'Terms of Surrender' in AGG-HB7 2E, Archives NZ.

31. Draft McLean to Fraser, 15 November 1865, AGG-HB4/8 (doc F16, p106)

the boundaries described. The ‘lands’ amounted to approximately 1.195 million acres, including, but not limited to, almost the entire present inquiry district.

- ▶ Although it was not a question of controversy in these hearings, it appears to us that this yielding up was more in the nature of a political submission to the Crown than an agreement whose underlying purpose was the transfer of title. We hold that view even though the deed is expressed, at least in the English version, as a cession of land, and thus an extinguishment of title. The reciprocal undertaking of the Crown supports our interpretation. That is, although the deed purported to extinguish native title, a commission was to be set up to hand back almost all the ceded lands to the traditional owners, provided they were ‘loyal’. Given this provision, Maori must have seen this as a means of demonstrating acceptance of the Crown’s authority, and it is likely that the Crown explained it that way.
- ▶ Our view on this is confirmed in part by comments by Chief Justice Stout in the case of *Willoughby v Panapa Waihopi* which relate to the manner in which the land subject to the deed of cession came into the hands of the Crown:

The preamble of that Act [the Poverty Bay Grants Act 1869] explains how the land came into the hands of the Crown. It was not confiscated land, as the Mohaka and Waikare lands. The lands were Native lands given to the Governor, impressed with a trust that part of the land was to be given to certain Maoris. It was Maoris giving land to Maoris through the medium of a trustee. *The lands were not, therefore, what is termed European land; and never belonged to the Crown, save as trustee.* [Emphasis added.]³²

- ▶ Fourthly, we note that, where the proposed commission upheld claims brought by loyal Maori, titles to land within the ceded block would be awarded as Crown grants. In other words, the outcome of the deed of cession for those Turanga Maori who signed it was to be the acceptance of new Crown-derived titles. As we shall see in chapter 7, the nature of the title issued to Maori on the recommendation of the Poverty Bay Commission was to have major practical implications for Turanga Maori.
- ▶ The fifth significant point is that the effect of the deed was to confiscate lands of ‘rebels’, although the deed does not say this explicitly. To ensure that the interests of those who had confirmed their loyalty by signing its terms were protected, the deed provided that, if any of the lands retained by the Crown were found to be lands of ‘loyal’ Maori, then they would be compensated with ‘rebel’ lands of equal value. The role of the Poverty Bay Commission in identifying and excluding ‘rebels’ was not stated, though it was implicit. In this, it differed from the role of the Native Land Court envisaged in the East Coast land legislation 1866 to 1868. The wording of the deed required the commission to award titles to ‘loyal’ Maori only.

32. *Willoughby v Panapa Waihopi* (1910) 29 NZLR 1123, 1128–1129

- Finally, the deed also recorded a ‘request’ from Turanga Maori that settler claims to land in the district would be validated by the Crown after having been investigated and confirmed by the commission. All but two of these claims arose from private transactions that were entered into after 14 January 1840 and that were in breach of the Crown’s land purchase monopoly. They were therefore unlawful and unenforceable.

6.2.3 The nature and quality of Maori consent to the deed of cession

The first key issue we address here is the quality of the consent of those who signed the deed of cession: did they sign under duress or was their consent freely given?

(1) *The Crown’s case*

Given the facts as we have set them out, the Crown understandably did not argue that Maori consent was freely given. The Crown position, based on the research of their leading witness Ms Edwards, was more finely calibrated.

Essentially, the Crown argument was that the firm stance it took in negotiations was appropriate to the time and place but did not amount to duress. The Crown was entitled, counsel argued, to take advantage of the political and strategic circumstances as they existed in order to secure Maori agreement to the cession.

The Crown accepted that ‘undoubtedly’ it applied pressure to Turanga Maori in the period from after Waerenga a Hika until the deed of cession was signed in December 1868.³³ It was accepted that officials at the time threatened to remove military protection unless Turanga Maori ceded land to the Crown. Implicit in this threat was the likelihood that, if carried out, Turanga would be attacked either by Te Kooti or Ngati Porou forces. The Crown none the less submitted that the deed of cession was neither forced nor voluntary: it was ‘much more nuanced’ than either of those descriptions.³⁴

The Crown identified four elements of the pressure that it applied to Turanga Maori to reach an agreement. The first was the amount of land it sought to retain.³⁵ As we have discussed, Biggs had at one point proposed to take and keep up to 200,000 acres.³⁶ The second element of the pressure applied by the Crown was the impact that a cession would have had on the land of ‘loyal’ Maori.³⁷ Biggs’ proposals included the taking of land owned by ‘loyal’ Maori. A committee of ‘loyal’ Maori that was negotiating with Biggs was steadfast in its view that those who had remained loyal should not lose any of their land.³⁸

33. Document H14(7), p12

34. Ibid, p14

35. Ibid, p12

36. Document F18, p46

37. Document H14(7), p12

38. Document F18, p47

Biggs' negotiating style was the third element of the pressure.³⁹ Crown counsel referred to the July 1867 petition in which Turanga Maori complained of Biggs' constant harassment.⁴⁰

The fourth and final element of the pressure applied by the Crown was its threat of a military withdrawal from Turanga.⁴¹ In her evidence, Ms Edwards considered that Richmond's decision to continue negotiating for a cession in the climate of heightened tension and fear showed an awareness that 'timing and opportunity played a role in the negotiating environment.'⁴² Ms Edwards, however, appeared uncertain as to the effect of this ultimatum: 'I do not know ultimately what changed their minds, whether in fact Richmond's rhetoric was the turning point, or whether he had touched upon a matter of real concern.'⁴³

It was Ms Edwards' evidence that while some Maori had resisted Richmond's proposals to cede land, they did change their minds and agreed to the cession.⁴⁴ Ms Edwards suggested that there was, however, more to it than the duress argument. First, Turanga Maori felt genuinely obliged to make amends for the events at Matawhero and, secondly, they themselves faced a significant security threat.

Nevertheless, Ms Edwards accepted that the environment in which the deed of cession was signed – a climate of fear and heightened tension – and Richmond's negotiations at this traumatic time 'contributed to a situation of some stress.'⁴⁵

In terms of actual effects, the Crown emphasised the absence of Maori protest about the cession after the event. This, the Crown argued, was an acknowledgement by Turanga Maori that they were a willing party to the deed of cession. Turanga Maori did not deny that the deed of cession was a valid and operational instrument; rather, their later complaints focused on the Crown's retention of too much of the land it had acquired under the deed as representing 'rebel' interests.⁴⁶

(2) *The claimants' case*

The essence of the claimants' case, drawing on the work of their expert witnesses Bruce Stirling and Vincent O'Malley, was that the Crown forced Turanga Maori to accept the deed of cession.⁴⁷ The claimants argued that the Crown pursued negotiations for a cession at a time when there was a heightened sense of fear throughout the whole district. However, evidence emphasised by counsel indicated that, for Turanga Maori, other factors contributed to the sense of threat at the time. Mr Stirling referred to the threat posed to Turanga Maori by

39. Document H14(7), p12

40. Ibid

41. Ibid, pp12–13

42. Document F18, p184

43. Ibid, p185

44. Ibid

45. Ibid

46. Document H14(7), p15

47. Document H2, p53; doc H3, p49

Crown forces (principally Ngati Porou), the threatened removal of Crown protection, and the threat of raupatu by the Crown.⁴⁸

Mr Stirling argued, first, that the presence of armed Ngati Porou in Turanga was a significant contributing factor to the climate of fear.⁴⁹ He cited a statement by Rapata Wahawaha as evidence of the designs that Ngati Porou had on Turanga land. Leonard Williams recorded in his journal in December 1868 that Wahawaha had said, ‘When he fought for the Govt before, he was promised great things and got nothing. Now, he says, he does not mean to trust to promises but he just means to take the land for himself.’⁵⁰

The second factor cited by Mr Stirling was Richmond’s threat to remove Crown protection from Turanga.⁵¹ The continued uncertainty regarding Crown protection in the district will be addressed later as a key issue.

Thirdly, Mr Stirling emphasised the fear of extensive raupatu by the Crown, though he suggested that this may not have been as immediate a threat as that posed by Te Kooti and the loss of Crown protection. Even so, he thought the fear among Turanga Maori of large-scale land loss, perhaps to both colonial and kawanatanga forces, and the associated cultural and economic implications, would have been a factor in Turanga Maori considerations.⁵² In particular, the claimants referred to the Crown’s threat to remove protection. These facts were not disputed by the Crown, although the parties differed on their significance.

Interestingly, it appears that the instructions from Cardwell, the Secretary of State for the Colonies, to Governor Grey in 1864 confirm that, while the Colonial Office preferred that transfers of this nature took the form of cessions, all understood that they were in fact confiscations: ‘The proposed appropriation of land should take the form of a cession imposed by yourselves and General Cameron upon the conquered tribes.’⁵³ Thus, in the climate of the 1860s it was expected, and even unremarkable, that cession would be forced.

Counsel for Rongowhakaata argued that recourse should be had to the ordinary principles of the English common law in determining for Treaty purposes the validity of the deed of cession.⁵⁴ Counsel for Ngai Tamanuhiri argued that the eighteenth-century concept of contractual unconscionability could be applied to analyse the facts in this case, not least because the relevant principles were in force as law in England and New Zealand at the time of the deed of cession. Counsel referred to the well-known 1751 decision of Lord Hardwicke in the *Earl of Chesterfield v Janssen*, where it was held that the law would move to ‘prevent taking surreptitious advantage of the weakness or necessity of another’.⁵⁵ Counsel argued by

48. Document A44, p 31

49. Ibid, p 32

50. W L Williams, journal, 3 December 1868 (doc A10, p 347)

51. Document A44, p 32

52. Ibid, pp 32–33

53. Cardwell to Grey, 26 April 1864, *New Zealand Gazette*, no 24, 30 June 1864, pp 281–285 (doc H2, p 49)

54. Document H3, p 52

55. *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82, 100

analogy that the Crown had deliberately moved to take surreptitious advantage of the necessity of Turanga Maori and that, as a result, the deed should be found to have been unlawful and invalid.

(3) *Tribunal finding and analysis*

The Crown, through Captain Biggs, had been negotiating with Turanga Maori for two years since late 1866 with no tangible reward. On 9 November 1868, just before he was killed, Biggs had finally recommended that the Crown accept an expected offer by Turanga Maori to cede 10,000 to 15,000 acres. By then, Turanga Maori were firm in their determination not to offer any more land, but they were prepared to pay the price of some land. This, they did not for their 'rebellion' at Waerenga a Hika but in a bid to normalise their relationship with the Crown in the post-Waerenga a Hika world and to secure Crown protection at a time when there was growing anxiety about Te Kooti's intentions.

It was a terrible irony that this agreement, so close to formalisation three years after Waerenga a Hika, was not in fact concluded before the attack on Matawhero. The murder of settlers and Maori at the hands of the Whakarau changed the dynamic completely. Turanga Maori, who had seen a number of their chiefs killed, had every reason to fear Te Kooti. Many may have feared that his desire to strike those that he thought had wronged him had yet to be requited. In addition, Turanga Maori had reason to fear the designs that Ngati Porou kawana-tanga forces had on themselves and their lands. Indeed, Wahawaha had threatened them with raupatu.

This was the context in which Richmond made his threat:

I have told the settlers if they do not help me in obtaining the necessary cession of land I shall remove all help and leave the place to take care of itself . . . The same argument has great weight with the natives. I tell them there are three Governments Kooti's, Ngatiporou's, and Sir G Bowen's. I offer them the choice. I don't think they have much doubt but they keep haggling and want to retain the very piece which I propose to give to the tribes & the defence force. About half the resident natives have come in to my proposals and the rest will do so when they see me beginning to pack.⁵⁶

In our view, there is little doubt but that the direct cause of the formal cession of 1.195 million acres to the Crown by 'loyal' Turanga Maori was the Crown's threat to remove its protection from both Maori and Pakeha at a time of considerable tension and distress in the district. Richmond offered the people no choice at all. Turanga Maori could choose Te Kooti's fury, Ngati Porou's subjugation or the Governor's protection.⁵⁷ The latter would, however, come at a price. First, the entire district was to be ceded to the Crown. Secondly, the Crown

56. Richmond to Stafford, 12 December 1868, Stafford papers, MS copy micro 0173, ATL (doc A1, p117; doc A10, p336; doc F18, p86). Stafford had decided to dispense with a Native Minister when he formed his Ministry.

57. Document F18, p86

would thus assume control of Turanga lands. And, thirdly, the Crown would retain an unspecified quantity of land for its own purposes.

It is clear that the Treaty would never countenance the use of such a bald threat. By the terms of its preamble, Queen Victoria expressed her desire 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’. That is, a determination to combat lawlessness and to protect Maori and settlers from its effects appears to have been a primary reason for the Treaty. We agree with the approach adopted in the preamble in the Tribunal’s *Rekohu* report and its conclusion that the desire for the ‘Queen’s law’ in the context of the preamble was for protection, where needed, and substantive (rather than technical) justice for all.⁵⁸

In article 3 of the Treaty, in consideration of the Maori acceptance of kawanatanga, Queen Victoria promised Maori ‘Her royal protection and . . . all the Rights and Privileges of British Subjects’. Thus the Crown had already guaranteed the Governor’s protection to Turanga Maori 29 years earlier. At no time could that protection have been more necessary than in December 1868. Though we have argued earlier that no level of provocation could have justified the indiscriminate murder of Turanga settlers and Maori in November 1868, we also found that the Crown’s actions in holding so many people without trial did constitute considerable provocation, and that the pursuit of the Whakarau by the Crown’s forces when they escaped and returned to the mainland added to that provocation. It escalated tension when it might have been defused by a thoughtful Crown response. To that extent, in December 1868 the Crown had a very particular responsibility to protect Turanga communities, Pakeha and Maori, who had borne the brunt of Whakarau grievances. The Crown chose instead to abandon its Treaty promises, in favour of a renegotiation more conducive to its immediate interests. We find it did so with a cynicism that reflects poorly on its honour. Donald McLean, it will be recalled, was of the same view (see sec 6.2.1).

We find that the deed of cession was extracted in response to a direct threat by the Crown to pull out of Turanga at a time when the lives and property of its subjects were clearly in danger. The threat was effectively to remove the very protection promised by the Treaty itself. It was a threat to abdicate a primary obligation of kawanatanga – that of keeping the Queen’s peace. It must follow that a threat to act in breach of the Treaty unless Maori cooperated by giving up their Treaty-guaranteed lands, was duress such as to vitiate Maori consent and was itself in breach of the Treaty.

58. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp169–175

6.3 WHO CEDED FOR WHOM?

It will be recalled that the 279 signatories of the deed of cession professed themselves to be ‘nga Rangatira me nga tangata Kawanatanga’, or ‘loyal chiefs and people’, and that they ceded the whole of the district to the Governor. Clearly, those 279 men and women were not all of the adult Maori landowners in the district. Two hundred more were part of the Whakarau, and some 300 more again had recently been captured by Te Kooti and taken to his base inland. An unknown number of others had simply not ‘come in’. The second key issue we will now address is whether those signatories had the authority to cede the lands of those who were not present and who did not sign the deed.

6.3.1 The Crown’s case

In addressing this issue, the Crown asserted that those who signed the deed of cession considered that they held the right to speak on behalf of others and cede their rights: ‘Those signing purported to be the chiefs and men who were loyal. Presumably, as a matter of their own views of what was right in light of their customs, they considered themselves the right-holders who would speak for all.’⁵⁹

The Crown accepted that, at law, ‘native title can be ceded by the consent of those who hold it.’⁶⁰ The Crown submitted that the relevant factual question for this Tribunal was: Who held the rights to agree to a large cession such as this in exchange for the promises contained in the 1868 deed of cession?⁶¹ In the end, however, the Crown accepted that the signatories could cede only their own lands. The lands of the non-signatories were confiscated:

Tribunal: For its part the Crown considers that a proportionate taking of land following rebellion accompanied by the degree of consent obtained in this case is consistent with the principles of the Treaty of Waitangi, provided the following two provisos apply, so do you say that 52,000 or 57,000 whichever number you take was proportionate, is that the proportionate figure you say?

Crown counsel: Yes Sir.

Tribunal: So that 57,000 was proportionate and it was sufficient that only the loyal Maori consent?

Crown counsel: Yes. I think it’s implicit that only the loyal Maori would, I’m not suggesting that there was a Treaty duty on the Crown to obtain the consent of the rebel Maori.

Tribunal: Why?

Crown: Because I don’t think there was because under the Treaty the Crown would punish people for wrongdoing.

59. Document H14(7), p21

60. Ibid, p22

61. Ibid

Tribunal: One can see the force of that immediately. Doesn't that stop it being a cession and make it a confiscation?

Crown: Does that stop it being a cession and make it a confiscation?

Tribunal: Well a cession requires agreement of those whose property it is.

Crown: Yes . . . The issue 7 question is about the Deed of Cession and the Crown's argument there is that it is a cession and in illustrating that I will have to address your Honour's points about the true nature of it and the trust like components of it.

The issue 8 question about the retained land is the application of the Crown's confiscation policy and the Crown says here that at a factual level we got a degree of consent to this 1869 [*sic*] agreement but of course we are saying that it was only obtained from loyal Maori, and that no attempt was made to obtain it from rebel Maori, and that that is taking land from rebel Maori without payment and without their consent and so I think it's appropriate to call it confiscation.⁶²

6.3.2 The claimants' case

Counsel for Ngai Tamanuhiri accepted that, from a legal perspective, conviction for treason could result in the forfeiture of land to the Crown. However, explicit statutory authorisation would be required for the owner of one legal interest to dispose of the interest of another. Counsel argued that in this case it was clear that the deed of cession was entered into without the consent of all the landowners and that there was no statutory authority for those who signed to cede interests of others.⁶³

Counsel referred to evidence of Mr Stirling, who said that those who signed the deed of cession spoke only for themselves and were seeking only to protect what they could of their own lands:

the question of the legal or customary right of those signing to also cede the rights of those not signing is not entirely relevant. Those who signed did not pretend to represent those who did not; they acted under duress and in an attempt to preserve what they could of their own lands. Custom did not come into it for the Crown was the party which assumed that the interests of non-signers were, due to their failure to affirm loyalty, available for confiscation.⁶⁴

62. Transcript 4.25, pp95–96

63. Document H2, p54

64. Document A44, p34

6.3.3 Tribunal finding and analysis

In an opinion to the Native Minister dated 16 August 1869, James Prendergast, then the Attorney-General, raised the issue about whether the Crown was satisfied that those who ceded land had title to cede. Prendergast wrote:

This matter seems to rest on agreement between the Crown and those who have ceded the land.

If the Crown is satisfied that those who dealt with it had title to cede the land then the whole transaction is similar to previous dealings with Natives by the Crown and the land becomes Crown lands but the Crown is of course bound to perform the terms of the contract.⁶⁵

In the end, the Crown accepted before this Tribunal that, to the extent that the deed of cession purported to extinguish the customary title of non-signatories, then it was ineffective. Clearly, that acceptance is correct both as a matter of law and of Treaty principle. As we will see in the next chapter, when the Poverty Bay Commission moved to exclude rebels from ownership lists of the blocks it investigated, it confiscated those interests. They had clearly not been ceded by the owners. The question then to be addressed is whether the commission had the legal power to confiscate. We deal with that issue in the next chapter. What is important is that the signatories did not even pretend to extinguish the rights of non-signatories. They purported only to cede their own rights.⁶⁶

In our view, the deed did two things. First, it recorded the final accession of those Turanga Maori who signed it, to the Crown's authority. Secondly, it signified an acceptance of the need to formalise a relationship with the Crown, which would, after Matawhero, be on the Crown's terms. The real conveyance of land to the Crown was to come later in the negotiations surrounding what was described to us as the retained lands issue. It related to a much smaller area of land. As we have said, the Supreme Court in *Willoughby v Waihopi* was of the same view: the Crown was to accept the larger cession only as trustee. In any event, it is clear enough that, to the extent that the deed provided for a system of block-by-block confiscation of 'rebel' interests through the Poverty Bay Commission, and to the extent that it confiscated non-signatory interests in the retained lands, it was in breach of the article 2 guarantee of exclusive and undisturbed possession by those Maori of their lands.

In chapter 3, we found that those who fought at Waerenga a Hika were not in rebellion. There could therefore be no Treaty basis for taking their land. In chapter 5, we considered that Te Kooti and the Whakarau had been in rebellion when they attacked Turanga settler and Maori communities. The attack was, we found, a breach of their own Treaty responsibilities,

65. Prendergast to Native Minister, 16 August 1869, Poverty Bay inwards correspondence, MA62/8, Archives NZ (RDB, vol131, p50237)

66. '[N]ga wahi whenua o ratou o aua iwi e rua Hangamahaki [sic] me . . . Ngaitahupo' in the Maori; 'all the lands of themselves [of] the two tribes Hangamahaki [sic] and . . . Ngai tahupo' in the English. The 'ratou' and 'themselves' clearly refers to 'loyal' Maori who were entering into the agreement with the Crown.

but it resulted from significant provocation by the Crown. Given the ‘punishment’ inflicted on the Whakarau at Ngatapa, ought those who died there and those who survived to have been subjected to confiscation in addition to whatever criminal sanctions were available to be levied against the survivors? On balance, it is our view that, in the light of the Crown’s provocation and the losses suffered by the Whakarau at and before Ngatapa, confiscation was a grossly disproportionate punishment. It would, in addition, have punished not just the Whakarau. Most of them were dead, killed in many cases by summary execution, as we have seen. The impact of confiscation would be borne by the children of those who fought alongside Te Kooti (and as we shall see, his prisoners). By the end of 1868, these people had suffered enough. A reasonable Crown would not have considered it appropriate to punish both the survivors and the descendants of those killed, particularly in the light of the Crown’s own contribution to the problem. In any event, as we conclude in our discussion of the Poverty Bay Commission, no confiscation could be justified without a proper inquiry into the circumstances of each right-holder accused of rebellion. None were ever held.

Once the purported agreement was reached between the negotiators on each side, as reflected in the deed of cession, Maori signatures were collected until mid-January.⁶⁷ At that very time, the siege and subsequent fighting at Ngatapa between Te Kooti’s Whakarau, and the colonial and kawanatanga forces was taking place. (See chapter 5 for a discussion of the events at Ngatapa.)

In a memorandum of 10 February 1869, Richmond recommended that the Governor accept the deed of cession. Richmond stated that the deed gave the Crown actual ‘prima facie title in the rebel lands’.⁶⁸ As we have said, we rather doubt that the deed did give title to the Crown – it was clearly ineffective in extinguishing the title of so-called rebels (since none of them had signed) and those ‘loyal’ Maori who had signed had been overborne by the Crown’s threat to remove its protection from the district.

In the *New Zealand Gazette* of 13 February 1869, the deed of cession was publicly notified and Governor Bowen declared that native title to land as described in the deed was deemed to be extinguished from 18 December 1868.⁶⁹

If, however, the deed failed in its purpose of extinguishing the title of ‘loyal’ and ‘rebel’ alike, then the proclamation that followed must also have been ineffective.⁷⁰ The Jones commission in 1920 alluded to just this problem:

By a Proclamation, without date, but appearing in the *Gazette* of the 13th February, 1869, the Governor accepted the cession by the Natives, and proclaimed Native title to be extinguished. *It is not clear to us how the title of the rebel Natives became extinguished*, but we assume it must have been done in some regular way, since the Attorney General’s opinion of

67. Document F18, p98

68. Richmond, memorandum for Governor, 10 February 1869, MA62/8, Archives NZ (doc A10, pp 351–352)

69. Document A23, p 207

70. See *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321 and discussion in chapter 7.

the 16th August, 1869, was that 'if the Crown is satisfied that those who dealt with it had title to cede the land, then the whole transaction is similar to previous dealings with Natives by the Crown, and the land becomes Crown lands; but the Crown is, of course, bound to perform the terms of the contract.' [Emphasis added.]⁷¹

As Chief Judge Jones probably suspected, extinguishment had not been achieved in any regular way at all. We find therefore that the deed of cession was inconsistent with the title guarantee of the Treaty in that it purported to extinguish by consent, the title of those who had not consented at all.

6.4 THE CROWN'S RETAINED LANDS

We turn here to the third issue: the land to be retained by the Crown (out of the whole district ceded formally ceded) in the deed of cession. The question we address is whether an agreement on this matter was reached between Turanga Maori and the Crown immediately before the commencement of the hearings of the Poverty Bay Commission. And, if it was, we will consider just what that agreement comprised.

We note at the outset that there is some ambiguity in the terms used to describe the Crown's lands. In particular, the blocks which the Crown retained or reserved after the cession of 1.195 million acres were sometimes described in contemporary sources as 'lands conceded to the Crown', a phrase which tends to confuse the issue today. It is, however, a wording which may be of more than semantic interest. It seems to us to imply that contemporary officials understood that the real decision about what the Crown would take, came after the deed of cession. That is, at the time when the Crown discussed with Turanga Maori, the blocks it wished to 'reserve' for military settlement. We return to this point below.

As we have said, the lands to be retained by the Crown from within those ceded under the deed of cession were not finally agreed at the time the deed was signed. It appears instead to have been understood between the parties that the precise area and boundaries would be resolved later. On the first day of the first hearing of the Poverty Bay Commission, 29 June 1869, the commissioners adjourned the hearing on the grounds that an agreement regarding the lands that would be retained by the Crown was close. The following day, W A Graham appeared before the commission and explained the basic terms of the agreement that had been reached either on that or on the previous day, and the boundaries of the land to be given up were pointed out on a map. Crucially, there is no extant written record of the agreement presented to the commission. Indeed, it is unclear whether there ever was such a record. The claimant and Crown understandings of what was agreed, both outside the commission and

71. 'Report No 4, Patutahi Block', AJHR, 1920–21, sess 2, G-5, p15

before it, differed. In the absence of a written record, it has remained difficult to resolve this matter.

From the time of the Poverty Bay Commission hearing, the consistent position of Turanga Maori was that three blocks of 5000 acres each were agreed as the lands to be retained by the Crown. This was also the position argued by the claimants before this Tribunal. The historical position of the Crown was that a much larger area of 67,400 acres had been agreed. The Crown today does not support either figure. It simply argued that what was agreed was three blocks of 5000 acres each, plus a larger area of hill country indicated on the map presented to the Poverty Bay Commission by W A Graham on the second day of the commission's first session. We shall explain why in the course of the treatment of these issues.

To assist our understanding of the controversy surrounding the Crown's retained lands, we provide a detailed chronology of successive stages in the emergence of the purported agreement. We briefly discuss the protests lodged by Turanga Maori with respect to the Crown's retained lands. We then address the conclusions reached in those various inquiries before moving to consider the arguments of counsel and drawing our own conclusions.

6.4.1 A chronology

Our chronology identifies and discusses each stage in the development of the purported agreement of June 1869 between the Crown and iwi, and the subsequent interpretations of it. We also outline the primary sources on which our chronology depends, identifying where they agree and where they differ.

(1) The situation prior to the Whakarau assault on Turanga

We begin our chronology on 9 November 1868, shortly before Te Kooti led his attacks on Matawhero. On 9 November 1868, Biggs had written to McLean that he expected to be offered 10,000 to 15,000 acres of flat lands by loyal Turanga Maori, and he recommended that this offer be accepted.⁷² This appears to have been Biggs' last communication regarding cession before he and his family were murdered some hours later. It is also the last statement we have prior to Matawhero as to what Maori were prepared to offer and what the Crown was prepared to accept. It seemed that agreement was close.

We also have a survey plan prepared by Williams and W A Graham in the period prior to Te Kooti's attacks on Turanga communities and prior to the deed of cession; that is, between June and September 1868.⁷³ This map, titled 'Reduced Copy of Plan and Surveys in the Poverty Bay District in the County of Stafford', showed a number of blocks (see map 10).⁷⁴

72. Document F18, p77

73. Document F33, vol11, map c. Graham had undertaken a number of surveys for the land court sittings planned for 1867–68 (which did not take place). It appears such surveys were recorded on this map.

74. We note that in 1868 the block Patutahi did not exist as such and that Muhunga was marked not as a single block but as a group of five blocks.

Two of these were the Muhunga and Kaimoe blocks which formed part of the lands ultimately retained by the Crown. The area of these blocks was recorded as being 3518 acres and 3546 acres respectively.

(2) *After initial discussions for military settlement*

An early theme that emerged from the documentary evidence was the establishment of military settlements as a priority for Turanga Maori and the Crown, following the signing of the deed of cession. The deed itself explicitly stated that this was the purpose of the blocks to be retained by the Crown. In his 10 February 1869 memorandum, referred to above, Richmond also acknowledged this purpose:

the chief motive of the ceders was to enable the Government to afford them some protection against rebel tribes by allotting land to a body of men known as the Hawke's Bay Defence force, who had had a promise for years past of sections, and a hope held out that they would be at Turanga. Blocks will be at once set apart for them if his Excellency issues the attached notification and also for a small body of Ngati Porou who are anxious to emigrate to Turanga and who will bring the weight of their tribal connection to the support for the place. The settlement of both these bodies of men is very earnestly desired by the European colonists of the place.⁷⁵

Richmond expanded on this point in a letter of 13 February 1869. He informed Crown agent WS Atkinson that the Government was seeking from Turanga Maori 'the right to occupy so much land as is requisite for fulfilling the engagements of the government with the defence force, and the Ngati Porou'.⁷⁶ Subject to that requirement, Richmond stated, 'the district should be dealt with as the commissioners may think equitable'.⁷⁷

One proposal being considered in the period prior to the Poverty Bay Commission's first hearing was the establishment of a military settlement of Ngati Porou at Patutahi.⁷⁸ Haughton, the Under-Secretary for Defence, advised Atkinson in March 1869 that the village of Ngatapa would be an opportune site and that the deed of cession allowed the Government to 'occupy with settlers such portions of the land as they may think necessary for the safety of the place, and to compensate claimants in those blocks by land outside'.⁷⁹

However, in May 1869 a petition from 42 Pakeha settlers expressed strong opposition to a Ngati Porou settlement in the district:

75. Richmond, memorandum to Governor, 1 February 1869, MA62/8 (doc A1, p119; doc F18, p91)

76. WS Atkinson was Biggs's successor as resident magistrate. Atkinson was also Richmond's brother in law.

77. Richmond to Atkinson, 13 February 1869, MA62/8 (doc A23, p208)

78. The Poverty Bay Commission was established to hear claims from Turanga Maori to ceded land not required by the Crown. It will be discussed in detail in chapter 7.

79. Haughton to Atkinson, 20 March 1869 (doc F18, p100) The village of Ngatapa mentioned was not the pa much further inland.

Having already had experience of their utter lawlessness and repudiation of control, either by the authorities constituted to uphold the law; or even by their own chiefs – we beg to state our conviction that not only would they be of no value as settlers, but that the amount of protection afforded to us by them would be more than counterbalanced by the injury they would do us.⁸⁰

(3) *The first meeting with Crown officials: Maori understanding*

Maori evidence about these early discussions with the Crown conveys a consistent Maori understanding of them. The young Te Aitanga a Mahaki chief Wi Pere later referred to a meeting in Turanganui attended by Atkinson and officials and took place after the fighting at Ngatapa Pa (ie, after the first week of January 1869): ‘Mr Atkinson stated that he wanted 3 blocks for Military stations, 5,000 at Muhunga, 5,000 at Patutahi and 5,000 at Arai. If these blocks were not ceded he wanted to withdraw the troops and we would have to protect ourselves.’⁸¹

This evidence was presented by Wi Pere at the 1877 *Papatu* hearing in the Native Land Court.⁸² He repeated his statement in evidence to the native affairs select committee in 1879:

Mr Atkinson said that if the natives did not agree to give to the government 15,000 acres of land, that they would withdraw the military and leave the natives to the mercy of the Hauhaus . . . It was on account of Mr Atkinson threatening to withdraw the soldiers that the Maori agreed to the proposals lest the Hauhaus should come down and kill them.⁸³

It was the evidence of Turanga Maori that, if Te Muhunga was found to be in excess of 5000 acres, the excess would be returned. Panapa Waihopi, who would play an important role in the Poverty Bay Commission, also referred to discussions with Atkinson, when he gave evidence at the 1882 Clarke commission into the Crown retained lands.

I know that it was arranged at the meeting and afterwards confirmed, that five thousand acres of Te Muhunga should be ceded to the Government . . . I remember our going afterwards to point out those pieces . . . I know Mr Atkinson stated that if we handed over the whole block the excess over five thousand acres would be handed back. I know that Mr Atkinson’s statement was the reason we agreed to hand over the whole block.⁸⁴

80. Settlers of Poverty Bay to Atkinson, 24 May 1869 (doc F18, p101)

81. Evidence of Wi Pere, 14 March 1877, *Papatu* minutes, MA11/2 (doc F18, p115)

82. Document A23, p293

83. Le 1/1879/3 (doc A23, p217)

84. ‘A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay’, 1 November 1882, AJHR, 1884, sess 2, vol2, G-4, p15

(4) *The agent W A Graham instructed by Maori*

Hape Kiniha gave evidence at the Papatu hearing of the Native Land Court. He stated that W A Graham, the agent for two of the tribes who were party to the 1869 agreement, was given careful instructions as to which land was to be given up to the Government:

We had made the boundaries quite clear to Mr Graham and he was thereby enabled to explain them to the Government without a map 5,000 in Arai, 5,000 in Te Muhunga and 5,000 in Patutahi was the amount of land agreed to be ceded – the 5,000 acres in Arai took in a portion of Mr Westrup's run.⁸⁵

Kiniha also referred to the production of a map 'of the whole district' at the commission hearing, but he did not know if the boundaries of the land were marked on it.

Judge Monro's personal notes record that 'Mr W Graham said that he appd. on behalf of Te Aitanga a Mahaki and Rongowhakaata & the hapus thereof. The chiefs were Raharuhi Rukupo, Tamihana Ruatapu, Panapa.'⁸⁶ While the names of these chiefs have been recorded, it is not clear if this is a complete record of those who dealt with Graham on behalf of Te Aitanga a Mahaki and Rongowhakaata.

(5) *Graham presents Crown–Maori agreement to Poverty Bay Commission*

On 29 June 1869, the Poverty Bay Commission opened its hearings. Atkinson, who was appointed to represent the Crown before the commission, appeared before it and announced that 'he had good reason to expect an arrangement between the Crown and the Native Claimants might be satisfactorily arrived at'.⁸⁷ In the absence of any objection, Judge Rogan adjourned the commission.⁸⁸

The next day, Atkinson reported to the commission that an agreement had indeed been reached with Graham. Maori present at the hearing confirmed that Graham was acting for them. Under the agreement 'a certain proportion of the ceded block should be given up absolutely to the Crown', in Atkinson's words. In return, the Crown would waive all claims to the remainder. Graham stated that the three blocks subject to the agreement were Te Muhunga, Patutahi, and Te Arai.⁸⁹

(6) *The Poverty Bay Commission records the agreement*

The Poverty Bay Commission recorded a number of details about each of the blocks for the Crown. We address below the question of whether the acreages, which we have italicised, were written down at the same time as the rest of the minute.

85. Evidence of Hape Kiniha, 14 March 1877, MA11/2 (doc F18, p116)

86. HAH Monro, 'Poverty Bay Notes,' MS 366, box 1, folder 13, Auckland War Memorial Library, pp1–2 (doc F18, p103)

87. Poverty Bay Commission minutes, 29 June 1869, reel 3663, Archives NZ (doc F18, p102)

88. Document A10, p357; doc F18, p102; doc A23, pp 211–212

89. Poverty Bay Commission minutes, 30 June 1869, reel 3553, Archives NZ, pp 2–3 (doc F18, p102)

The following details are recorded for Te Muhunga block:

In reference to the first block, it was agreed that this block should contain *5,000 acres more or less* subject to the subsequent determination of boundaries on Survey. The land was stated to be of first class quality, and was suited by its situation for a Military settlement. [Emphasis added.]⁹⁰

The second block discussed was Patutahi:

Patutahi is situated on the west bank of the Waipaoa River; – a block as yet unsurveyed; the Boundaries have been agreed upon; – and were here stated by Mr Graham – and pointed out upon the Map produced. A Reserve of probably about 10 acres at Patutahi, on account of the urupa[,] was asked for by Tamihana Ruatapu; the same to be made a Public Cemetery reserve. The land was stated to be of very good quality, and in a position in the centre of the bay and commanding all the main lines of access. The Acreage is estimated at *fifty seven thousand (57,000) acres more or less*. [Emphasis added.]⁹¹

The third and final block was Te Arai:

The Arai Block, adjoining the Patutahi Block on the western side is also as yet unsurveyed; but the Boundaries were stated, and pointed out by Mr Graham. The block was stated to command the sole other line of access into the District, excepting only the coast road, which however is capable of a separate defence – Acreage estimated *at about 735 acres more or less*.

These claims that have been preferred within the limits of these three Blocks would be adjusted as they arose by Mr Graham. [Emphasis added.]⁹²

The personal notes of the proceedings kept by Judge Monro read as follows: ‘Mr Graham stated that he on behalf of his clients would give up all claim over 3 blocks – Te Muhunga Patutahi and Te Arai – Te Muhunga to contain 5000 acres – Patutahi unsurveyed (Boundaries named).’⁹³

Neither the commission nor Monro’s personal notes recorded the boundaries named by Graham. In the report of the 1920 native land claims commission, Chief Judge Jones described the recording of the agreement in the following terms: ‘though the boundaries of the unsurveyed land were stated and pointed out, no note of them was taken in the minute-book, nor does any record . . . appear to have been kept.’⁹⁴

90. Poverty Bay Commission minutes, 30 June 1869, reel 3553, Archives NZ, pp2–3 (doc F18, p102)

91. Ibid

92. Ibid (p103)

93. HAH Monro, ‘Poverty Bay Notes,’ MS366, box 1, folder 13, Auckland War Memorial Library, pp1–2 (doc F18, p104)

94. AJHR, 1921, sess 1, G–5, p16 (doc A10, p518; doc A23, p328)

In our inquiry, Crown witnesses Cecilia Edwards and Brent Parker between them provided slightly divergent evidence on whether the commission recorded an estimated acreage for any of the blocks. Ms Edwards stated that the commission minutes recorded a figure of 5000 acres for Muhunga, but space was left in the minute book for the acreage of Patutahi and Te Arai to be added at a later date. Ms Edwards noted that these figures were added in the space that was left in each case, and in the same handwriting as the rest of the minute book.⁹⁵ Mr Parker, however, stated simply that all the acreages, '57000 acres more or less' for the Patutahi block, 'about 735 acres more or less' for Te Arai, and '5000 acres more or less' for Te Muhunga, appear to have been inserted into the commission minutes at some later time.⁹⁶ We consider below just how much later these changes were made.

It appears that none of the Turanga Maori at the 1869 Poverty Bay commission hearing objected to or disputed the agreement presented by Graham.⁹⁷ Statements made later by those who attended the hearing confirm this. Wi Pere recalled that he made no objection to the agreement presented to the commission in 1869. The record of his evidence states: 'I remember a Court sitting here in 1869 . . . I know that they awarded these lands to the Government. I made no objection, as I thought that judgment only affected the 15,000 acres.'⁹⁸

(7) Poverty Bay Commission hearings: Maori abandon claims to Kaimoe and Te Muhunga

After the matter of the Crown-retained lands had apparently been settled, the Poverty Bay Commission proceeded to hear the claims brought by 'loyal' Maori to various blocks within the area covered by the deed of cession. In the course of these hearings, Maori formally abandoned their claims to Kaimoe and Te Muhunga blocks in favour of the Crown. On 30 June 1869, the Kaimoe block was brought before the commission. This block was to form a part of the larger Patutahi block ultimately retained by the Crown.

On 4 August 1869, the Muhunga block was brought before the commission:

The Crown Agent (Atkinson) stated that he proposed to lay before the Court the Block called Te Muhunga (including Wharahaki, Wairerehua, Waitawaki, Te Hapua) and to state that it had been definitely arranged between himself and Mr Graham, on the part of the Natives, that this should be retained by the Crown as part of the land to be accepted in satisfaction of the Crown's rights over rebel claims.⁹⁹

The commission minutes noted:

95. Document F18, p104

96. Document F12, p13. According to Parker, the figures in the minute book would probably have been inserted between the beginning of the first hearing in 1869, and the beginning of the 1873 hearing, probably sometime during 1869, to represent the areas included in the June 1869 agreement: see doc F12, pp14–15.

97. Document F19, p39

98. AJHR, 1884, sess 2, G-4, pp14–15 (doc A10, p496; doc A23, p317)

99. Poverty Bay Commission minutes, 4 August 1869, reel 3663, pp307–308, Archives NZ (doc F18, p108)

6.4.1(8)

Tamihana Ruatapu [*sic*] (not sworn) stated that the Native claims upon this land are abandoned to the Crown in compensation for Hauhau claims in the Turanga district.

Mr Graham stated that a claim for survey was preferred on account of this land, as against the Natives formerly claiming it, amounting to the sum of £88- 13-; and that this claim was admitted by them as correct. I am not at present prepared to say what I shall pursue in reference to the recovery of this claim.¹⁰⁰

(8) Sketch map presented to Poverty Bay Commission

On 30 June 1869, Graham presented a sketch map to the Poverty Bay Commission.¹⁰¹ This was the second important map to which we were referred in our hearing.¹⁰² According to the commission minutes, the lands subject to the agreement were ‘pointed out’ by Graham on this map (see map 10).¹⁰³ The handwritten legend in the bottom corner of the map recorded ‘OLW Bousfield gen govt surveyor, April 1869’. This sketch map, however, was not entirely the work of Bousfield. When the Muhunga block came before the commission, on 4 August 1869, Bousfield stated that the sketch map was, in effect, a compilation of other surveys: ‘The survey of the outer boundaries of this [Muhunga] block is not mine:—some of the surveys are by Mr Graham. Some by Mr McDonald:—I made the plan, having compiled it from the surveys of the other gentlemen named.’¹⁰⁴ On another occasion, Bousfield reiterated that: ‘The sketch map I made for the Court of Commission was not made on the ground, but was carried out by me according to the instructions of the officers of the Government.’¹⁰⁵

The 1869 sketch map contains considerable information relevant to our inquiry:

- The official title of the map is ‘Sketch Map of the Land Conceded to the Crown by the Native Owners: Poverty Bay’.
- The acreage formally recorded in the legend of the map is that ‘conceded’ to the Crown, stated to be ‘containing about 1100000 acres’.¹⁰⁶

100. Poverty Bay Commission minutes, 30 June 1869, reel 3553, p 11, Archives NZ (doc F18, p109)

101. We noted Graham’s earlier survey map of 1868 at section 6.4.1(1).

102. Unfortunately, we have had to rely on a copy of this map, as the original has recently been mislaid within Land Information New Zealand. While we are satisfied that our conclusions are based on a careful reading of the case, we take this opportunity to record our dissatisfaction that such a crucial piece of evidence should so recently have been lost sight of in an official archive.

103. Leading Crown witness on the subject of the ‘cession retention’ maps Brent Parker argued that this map (map B) was the original map presented to the Poverty Bay Commission. Previously we had heard evidence on the basis that another map (map A) was the map presented to the commission. It is Parker’s evidence that map A is a copy of map B. Parker’s reasoning on this point is persuasive and we proceed on the basis that map B, in some form or another, was the map presented to the Poverty Bay Commission on 30 June 1869. We leave open at this stage the question whether map B as presented to the commission contained all the information visible on map B today.

104. Poverty Bay Commission minutes, 4 August 1869, reel 3663, pp 307–308 (doc F18, p108)

105. Gisborne Maori Land Court minute book 3, 14 March 1877 (doc A10(a), vol 4, p1871)

106. We note that the 1.1 million acres mentioned on the map differs from the 1.195 million acres mentioned in the statement of issues by both the Crown and the claimants.

- ▶ The outer marked boundaries of the land appear to be those comprised in the wider deed of cession, as also referred to in deed 339 in *Turton's Deeds*.¹⁰⁷
- ▶ Bousfield, as general government surveyor, signed and dated the map April 1869 (ie, at least two months before the first hearing of the commission, where it was produced).
- ▶ The map shows a number of named land blocks sketched in a faded red (presumably marked in preparation for earlier proposed land court cases).
- ▶ The names of the different iwi are marked in faded red on the appropriate areas of land.

Some features were clearly added to the map, not only subsequent to April 1869, when the map was prepared, but also subsequent to 29 June 1869, when it was produced to the commission. We will discuss later exactly when the notation below was added. For now, it is sufficient to indicate that these later amendments include the following:

- ▶ Two such areas washed reddish brown; one at Patutahi, which is not named, and one at Te Muhunga, which is named.
- ▶ The note 'Block conceded to the Colonial Govt August 1869 – containing about 50,746 acres', which appears on the block at Patutahi.
- ▶ The word 'Kaimoi', which is at the eastern corner of this block along with the legend 'Proposed Reserve [for] Ngatiporo'.
- ▶ A number of heavy red lines, which appear to indicate both the lands ceded to the Crown under the deed of cession, as the map's title indicates, and the boundaries of the lands retained by the Crown.
- ▶ The note '5,395 acres [indecipherable] map laid before the NLC held at Turanganui July–August 1869', which appears on the Muhunga block (we discuss later exactly how this notation was added).¹⁰⁸
- ▶ Two straight lines joining at a point named Okeikoko, forming an inverted 'v'. The southern line begins on the southern side of the Mangawehi Stream and has the note 'wnw about 10 miles'. This line appears to meet and follow the Waimata River and then into the Te Arai. The northern line has the note '45° sw 8 miles'. It was Parker's evidence that these lines show the general area of land to be retained by the Crown in an area that had not then been surveyed.¹⁰⁹

(9) Contemporary reports of the agreement between Maori and the Crown, 1869

Even before the apparent agreement between the Crown and Maori was reported to the Poverty Bay Commission on 30 June 1869, hearsay accounts of it were current. Subsequently, many versions of the agreement were recorded, both by officials and by private parties. We set out here a range of such statements, which testify to the variety of figures circulating as to the size and nature of the Crown's retained lands.

107. HHTurton, *Maori Deeds of Land Purchases in the North Island of New Zealand* (Wellington, 1877)

108. Despite the fact that the notation refers to the Native Land Court, this was clearly intended as a reference to the Poverty Bay Commission.

109. Document F12, p11

On 29 June 1869, Leonard Williams recorded in his journal a conversation he had that day with the Crown agent Atkinson. He wrote that Turanga Maori had offered '5000 acres from Waerenga a Hika to the Muhunga as far as Kaitaiatahi, 5000 more at Patutahi & 5000 more on the Arai with about 40,000 acres of back country'.¹¹⁰

The same day, another report of the agreement was recorded by Major Charles Westrup in a letter to Donald McLean: 'Crown Agent accepted a block of land; but not near the extent poor Biggs wanted – There may perhaps be eight thousand acres of flats but not more and some 40,000 hill country – any settlement seems better than none now.'¹¹¹

McLean, who had yet to be formally designated the Native Minister, was soon receiving reports of the agreement from Crown officials, as well as from settlers in Turanga. On 7 July 1869, Atkinson reported to McLean:

I have reserved a block of about 50,000 acres for Government purposes (with the full consent of the Natives through their agent Mr Graham) covering the three principal roads by which an enemy might enter the valley. Viz the road by Waipawa from the Opotiki country, the road by Patutahi from Ngatapa and the Urewera Country and the road by Te Arai from the Wairoa and other places.¹¹²

Two days later, on 9 July 1869, Locke wrote to McLean to inform him that Turanga Maori had agreed to give up 12,000 acres in three blocks (5000 at Waerenga a Hika, 4000 at Patutahi, and 3000 at Te Arai), plus a further 30,000 to 40,000 acres of rough hill country.¹¹³

Shortly after the first commission hearing, news of the agreement emerged in regional and national newspapers. On the same day that Locke wrote to McLean, the *Hawke's Bay Herald* published a letter from an unnamed Turanga settler reporting dissatisfaction at the settlement and recording the extent of the cession as being '10,000 acres of flat land at the back of the bay, in three blocks, for the purpose of a military settlement, and 30,000 acres of rough land on the hills inland'.¹¹⁴ Also in that issue of the *Hawke's Bay Herald*, a letter written by James Hawthorne confirmed both the amount, 40,000 acres, and the feeling of dissatisfaction. He wrote of the 'sad muddle of the land question'.¹¹⁵

McLean received further conflicting accounts. On 23 July 1869, George Worgan, writing from Napier, reported news of the Turanga agreement to McLean. Worgan told McLean that Paora Te Apatu had brought news to Wairoa earlier that Turanga Maori had agreed to the Crown retaining three blocks of 5000 acres each.¹¹⁶ This is the first reported account we have of what Maori understood as the Crown's share of the lands.

110. W L Williams, journal, 29 June 1869, vols 3–6, 1868–71, MS copy micro 0628-02, pp8–9 (doc F18, p111)

111. Westrup to McLean, 29 June 1869, MS copy micro 0535-096 (doc F18, p111)

112. Atkinson to McLean, 7 July 1869, MA62/8 (doc F18, pp104, 128)

113. Document F18, p129

114. *Hawke's Bay Herald*, 9 July 1869, p2 (doc F18, p112)

115. *Hawke's Bay Herald*, 13 July 1869, p2 (doc F18, p112)

116. Document A23, p214; doc F18, p113

In a memorandum of 4 August 1869, JD Ormond, the deputy superintendent of Hawke's Bay, recorded that the 'whole of their lands' had been ceded, subject to a commission inquiring into claims to land by the cedees.¹¹⁷ Where the commission found claims to be substantiated, Crown grants were to be issued to the claimants. Ormond referred to the central issue of military settlement in the district: 'But it was agreed that the Governor should before the adjudication of such claims by the commission, reserve such blocks of land as were required for the settlement of certain Europeans and Maoris, as guardians of the peace of the district.'¹¹⁸

Ormond also referred to the instructions given to the commissioners and to the resident magistrate, Atkinson. The latter was to interfere with the actions of the commissioners as little as possible, and was to 'secure the quantity of land necessary to fulfil the engagements of the Government to the members of the Defence Force and the Ngatiporou Tribe, and generally so to act as to secure promptly and amicably the settlement of the land question of the district.'¹¹⁹

Ormond reported that Atkinson, had both 'reserved a Block of Fifty thousand (50,000) acres with the consent of the Natives' and recorded that 'the Natives seem perfectly satisfied with the proceedings of the Commission and everything is going on pretty smoothly.' Ormond stated that, other than the information provided above – presumably, the reserve of 50,000 acres and Turanga Maori's satisfaction with the proceedings – there was no further information in Atkinson's report: 'The Government is left in ignorance as to the character of the Blocks reserved.'¹²⁰ Ormond described Atkinson's report of the commission hearings and his participation as 'most meagre and unsatisfactory.'¹²¹

There is a note attached to Ormond's memorandum stating:

Since the foregoing was written a meeting has taken place between the Native Minister & the Chiefs present in Wellington representing the Ngatiporou, Ahuriri & Mohaka Tribes it has been agreed that their claims shall be satisfied out of the Blocks in Poverty Bay ceded to the Govt.¹²²

On 13 August 1869, Atkinson wrote to the Native Minister to inform him of the agreement: 'The amount of land reserved for the Government according to Mr Bousfield's plan (enclosed) contains about 62395 acres of which 11000 are of the best land in the Bay.'¹²³ Mr Parker noted in his evidence before us that the figure in this letter is 340 acres less than

117. Memorandum relating to proceedings taken in respect of the Poverty Bay land question, 4 August 1869 (RDB, vol131, p50,239)

118. Ibid (p 50,240)

119. Ibid (p 50,241)

120. Ibid (p 50,243)

121. Ibid (p 50,244)

122. Ibid (p 50,247)

123. Atkinson to Minister, 13 August 1869, MA11/1 (doc F12, p14)

6.4.1(9)

the total of 62735 acres written, probably at a later stage, in the minute book.¹²⁴ Minuted on Atkinson's letter was a note from GS Cooper, dated 30 August 1869: 'Mr Atkinson informs me that written descriptions of these blocks can only be obtained from Poverty Bay & he recommends that Mr Bousfield & Mr Graham be written to for them.'¹²⁵

On 23 August 1869, the commissioners sent their first report to the Native Minister. They stated that they had:

confirmed the arrangement made by WS Atkinson Esq the Crown Agent, by which three blocks of valuable land – a large portion of which is available for immediate settlement – have been absolutely ceded to the Crown, in satisfaction for the Claims of Rebel Natives. The Area of these three blocks is estimated at about 67,400 Acres.¹²⁶

Three days later, the *New Zealand Herald* published yet another version of the acreage involved. According to the paper, two 5000-acre blocks and one 50,000-acre block had been agreed to.¹²⁷

On 24 August 1869, Richmond stated in Parliament that, in relation to the retained lands, he had envisaged 'something like 20,000 acres' and no more than was necessary to fulfil the Government's promises to the defence force.¹²⁸

On 27 August 1869, just over a month after its earlier reference, the *Hawke's Bay Herald* again reported that 'about 15,000 acres' had been given up.¹²⁹

On 25 October 1869, Samuel Locke reported to Ormond the details of the blocks subject to the agreement and Ormond subsequently forwarded this report to McLean. Locke referred to two blocks, Muhunga and Patutahi. Muhunga was described as containing 5390 acres, 4500 of which were 'very good flat lands', and the remainder 'very hilly'. Locke considered Muhunga to be in an important strategic position for siting the Defence Force.

The second block was Patutahi, which Locke said had been promised to Ngati Porou and Ngati Kahungunu. Patutahi consisted of approximately 57,000 acres, of which 3500 acres were flat and a further 1000 acres needed drainage. The balance of the block, less 400 acres up the Te Arai Stream, was hilly. Locke concluded that there was 8400 acres of land suitable for military settlement, 3900 of which were in the Patutahi block. Locke concluded:

124. Document F12, p14

125. Atkinson to Minister, 13 August 1869, MA11/1 (doc F12, p14) We note that a number of different figures are recorded for the amount to be ceded to the Crown. The evidence contains no reason as to why these differing amounts were recorded in official documents, in such a short space of time.

126. Rogan and Munro to Native Minister, 23 August 1869, MA62/8, Archives NZ (RDB, vol131, p50219). Edwards, at doc F18, p109, observed that the area given in the report (57,400 acres) had been written in a different hand, which suggested that the Commissioners had left a blank to allow the acreage to be inserted, and that the word 'Area' had been written over the word 'Acreage'. However, the letter cited by Edwards of Rogan and Munro to Native Minister, 23 August 1869, MA62/6, Archives NZ, RDB, vol129, p49650 – which may be read as stating '57400' is a copy of an original found at RDB, vol131, p50,219, which clearly reads '67,400' acres.

127. Document A23, p214; doc F18, p113N. Edwards noted that this article was reprinted in the *Hawke's Bay Herald* on 3 September 1869.

128. 24 August 1869, NZPD, 1869, p681

129. *Hawke's Bay Herald*, 27 August 1869, p3 (doc A23, p214; doc F18, p113)

As I am not aware of the number of Defence Force to be located on the land, I cannot state what may be required to settle their claims. I would beg to suggest that should the Muhunga block be found insufficient, that arrangements be made with those tribes to whom the Patutahi block was promised, by which that land could be settled by European settlers.¹³⁰

(10) Crown negotiations with Ngati Porou and Ngati Kahungunu

During the period prior to and following the first sitting of the Poverty Bay Commission, evidence emerged of the Crown's efforts to fulfil its obligations to its kawanatanga forces. On 12 January 1869, Westrup wrote to McLean regarding Ngati Porou expectations of the lands to be ultimately retained by the Crown:

The Ngatiporou don't appear satisfied at the amount of land they will get as a settlement here. They don't understand only 60 of them getting land out of 200 or 300 – Instead of giving them 60 acres each – if the them [*sic*] a block say $60 \times 60 = 3600$ acres made the agreement that never *less* than 60 men were to be on the land at one time I think they would have agreed perfectly well to this – They now say – 'who is going to let only 60 men stay at Turanga. We want 150 – I should like to see the whole of the lands in this district in the hands of the Government. What is not to be got by confiscation should be produced – unless we can get a large European population on the spot I am afraid that frequent trouble will overtake us. I think Mr Richmond will try to do this'. [Emphasis in original.]¹³¹

Worgan's letter to McLean of 23 July 1869 indicated that Ngati Kahungunu understood they would receive 5000 acres at Turanga as payment for their military service. At a meeting in Wellington on 9 August 1869, McLean and representatives of Ngati Porou and Ngati Kahungunu reached the following agreement: 'the land given up in three different blocks as payment for the offences of the Hauhaus should be divided into three equal portions – first to the Ngati Porou, second to the Ngati Kahungunu, third to the Government.'¹³²

On 18 November 1869, McLean wrote to Ormond, referring to the agreement reached with Ngati Porou and to the importance of the Government's strict adherence to that agreement:

You will recollect that the course decided on at Wellington with the Ngatiporou and Ngati-kahungunu chiefs was, that the land made over to the Government by right of conquest should be divided into three equal portions. One part for the Ngatiporou, one for the Ngati-kahungunu, and one for the Government. This distribution was considered by the chiefs fair and equitable; and indeed it was the only basis upon which a good title could be secured, or the acts of the Poverty Bay Commission ratified. And it must strictly be adhered to.¹³³

130. Locke to Ormond, 25 October 1869, AJHR, 1870, A-16, p11 (doc F12, pp15–16; doc F18, pp147–148)

131. Westrup to McLean, 12 January 1869 (doc F33, vol6, pp01973–01974)

132. File note, McLean, 9 August 1869, MA62/7 (doc A1, p135; doc F18, p128) see also doc A23, p253.

133. McLean to Ormond, 18 November 1869, AJHR, 1870, A-16, p13

(11) *Contention over Te Muhunga*

Contention over the Crown retained blocks surfaced both at Te Muhunga and Patutahi as surveys began. By late 1869, fewer than four months after the purported agreement, Turanga Maori were already objecting to the Crown's retention of an area of more than 5000 acres of the Muhunga block. They claimed that the agreement had been for the Crown to take up to 5000 acres, with any area in excess of that to be returned. In his report of 25 October 1869, Locke had attached a claim made by Wi Pere for the land in the block in excess of 5000 acres. His claim stated:

The word of the runanga who gave up the piece of land (was) five thousand acres; should it be over, the balance was to be handed back, so as to make the even five thousand acres; should it be less it was to be made up to the five thousand acres. Now, it has exceeded the five thousand acres by three hundred and ninety. I then went to Mr Atkinson to give to me the three hundred and ninety acres and he did not consent; shortly before his word was to me 'he would not put hands on that piece'. I left it to his decision, and therefore I consented to let it pass the Court. Now (I look) to you to return me the three hundred and ninety acres, in that you are our parent at the present time.¹³⁴

In November 1869, Munro (the surveyor, not the commissioner) began the survey of the Muhunga block under armed protection organised by Major Westrup, then the commander of the district.¹³⁵ On 19 March 1870, the Muhunga survey party was withdrawn when Major Westrup could not guarantee its safety. However, the survey for the township of Ormond, on the Muhunga block, was completed by June 1870.¹³⁶

While the survey was being carried out, Wi Pere sought to have excluded from the block certain lands that he claimed – specifically, 'the orchard' at Waerenga a Hika.¹³⁷ This was a matter raised before the Clarke commission in 1882, but it is important to note the claim, however, at this point in our chronology. Preece and Graham, acting for Pere, wrote to Munro in 1869 confirming that the orchard had not meant to be included in the Muhunga block; its inclusion was, they said, an oversight. They detailed the boundaries of the orchard and suggested that the area be left 'an open question'.¹³⁸

Munro forwarded Preece and Graham's suggestion to Ormond (who was then Crown agent for the general government), telling him that the orchard had been included in Bousfield's survey, 'without consulting them (Natives)'.¹³⁹ Munro wrote:

134. Pere to McLean, 12 October 1869, AJHR, 1870, A-16, p12 (doc F18, p146)

135. Document F18, p149. While Maori complaints explain why the military escort was necessary, given that the five blocks which made up the 5395 Muhunga take had all already been surveyed. It is not clear, therefore why a survey of the external boundary was considered necessary at all. None the less, it was attempted.

136. Document F18, pp150–151

137. We deal with the question of 'the orchard' in detail below.

138. Preece and Graham to Munro, 23 December 1869, AGG-HB7/4 (doc F18, p149)

139. This claimant certainly means Bousfield's survey plan which was drawn from other surveys.

This I cannot vouch for, as some of them have, since I commenced the survey, raised objections, and claimed half the confiscated blocks as legally their land & had been passed through the Lands Court in their absence. This piece of land known as the Orchard I will leave over until I have your advice.¹⁴⁰

Further details of Pere's claims to part of the Muhunga block will be discussed below.

Even before the survey of Te Muhunga began, there was some uncertainty as to whether there was enough land to meet the requirements of the defence force settlers. Locke suggested that, if there was insufficient land, the Government should negotiate with Ngati Porou and Ngati Kahungunu to release the flat part of Patutahi for the settlers.¹⁴¹ In evidence before us, Crown historian Cecilia Edwards suggested that Cooper believed Biggs had made promises regarding entitlements for the Colonial Defence Force and military settlers for land at Te Muhunga.¹⁴²

Cooper later sought clarification from Judge Rogan regarding the issue of the boundaries of Te Muhunga. Although named as a single block, Te Muhunga was in fact made up of several discrete surveyed blocks (see map 11). On 2 June 1870, Rogan replied:

I have a distinct recollection of the circumstances relating to the cession of the three blocks of land to the Commission. It was agreed between Mr Graham agent for the Natives, and Mr Atkinson on the part of the Government that Te Muhunga lands 5000 acres should be one block. It was found subsequently by Mr Graham that the boundaries of this block as they stood overlapped a large block of land already surveyed and would cause considerable expense in resurvey – Mr Atkinson at Mr Graham's request agreed to the boundaries of Te Muhunga block as surveyed at present because it would remove the boundaries lower down the ranges, giving more flat land and rather more than the 5000 acres. I opposed this at first and was overruled by the arguments in favour of accommodating both the parties, subsequently all parties concerned went onto the ground and fixed the boundaries as they now exist. It appears to me as usual in cases of this kind that the Natives adhere to that part of the agreement suitable to themselves and repudiate the other conditions.¹⁴³

In July 1870, after the survey of Te Muhunga was completed, Panapa Waihopi and three others petitioned the Government regarding the return of land at Te Muhunga in excess of 5000 acres. The public petitions committee questioned Cooper on whether the block size was not to exceed 5000 acres, who stated that:

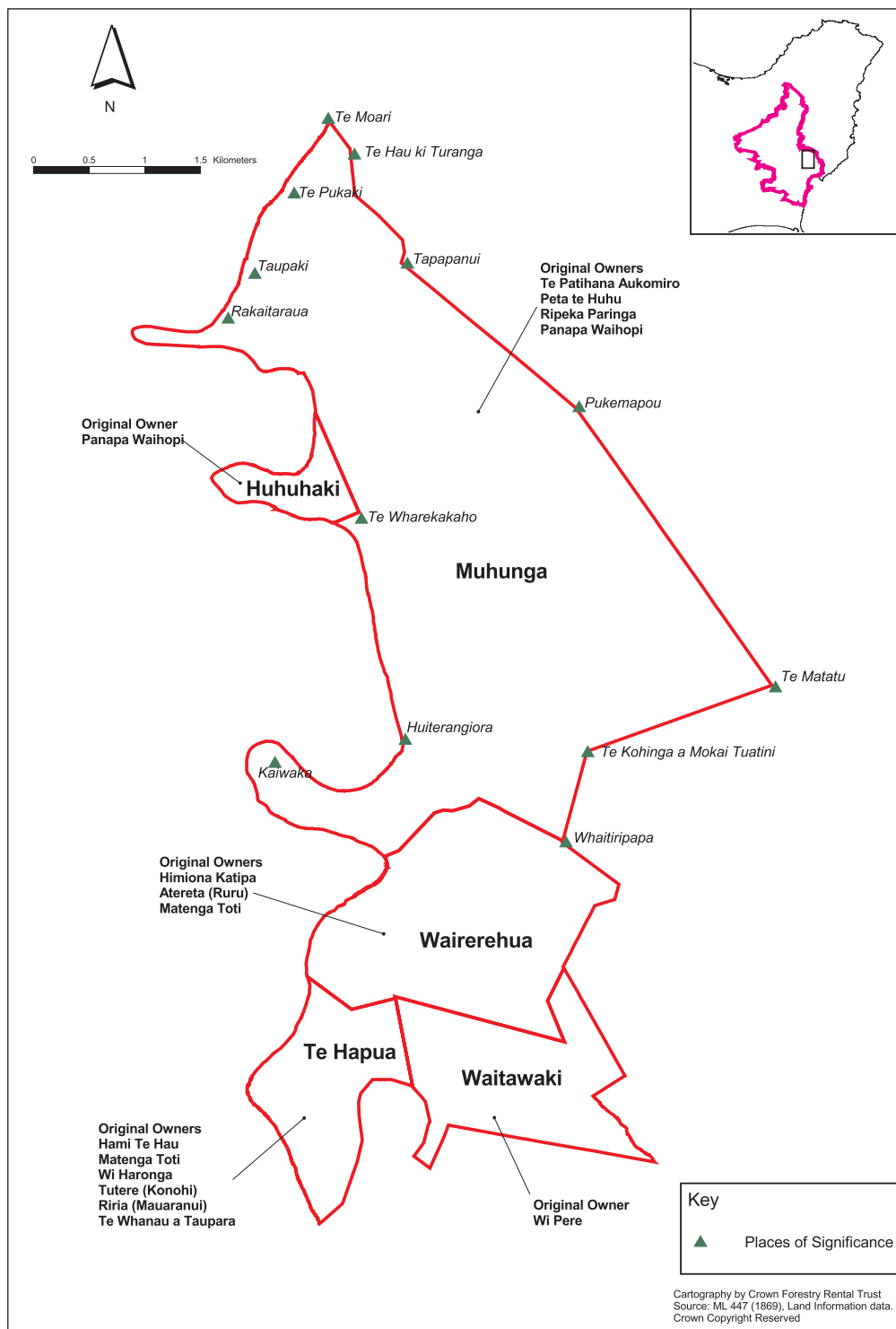
there are no documents in the Office connected with the cession of the 5000 Acres alluded to; that Mr Atkinson transacted business in a very irregular manner & that he had been dismissed from the Service since the present Ministry came into office.

140. Munro to Ormond, 14 January 1870, AGG-HB3/5 (doc F18, p149)

141. Locke to Ormond, 25 October 1869, AJHR, 1870, A-16, p11 (as cited in doc F18, pp147–148)

142. Document F18, p150

143. Rogan to Native under-secretary, 2 June 1870, BADW10512/46, Archives NZ, Auckland (doc F18, p151)



Map 11: The five blocks that later comprised the Te Muhunga block

I am directed by the [committee] to report that, that in the absence of documents connected with the cession of the Block of Land, they are unable to make any specific recommendation to the House; but I am also instructed to remark, that it appears to them highly objectionable that Land should be *ceded* to the Govt by Aboriginal Natives without a special Deed of Cession & that in the present case, the Minister for Native Affairs should at once institute enquiries as to the terms on which the Block was ceded, & either comply with the Prayer of the Petitioners, or prove to his own satisfaction that no such terms as those specified by the Petitioners ever were entered into. [Emphasis added.]¹⁴⁴

(12) Further Crown negotiations with Ngati Porou and Ngati Kahungunu

Crown discussions with Ngati Porou and Ngati Kahungunu regarding the land to be allotted to them for settlement also shed light on what the parties understood to be the size and location of the Crown blocks.

On 29 November 1872, a meeting took place between McLean, Ngati Porou, and Ngati Kahungunu. It was reported by the *Poverty Bay Herald* of 21 December 1872. This meeting appeared to reach a different outcome from when the same parties met three years earlier, on 9 August 1869. It will be recalled that the parties at the meeting of 1869 meeting agreed ‘the land given up in three different blocks as payment for the offences of the Hauhaus should be divided into three equal portions.’ At this later meeting, McLean stated:

It has always been decided that this land was to be divided into three distinct pieces; one-third to be retained by the Government, the other two-thirds to be given to the natives who remained faithful to the Queen. 5,000 acres of land have been appropriated by the Government at Te Muhunga for a military settlement; and now 10,000 acres at Patutahi, will be given to Ngatiporou.¹⁴⁵

Rapata Wahawaha apparently asked at the meeting that the Patutahi block be given to Ngati Porou so that they could lease the lands and apply those funds to educational purposes. Furthermore, Mokena Kohere was reported as claiming that he had earlier refused to allow Rapata Wahawaha to sign over half the land to Ngati Kahungunu ‘as they would only return it to the original Hauhau owners.’¹⁴⁶

Two days later, McLean met with Turanga tribes, and according to a newspaper report made the following statement:

they knew of the arrangements under which the lands were originally taken from Waiapu to Poverty Bay, and most of them afterwards restored: Patutahi and the adjacent land were

144. Petitions Committee minute book – Panapa Waihopi and three others – Turanga, 22 September 1870, Le 1/1870/13, Archives NZ (RDB, vol1, pp24–25). We note that, although there was a general deed of cession, the actual lands to be retained were not defined.

145. *Poverty Bay Herald*, 21 December 1872 (doc A10, p408)

146. *Ibid* (doc F18, p138)

to be divided into three parts, one for the Government, one for Ngatiporou, and one for Ngatikahungunu and yesterday he had fixed the extent for Ngatiporou at 10,000 acres out of 57,000 or 60,000 acres which belonged to the Government.¹⁴⁷

(13) *The Patutahi survey, 1873*

In June 1872, three years after the Crown–Maori agreement was recorded by the commission, Bousfield made an offer to Ormond to survey the Patutahi block. He estimated it at around 65,000 acres. On 25 November 1872, settler CJ Harrison complained to Cooper that he was unable to have a piece of land up the Waipaoa River that he wished to lease passed through the Native Land Court. After it had been surveyed, Harrison had been told that it was part of the lands to be retained by the Crown. Cooper noted on Harrison's letter:

I have constantly recommended . . . that the unsurveyed block of land which the Govt intend to retain out of the Poverty Bay cession of Dec 1868 – the Patutahi Block – should at once be surveyed and its boundaries marked on the ground in the clearest manner . . . It seems to me of the greatest importance that this should be done *before* a general amnesty is proclaimed, or else the right of the Govt to the Patutahi Block may I fear be in great jeopardy. I think the original dimensions of the Patutahi Block might very well be restricted in the back of South Western part of it, as the land in that part is of inferior value and is so broken as to be difficult of survey . . . As to the land referred to by Mr Harrison it is, as I believe quite outside of any land the Govt ever seriously intended to take, and it is a great injustice to the Maoris and intending settlers to keep it hung up so. [Emphasis in original.]¹⁴⁸

On 4 December 1872 McLean telegraphed Cooper in preparation for the survey of the Patutahi block. McLean expressed his understanding of the arrangements in these terms:

Captain Porter & Paora Parau & others accompany the surveyors to point out the boundaries – the Ngatiporou are to have 10,000 acres allotted to the Govt. Ngatikahungunu including Ihaka Whanga's people up to Hawke's Bay desire to give their portion of it to the Turanga people. That portion which was provided to them as well as to them in Tareha's place. Do not know that they are all disposed to do so. I intend to purchase out their rights if I can deal myself with the Turanga folks. No action is to be taken until all surveys are complete as to giving back any land to the Natives as proposed by Mr Johnson.¹⁴⁹

On 7 December 1872, Bousfield secured the contract to survey Patutahi, the 'confiscated block'. While we have not seen the terms of Bousfield's contract, resident magistrate Nesbitt noted in his correspondence to Locke of 6 January 1873 that it 'contemplates a block of 57,000 acres'.¹⁵⁰

147. *Poverty Bay Herald*, 7 December 1872 (doc A10, p 409)

148. Harrison to Cooper, 25 November 1872; note by Cooper, 26 November 1872, MA62/7 (doc A3, p103)

149. McLean to Cooper, 4 December 1872, MA62/7 (doc F18, p124)

150. Nesbitt to Locke, 6 January 1873, HB3/5 (doc F18, p125)

(14) Extending the Patutahi boundary

Bousfield was contracted to survey an area of approximately 57,000 acres, presumably within the boundaries identified at the 30 June 1869 commission hearing. However, when he calculated the area from the sketch maps, he found that the area was likely to be only 31,000 acres.¹⁵¹ He then sought instructions on what to do, given the likely shortfall.

On 4 January 1873, before Bousfield began work, Porter, who had been appointed by McLean to supervise the survey, informed Nesbitt of recent discussions with Turanga Maori. According to Porter, Te Aitanga a Mahaki and Rongowhakaata had sought a promise that ‘the side boundaries should not be extended in the event of the present block not containing 57000 acres as conjectured.’¹⁵² Porter declined to make that promise, but instead informed Nesbitt that he had: ‘obtained the consent of owners Te aitanga a Mahaki[,] Rongowhakaatu [sic] and Ngatikohatu to [an] extension of [the] back boundary to the Hangaroa river [and] thence to Whakarongongo. I have spoken to Mr. Bousfield upon the subject but he is not prepared to accede to any alteration. I therefore request information as to whether 57000 acres is to be surveyed or whether the Govt will accept whatever area is contained in the block marked on [the] map.’¹⁵³

Porter passed this information onto Bousfield, but Bousfield would not accept the change to his instructions proposed by Porter.¹⁵⁴ On 6 January 1873, Nesbitt tried to get Locke to clarify the matter, telling him that since Bousfield’s contract ‘contemplates a block of 57,000 acres’ the additional area would not be covered by the existing agreement:¹⁵⁵

Mr Bousfield is now ready to go on with the survey of the farther end of the block having completed the survey of this side. An immediate answer would therefore save the necessity of two surveys should the Government consider it advisable to take in the larger portion as suggested by the Natives. [ie, taking the back boundary to the Hangaroa river. The later [sic] fear that if the contemplated survey does not contain a sufficient quantity of land the Government will make up the deficiency by taking land on this side which has already been leased by them – hence their anxiety.¹⁵⁶

On 16 January 1873, after returning from pointing out the boundaries and learning that the area of Patutahi was, in fact, less than 57,000 acres, Porter reported to Locke that: ‘As I have all along anticipated it will fall short of 57,000 acres by some 20,000, I conjecture. The lines on the map was [sic] scaled off by Mr Atkinson’s orders without any previous idea or knowledge of boundaries or distances.’¹⁵⁷

151. Document H14(8), p20

152. Porter to Nesbitt, 4 January 1873, HB3/5 (doc A10, p412)

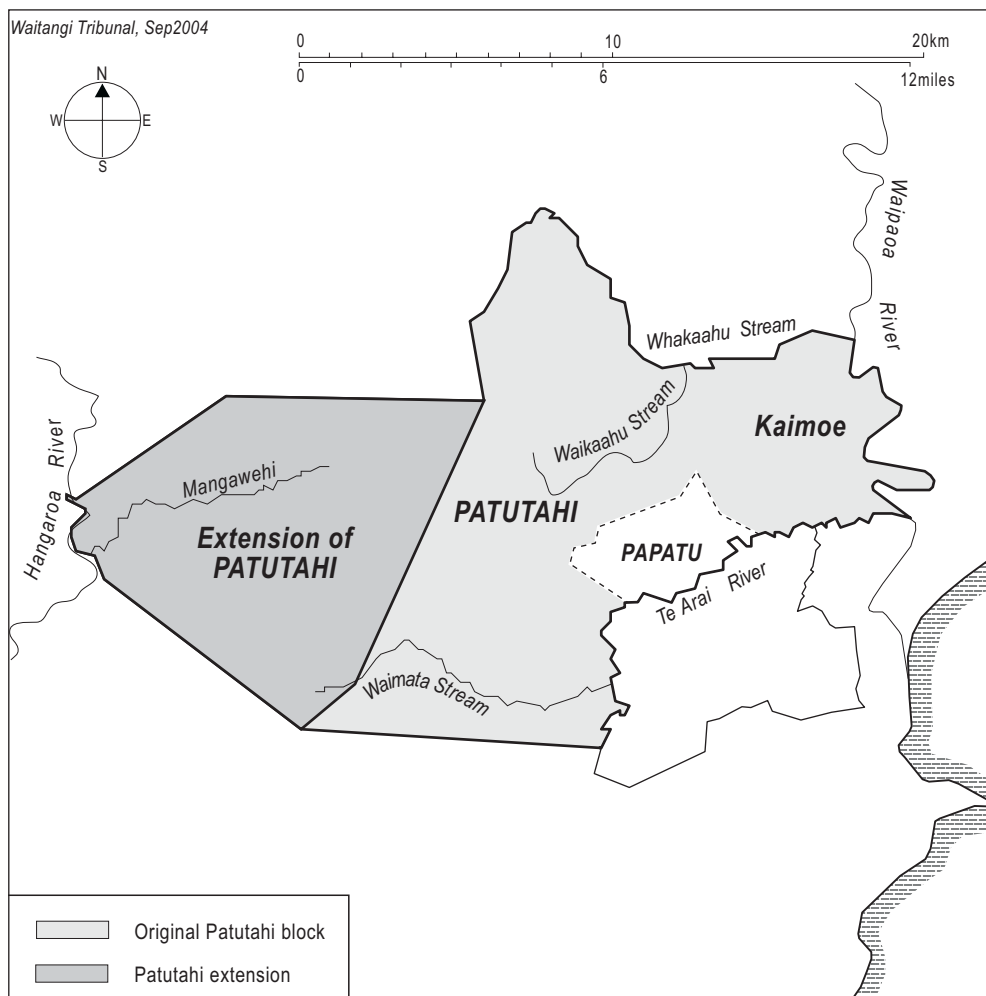
153. Ibid (doc A10, p413; doc F18, p125)

154. Ibid (doc F18, p125)

155. Nesbitt to Locke, 6 January 1873, HB3/5 (doc F18, p125)

156. Nesbitt memorandum, 6 January 1873, HB3/5/5/1873 (doc A10, p414; doc F18, p125)

157. Porter to Locke, 16 January 1873, MA11/1 (doc A10, p414; doc F18, p125)



Map 12: A representation of the survey of 1873, showing the extension to the Hangaroa River

On 18 February 1873, McLean, through Ormond and Nesbitt, instructed Bousfield to extend the boundaries of the survey to the Hangaroa River, 'so as to include the required quantity' and authorised the payment to Bousfield for his extra work (see map 12).¹⁵⁸ On 3 March 1873, Nesbitt informed Ormond that Bousfield had been instructed to extend the boundary as pointed out by Porter and that the extended survey was estimated at 30,000 acres.¹⁵⁹ Shortly after, Porter wrote to Locke stating that he had extended the boundaries to the River: 'If that is found insufficient to make up the 57,000 acres I am afraid I shall not be able to obtain more, as the Government has now received more than entitled to by original agreement.'¹⁶⁰

158. McLean to Ormond, 19 March 1873, HB3/5/5/1873 (doc F18, pp125–126)

159. Document A10, pp415–416

160. Porter to Locke, 11 March 1873, AD103/2, p50, Archives NZ (doc A10, p416)

In August 1873, Locke, in a crucial statement, explained the effect of the extension to McLean: 'I see by plan of Patutahi that the original ceded piece only contained 31,101 acres but that Porter has managed to get 19,445 acres added to [the] Block. There is a question whether, with so many European Maori lawyers here, that matter will not spring up again.'¹⁶¹

When Bousfield surveyed the Papatu block, which adjoined the line of the Patutahi survey on its eastern side, he found Papatu consisted of 6500 acres. This block, and its survey, is of significance in our chronology because the survey of Patutahi in 1873 in fact overlapped with Papatu by approximately 3000 acres.¹⁶² Because of this, Porter and Bousfield gave evidence in the 1877 *Papatu* case, which was brought in the Native Land Court by Hoani Ruru.¹⁶³ Captain Porter was instructed to go with the surveyor and point out the boundaries. He later gave evidence that he had a sketch map with him during the 1873 survey but no written description of the boundaries. Instead, he relied on Bousfield's instructions and Wi Pere's advice.¹⁶⁴

Porter told the court that he, Bousfield, and Pere followed the Whakaahu Stream and came to the hill where the disputed boundary begins. This area would have been familiar to Bousfield since he had surveyed the Papatu block for Eruera Harete (Edward Harris) 18 months earlier. Porter said: 'Mr Bousfield showed me a piece claimed by Pimia Aata and a discussion ensued whether we would have to include that piece in his survey. I told him to do so. I would like to ask Wi Pere if he was with me at that time.'¹⁶⁵ Pere told the court that he was with Captain Porter and that Captain Porter had made a mistake. Porter then continued:

When we arrived at that point I asked Wi Pere and Mr Bousfield where the boundary was. Wi Pere said he thought it was the creek and Mr Bousfield said he thought it ought to be the ridge. *On looking at the sketch map it was shown as the ridge.* Mr Bousfield said that he had laid out the creek as a boundary of Mr Harris' [Harete] land. I then decided to take the ridge as the boundary and if [a] dispute arose afterwards the Authorities would have to decide it. [Emphasis in original.]¹⁶⁶

Bousfield provided similar evidence. He recalled the survey going up the hill, despite telling Porter that the boundary for Papatu that he had surveyed 18 months prior went along the Whakaahu Stream.¹⁶⁷

161. Locke to McLean, [August] 1873, MS copy micro 0535-067, ATL (doc A10, p 417)

162. Document A23, p 296

163. It is significant to note here that the evidence from the *Papatu* case that relates to the Patutahi boundary applies only to a small portion of the entire Patutahi boundary.

164. Document A23, p 296

165. Gisborne Maori Land Court, minute book 3, 15 March 1877 (doc A10(a), vol 4, p 1883)

166. Wi Pere testimony, 15 March 1877, Gisborne Native Land Court minute book, no 3, p 405 (doc A23, p 299; doc C1, p 27)

167. Document A23, p 296

Pere also gave evidence on the issue. Under cross-examination from Harris, he stated: 'I did not point out the line marked on the map of Papatu to Captain Porter it is not the boundary of the ceded land.'¹⁶⁸

Pere explained more fully the extent of his participation in the Patutahi survey during the Clarke commission of 1882. 'I accompanied Captain Porter and Mr. Bousfield over the boundaries at Patutahi. [Map of actual survey of Patutahi Block produced.] I did not go round the boundaries, but through the block.'¹⁶⁹

McLean instructed Locke to 'try and arrange the discrepancies in the boundaries with the owners.'¹⁷⁰ Hoani Ruru then told the court that Locke had insisted that the Government boundary was correct, saying that Porter, Bousfield, and Pere had pointed out the boundaries. Ruru said: 'We then went on to the ground but could not convince Mr Locke of the justice of our demand. We all told him at that time that the boundary decided on was the stream, no one knew of any reason why it should be taken on the hill.'¹⁷¹

A F Hardy, a long-term local sheep-farmer, agreed with the claimants' evidence that the Whakaahu Stream was the correct boundary for Patutahi, and that Wyllie had admitted as much to him in 1874.¹⁷² He considered that Bousfield had erred in his placement of the Patutahi boundary in his 1869 sketch map, largely because it was only a sketch map, and because Bousfield had not been on the ground.¹⁷³ Following the survey of Patutahi, Turanga Maori began to express their concerns to the Government.

It is clear, then, that Pere accompanied Porter and Bousfield on the survey of Patutahi for at least part of the way. But Pere denied walking around the entire boundary.

(15) *Summary of contemporary Turanga Maori protests in respect of Crown retained lands*

A full discussion of Turanga Maori protests over the size and the boundaries of the Crown blocks ultimately retained by the Crown is contained in appendix III. However, it is appropriate here to summarise those protests, the evidence adduced, and the findings reached by the respective bodies that investigated them.

The surveying of the blocks led Turanga Maori to protest. The first protest was over the Patutahi–Papatu boundary, as noted above. For the first time in a Poverty Bay hearing, the judge and the assessor were unable to agree. As a result, Judge Rogan stated that he was unable to give judgment in the case, but he gave his own opinion that the claimants had not proved their case. He also, however, telegraphed Locke to the effect 'that a decision has been "given

168. Wi Pere, testimony, 15 March 1877, Gisborne Native Land Court minute book 3, p 404 (doc A23, p298; doc C1, p27)

169. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 31 October 1882, AJHR, 1884, sess 2, vol 2, G-4, p15

170. Gisborne Maori Land Court, minute book 3, 12 March 1877 (doc A23, p295)

171. Gisborne Maori Land Court, minute book 3, 14 March 1877, p372 (doc A23, p295)

172. Document A23, p297

173. Ibid

in favour of the government.”¹⁷⁴ (Later, he would say that this was by default, effectively.) The Government’s subsequent decision to sell the disputed Papatu land led to a number of Rongowhakaata petitions.¹⁷⁵

The survey of the Kauangaroa block also provoked protest. In 1878, Eru Takihi and others filed a petition claiming that, since they had remained ‘loyal’ and had not signed the deed of cession, the Kauangaroa block which they owned should not be included in the Patutahi lands retained by the Crown. This petition was rejected by the select committee which heard it, on the grounds that the land had been given up to the Crown in 1869 and all the parties understood this was the case. We note with interest that these claimants did not consider there was an inconsistency between professing loyalty, and refraining from signing the deed of cession. We also note that there were evidently Maori who had not been in ‘rebellion’ whose lands had been taken without their ‘agreement’.¹⁷⁶

In 1879, the native affairs select committee heard a petition claiming that more land than had been agreed had been taken at Te Muhunga. The committee rejected this petition.

(16) Commissions of inquiry

Two commissions of inquiry were established to investigate the growing discontent among Turanga Maori, over the retained lands.

(a) The Clarke commission: In 1882, the Clarke commission was set up to inquire into a number of land claims and petitions from Turanga. One of the petitions heard by the commission related to a claim to Tapatoho, or Tapatohotoho, by Eruera Harete and others. Tapatoho had been included in the Government survey of Patutahi. In the late 1860s, Tapatoho had been given to the Government for barracks to be built on the land but none were ever built. The petitioners, one of whom was Eruera Harete (who did not sign the deed of cession and did not believe he should be bound by it), sought the return of the land. Clarke declined to recommend this petition for favourable consideration; he considered that the individual members of the tribe were bound by the collective decision made to cede the land.

The commission also heard three claims presented by Wi Pere. The first claim was that more land had been taken at Te Muhunga than had been agreed (the 390 acres over 5000 – see section 6.4.1(11)). The second claim was Wi Pere’s personal claim to Waitawaki in Te Muhunga (the orchard block). The final claim was an appeal for land for Te Whanau a Kai who, Pere told the commission, had been rendered virtually landless by a combination of confiscation and the joint tenancy tenure of the land they had received back from the Poverty Bay Commission.

174. Rogan to Locke, 27 June 1877, MA11/2 (doc A23, p300)

175. Document A23, pp303–304

176. Native Affairs Committee hearing, AJHR, 1880, F-2

6.4.1(16)(b)

The evidence relating to Pere's personal claim to Waitawaki related to a gift of the land from the owners made to Pere when he was a child (see sec 6.4.1(11)). Pere's father, Thomas Halbert, had sold the land to Bishop Williams, who, according to Pere, had agreed to return it to Pere but had changed his mind after the fighting at Waerenga a Hika. On the basis of Atkinson's undertaking to return the land to Pere personally, Waitawaki was included in the Muhunga block. Clarke recommended that Pere be granted 91 acres, including an 11-acre portion of Waitawaki, named 'the orchard', with the remainder to be made up of bush reserve.

Clarke also recommended that 500 acres of 'fair average quality' land be provided to Te Whanau a Kai. Clarke reported that had Pere made a claim on the basis of repudiation of the 1869 agreement. 'I could not have entertained the question; but as he has thrown himself and hapus on the compassion of the government, I shall have a recommendation to make in their favour.'¹⁷⁷

(b) The Jones commission, 1920: In 1920, a native land claims commission was established, chaired by chief judge of the Native Land Court and under-secretary of the Native Department, Robert Jones. The Jones commission referred to some confusion on the part of the Poverty Bay Commission regarding the area to be retained by the Crown under the 1869 agreement. One example was the description of Patutahi as being land 'of very good quality'. The Jones commission accepted this as a description of Patutahi proper, but it 'could in no way apply to the greater proportion of the 57,000 acres.'¹⁷⁸

The Jones commission referred to Richmond's statement in Parliament in August 1869 that he had envisaged 'something like 20,000 acres' being retained by the Crown and no more than was necessary to fulfil promises to the defence force. The Jones commission explained the final retention by the Crown of three times the amount suggested by Richmond as follows:

The only explanation we can offer is that the Poverty Bay Commission, in error, adopted at some later date the outside tribal boundaries of the Rongowhakaata Tribe as showing the boundary of the land arranged to be given by that section of the people. This is the only way we can account for them taking nearly 51,000 acres from one tribe, and only 5,395 acres from another tribe which, according to records, contained an equal if not greater number of rebels, and owned a great deal more land than the first-named tribe.¹⁷⁹

177. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 3 November 1882, AJHR, 1884, G-4, sess 2, p12 (doc A23, p318; doc C1, p37)

178. 'Report No 4, Patutahi Block', AJHR, 1921-22, G-5, sess 2, vol2, pp16-17 (doc A10, p518; doc A23, pp328-329)

179. AJHR, 1921-22, sess 1, vol2, G-5, p17 (doc A10, p520; doc A23, p330). Te Aitanga a Mahaki received 400,000 acres not 185,000 acres, and Rongowhakaata had received 5000 acres not 4000 acres, plus 185,000 acres of back country to be shared with a Ngati Kahungunu hapu. These acreages were not returned to the iwi concerned but were processed through the land court and awarded to various individuals: doc A10, p520; doc A23, p330.

The Jones commission concluded that the Crown retained more than it should have. The commissioners also noted the absence of a comprehensive written record and the lack of Government action to confirm the agreement. They commented on the consistent view of Turanga Maori that 15,000 acres had been given up but found that a larger area had in fact been agreed. The commission concluded that the agreement had actually been for some 31,000 acres:

unless, indeed (which is unthinkable), the Government was knowingly departing from its solemn engagement and was proposing to take 35,000 acres for itself, and leave the other two parties [Ngati Porou and Ngati Kahangunu], who it had agreed should share equally with the Crown, not more than 10,000 acres each.¹⁸⁰

The commission's findings ultimately resulted in compensation being paid to Rongowhakaata for the land taken in excess of 31,000 acres.

6.4.2 The Crown's case

(1) *The size of the Crown's take*

The Crown argued that in 1869 an agreement was reached between Turanga Maori and the Crown for three blocks of 5000 acres of flat land and a larger additional area of Patutahi hill country.¹⁸¹

Since both parties could not be right, the Crown proposed two possible explanations as to why either the Crown or Turanga Maori were mistaken as to the area to be retained. The first explanation was that one of the groups, Maori or the Crown, misrepresented the agreement to the other group. But the Crown discounted deception by either party because that would have required a conspiracy on the part of leading Maori or a conspiracy by numerous officials across all levels of Government, and neither party behaved in a manner that was consistent with conspiracy.¹⁸²

The Crown favoured a second explanation; namely, that either Turanga Maori or the Crown (or both) later came to misunderstand the agreement due to the lack of an accurate record of it.¹⁸³ The Crown asserted that, while the subsequent Maori and Crown understandings appear irreconcilable now, 'at the time Maori and the Crown did reach an agreement.'¹⁸⁴ Since there was not an accurate record of this agreement, over time the Crown and Maori came to misunderstand the content of the agreement.

The Crown argued that, whether a finding on the actual content of the 1869 agreement could be made, the most accurate plotting of the boundary names given at the Poverty Bay

180. AJHR, 1921–22, G-5, p19 (doc C1, p57)

181. Document H14(8), pp 22–23

182. Ibid, p23

183. Ibid

184. Ibid

Commission, was the initial computation work by Bousfield.¹⁸⁵ That work has not survived, but the approximate area was 31,000 acres and, in 1873, the boundary was extended westward to encompass 50,746 acres.¹⁸⁶

The Crown argued that, on the basis of the boundary names given to the commission, the agreement for the retained lands was not for a particular acreage but rather a specific area within named boundary markers.¹⁸⁷ The Crown calculated that subtracting the 5000 acres of flat land from the 31,000 acres of Patutahi would leave approximately 26,000 acres of hill country. The Crown stated that it was likely that this 26,000 acres was the hill land to be retained by the Crown, in addition to the three blocks of 5000 acres of flat land.¹⁸⁸ Based on this assessment, the Crown argued that Maori were 'not incorrect that there were three 5,000 acre blocks to be retained but were not correct in stating that this was the full extent of the agreement. The hill country part of Patutahi was in addition to these areas.'¹⁸⁹

The Crown noted that, although the Poverty Bay Commission did not record the names of the boundaries of the area to be retained by the Crown, Judge Monro recorded that the agreement was 'assented to by natives present'.¹⁹⁰ The commission's minutes record that Graham reported to the commission that he was authorised to speak on behalf of Te Aitanga a Mahaki and Rongowhakaata and 'announced his acquiescence on their behalf with the terms stated by Mr Atkinson'.¹⁹¹ The Crown noted that, according to the minutes, those Maori present did not dispute the agreement reported to the commission.¹⁹²

Crown counsel referred to the map located by Parker, which was the original sketch map used at the commission hearing. This map, Parker argued, showed lines indicating the area of Patutahi to be retained by the Crown, in accordance with the agreement. These lines, two intersecting lines in the shape of an inverted 'v' and an irregular line that joined the two straight lines, covered an area that had not at that point been surveyed.¹⁹³ Crown counsel argued that the area bordered by these lines is obviously greater than 10,000 acres, which the claimants argued was the agreed area to be retained out of Patutahi and Te Arai.¹⁹⁴ This, counsel suggested, would have been plain to Maori viewing the map at the time.

The Crown argued that the evidence indicates that, from the time the agreement was presented to the Poverty Bay Commission, the Crown believed that there were '57,000 acres

185. Document H14(8), p 24

186. Ibid

187. Ibid

188. Ibid

189. Ibid

190. HAH Monro, 'Poverty Bay Notes,' ms366, box 1, folder 13, Auckland War Memorial Library, pp1-2 (doc F18, p103)

191. Poverty Bay Commission minutes, 30 June 1869, reel 3553, pp2-3 (doc F18, p102)

192. Document H14(8), p19; doc F19, p39

193. Document H14(8), pp19-20

194. Ibid, p20

within the lines on the sketch map and the boundaries read out to the commission for Patutahi.¹⁹⁵

On the basis of the contemporary evidence, the Crown took the view that the ‘safest’ position to take was that the boundary names read out to the commission for Patutahi–Kaimoe formed the agreed boundary of the area to be retained by the Crown.¹⁹⁶ The Crown admitted that it was possible the sketch lines were not on the sketch map on 30 June 1869, when Graham pointed out the boundaries to the commission. However, even if this were so, counsel argued, there was nothing to suggest that, once they had been drawn, they did not accurately reflect the agreement while it was still fresh in people’s minds.

(2) *Te Muhunga*

Crown counsel submitted that the agreement was based on the understanding that 5000 acres of Te Muhunga would be retained by the Crown to represent land held by ‘rebels’. When, after the survey, it was discovered that the block had an extra 395 acres, the parties came to a fresh agreement to vary the 1869 agreement rather than to simply excise the extra land. That is, the Crown would simply retain the Muhunga block at 5395 acres. In particular, counsel cited a letter written by Poverty Bay commissioner Rogan, on 2 June 1870. The boundaries of Te Muhunga block overlapped a large block already surveyed. Graham had asked that the boundaries of Te Muhunga be extended to include the previously surveyed block rather than be resurveyed, because of the considerable cost of resurveying. This would also give the Crown ‘more flat land and rather more than the 5000 acres’.¹⁹⁷ Rogan stated that he initially opposed this arrangement, but that he was overruled by both parties. Subsequently, the parties went over the ground themselves and fixed the boundaries.¹⁹⁸

In response to a question relating to Maori protest over the taking of excess land at Te Muhunga, counsel acknowledged that the Government did not respond to Wi Pere’s first complaint in 1869 (see sec 6.4.1(10)). The Government referred to the Poverty Bay Commission minutes when it assessed complaints, and those minutes stated that the Muhunga block ‘should contain 5,000 acres more or less subject to the subsequent determination of boundaries on Survey’.¹⁹⁹ However, the Clarke commission found that the words ‘more or less’ had been added after the initial sitting of the commission and that Commissioner Monro’s own notes referred to the fact that Te Muhunga was ‘to contain 5,000 acres’.²⁰⁰

While counsel noted that Pere and other Maori had consistently stated that the block was to be only 5000 acres, they also noted that Pere and the other complainants never referred to

195. Ibid, p21

196. Ibid

197. Rogan to under-secretary, Native Office, 2 June 1870, BADW10512/46, Archives NZ, Auckland (doc G10, p19)

198. Document F12, pp18–19

199. Poverty Bay Commission minutes, 30 June 1869, reel 3553, pp2–3 (doc F18, p102)

200. HAH Monro, Poverty Bay Notes, MS366, box 1, folder 13, Auckland War Memorial Library, pp1–2 (doc F18, p104)

Commissioner Rogan's 1870 record of the agreement to vary the 1869 agreement and include the excess acres in the ceded block.

6.4.3 The claimants' case

(1) *The size of the Crown's take*

The claimants argued that the Maori understanding was that the Crown would retain three 5000-acre blocks and that Turanga Maori were consistent in this view at the time.²⁰¹ Counsel for Rongowhakaata argued that this Maori understanding was confirmed by various Crown and independent sources. On 9 November 1868, shortly before the Te Kooti-led attacks on Matawhero, Biggs had told McLean that he expected to be offered 10,000 to 15,000 acres of flat lands by loyal Turanga Maori, and recommended that this offer be accepted.²⁰² Graham, referred to three blocks when he described the agreement reached at the hearing, and he also described the Patutahi land as being of 'very good quality'. Counsel referred to Crown witness Edwards' acknowledgement that this could not have been a reference to the whole block:

Counsel: So, the statement that 'the land is of very good quality' it can hardly refer to the 57,000 acres, can it?

Edwards: If we're saying that the land was stated to be of very good quality means is only a reference to flat land, no there certainly was nothing like 57,000 acres flat land, as Locke certainly points that out.

Counsel: Yes, but if the area was in fact 5,000 acres of Patutahi proper, the flats, that would make more sense wouldn't it?

Edwards: In terms of that first part of the sentence, yeah. If he had . . . just simply said some of the land is flat land, it would have helped us a lot more, now, actually understanding the nature of the agreement as represented on the day to the Commission.²⁰³

We were referred to McLean's November 1872 offer to Ngati Porou to the effect that there would be three equal blocks for Crown, Ngati Porou and Ngati Kahungunu.²⁰⁴ In context, counsel argued, this could have been a reference only to three 5000-acre blocks. It could not be interpreted as referring to the 5000 acre Muhunga block plus 50,000 or 60,000 acres of an expanded Patutahi.

Counsel argued that the Crown's hill country theory was seriously challenged by two further factors.²⁰⁵ Counsel referred to Bousfield's initial computation of the land within the agreed boundaries, which totalled only 31,101 acres. Accordingly, counsel argued that, even

201. Document H3, p56

202. Document F18, p77

203. Transcript 4.17, p95

204. Document H3, p57

205. Ibid, p58

based on the Crown's understanding of the 1869 agreement, Turanga Maori could not have in fact agreed to the 50,000 acres of Patutahi.²⁰⁶

In addition, counsel identified three primary factors for consideration. First, the majority of the sources confirm that Turanga Maori agreed to the Crown retaining three blocks of 5000 acres each. Secondly, the hill country theory was inconsistent with eyewitness evidence, the investigation by the Jones commission, and Porter's acknowledgement that the Government had taken more land than it had been entitled to. Thirdly, counsel argued that, even if the boundaries relied upon by the Crown were discussed in the Poverty Bay Commission, the evidence indicated that those boundaries were not marked on the map before the commission. Nor does the evidence show that Turanga Maori even saw, let alone agreed to, that map. In addition, contemporaneous statements by Wi Pere in relation to the Muhunga block indicated that Turanga Maori believed that the Crown would retain a maximum of only 5000 acres for each of the three blocks.²⁰⁷

Claimant counsel also addressed the evidence of the cession retention maps introduced by Crown witness Brent Parker. Counsel agreed that the map presented by Parker (map B), the sketch map, was the actual map that was presented to the Poverty Bay Commission in 1869 and that it was amended from time to time after presentation in 1869. Crucially, the acreage that finally appeared on that map (50,746) was inserted only after Bousfield's survey was completed in 1873 – four years later. According to counsel, this subsequent alteration was roundly criticised by the Clarke commission in 1882. Counsel argued that, on that basis, it was not certain what detail was on the map when it was before the Poverty Bay Commission, or if Turanga Maori were even aware of the map prior to the sitting of the Poverty Bay Commission.²⁰⁸

The claimants argued that, since Bousfield was instructed by Crown officials, his survey 'merely reflects at best the Crown understanding of the 1869 Agreement.'²⁰⁹

(2) *Muhunga*

As well as hearing evidence from the claimants as a group, the Tribunal heard evidence from a specific claimant group: Joseph Anaru Hetekia Te Kani Pere on behalf of Te Whanau a Wi Pere and others. While this claim reflects the specific concerns of the Wi Pere whanau, it also relates to the whole question of the retained lands. For this reason, we will consider their evidence as part of this section.

Claimant counsel submitted three key arguments regarding the Muhunga block, which, it will be remembered, consisted of five separately surveyed blocks. First, counsel argued that the Crown included the Waitawaki block in the ceded lands, and failed to later return the

206. Ibid

207. Ibid, p 60

208. Document H3, p 59

209. Ibid

block to the owner, Wi Pere, despite an understanding that that would be the case. As we have noted above, Wi Pere allowed the 444-acre Waitawaki block to remain in the land to be retained by the Crown, on the understanding that it would later be Crown granted to him. We were referred to Henry Clarke's report of 3 November 1882, in which Clarke noted Donald McLean's promise to return the land to Pere as a Crown grant.²¹⁰ This, counsel argued, did not occur. Second, counsel argued that the Muhunga block retained by the Crown exceeded 5000 acres, the amount agreed to by Turanga Maori by some 395 acres. As a result, the excess acres should have been returned to the owners. Counsel argued this only partially occurred. The Crown did recognise that excess lands had been taken, and did return 91 acres to Wi Pere in recognition of this, but the remaining lands were not returned.²¹¹ Both of these actions, the taking of Waitawaki and the taking of lands in excess of 5000 acres, counsel argued, constituted a Treaty breach.

6.4.4 Tribunal finding and analysis

We begin by returning to the key conclusions that we reached earlier in this chapter and in this report. We have found that Turanga Maori were not in rebellion at Waerenga a Hika and, on that basis, we do not consider any confiscation or cession under duress to be Treaty consistent. In this chapter we found that the deed of cession was forced upon Turanga Maori. The threats by the Crown to remove military protection at a time of clear and present danger, given the murder by the Whakarau of military settlers and their families and of Turanga chiefs, vitiated the consent of the signatories.

We turn now to consider the issue of the lands retained by the Crown under this forced agreement. We will begin by considering the Crown's purpose in retaining land under the deed. We then consider the evidence, such as it is, of the events of 29 and 30 June 1869. We will also consider the events leading up to, and including, the survey of the Patutahi block in 1873. Finally, we offer our conclusions as to whether an agreement between Maori and the Crown was reached on 29 June 1869, and if it was, what its terms were. As a postscript, we will also briefly address the question of the 1950 Rongowhakaata–Whanau a Kai compensation settlement.

(1) *The retained lands: the Crown's objective*

There is ample evidence that the Crown's primary purpose in retaining certain lands within the ceded block was to provide settlement and compensation lands for colonial and kawana-tanga forces. In the same way, the primary purpose of those Maori who executed the deed of cession was to secure the district from external threat (albeit, according to the claimants, that a part of the external threat was Ngati Porou itself). On 10 February 1869, four months prior

210. Document H3, p9

211. Document H6, p11

to the presentation of the agreement to the Poverty Bay Commission, Richmond, then Native Minister, wrote to the Governor in the clearest terms. Though this correspondence has been referred to above, it bears repeating:

the chief motive of the ceders was to enable the Government to afford them some protection against the rebel tribes by allotting land to a body of men known as the Hawke's Bay Defence force, who had had a promise for years past of sections, and a hope held out that they would be at Turanga. Blocks will be at once set apart for them if his Excellency issues the attached notification and also for a small body of Ngati Porou who are anxious to emigrate to Turanga and who will bring the weight of their tribal connection to the support for the place. The settlement of both these bodies of men is very earnestly desired by the European colonists of the place . . . With promptitude in this work I think the irritating land questions of the East Coast may be set at rest for ever.²¹²

Richmond's instructions to Atkinson of 13 February 1869 provide a further indication of the purpose of the cession for which Atkinson was to negotiate. Richmond told Atkinson that the Government was seeking from Turanga Maori 'the right to occupy so much land as is required for fulfilling the engagements of Government with the Defence Force, and the Ngatiporou'.²¹³

On 24 August 1869, nearly two months after the date of the agreement, Richmond reiterated the point in the House of Representatives.

Those reserves represented all that the Government sought to obtain, and they amounted to something like 20,000 acres in all. The instructions to the officers of the Government were stringent and very clear, that no attempt whatever should be made to secure any footing in the district beyond what was absolutely necessary to enable the Government to perform its promises to the defence force; and with that exception, he believed the land had been left for the natives.²¹⁴

These views were completely in accord with the Maori perspective on what the Crown sought to achieve. Wi Pere later said in the 1877 Papatu inquiry: 'Mr Atkinson stated that he wanted 3 blocks for Military stations, 5,000 at Muhunga, 5,000 at Patutahi and 5,000 at Arai. If these blocks were not ceded he wanted to withdraw the troops and we would have to protect ourselves.'²¹⁵

In the Jones commission of 1920, Captain Wiremu Tutepuaki Pitt, spokesperson for the Maori side, argued with considerable authority that security was the focus for Turanga Maori and the Crown:

212. Richmond, memorandum to Governor, 10 February 1869, MA62/8 (doc F18, p91; doc A1, p119)

213. Richmond to Atkinson, 13 February 1869, MA62/8 (doc F18, p100)

214. 24 August 1869, NZPD, 1869, p681

215. Evidence of Wi Pere, 14 March 1877, Papatu minutes, MA11/2 (doc F18, p115)

The Government's desire for land was evidently with an eye to strategical military positions because the land ceded commanded all egress and ingress from and to Poverty Bay, except on the side occupied by friendly Natives. Te Muhunga commanded the north west. Patutahi and Te Arai commanded south west, south and south east. Probably they were mentioned to the Natives by the Crown Agents. The arrangement arrived at was that 15,000 acres should be ceded to the Crown. 5000 of Te Muhunga, 5000 of Patutahi, and 5000 of Te Arai. By ceding the three Blocks all the people in the district would contribute.²¹⁶

Apart from the purpose of military settlement, and therefore strategic location, an ancillary Crown purpose was to ensure that the ultimate recipients of the retained lands shared the spoils equally. McLean was later to say that, without scrupulous adherence to equal division, the agreement would unravel:

You will recollect that the course decided on at Wellington with the Ngati Porou and Ngati Kahungunu chiefs was, that the land made over to the Government by right of conquest should be divided into three equal portions. One part for the Ngatiporou, one for the Ngatikahungunu, and one for the Government. This distribution was considered by the chiefs fair and equitable; and indeed it was the only basis upon which a good title could be secured, or the acts of the Poverty Bay Commission ratified. And it must be strictly adhered to.²¹⁷

Thus, according to McLean, the military settlers, Ngati Porou and Ngati Kahungunu were to receive the land in three equal blocks.

The original plan was that Muhunga block would be for the military settlers, with Te Arai and Patutahi blocks destined for Ngati Kahungunu and Ngati Porou. That subsequently changed with the withdrawal of Ngati Kahungunu and the decision to buy out Ngati Porou, but the change is not material to the question of original motive for the agreement that we are addressing here.

During the course of the negotiations, an agreement was clearly reached that Te Muhunga should comprise 5000 acres for the military settlers. There is a reasonable argument that, if 5000 acres were to be set aside for military settlers, then two further blocks of the same size must at the outset have been intended for Ngati Kahungunu and Ngati Porou. Interestingly, this calculation is generally in accord with the figure originally given by Captain Biggs of up to 15,000 acres in the days prior to his death at Matawhero. It is also in the vicinity of Richmond's assessment in Parliament of 20,000 acres at the very most.

At this stage in our analysis, then, we are able to conclude two things. First, that the original purpose of the lands to be retained was both for military settlement and as compensation for Ngati Porou and Ngati Kahungunu. This suggests three blocks. The clear indication

216. 1920 commission minutes, MA1, 5/13/189 (doc C1, p 48)

217. See doc A16, p13

from McLean and others that the spoils ought to be shared equally suggests that the original intention must have been three blocks of equal size and quality. All of this is supported by contemporary references to the three strategic access ways onto the Poverty Bay flats from the interior. Secondly, when the subsequently agreed size of Te Muhunga is added to the mix, we conclude that, in order to have been consistent with the purpose of the retained lands as articulated by Crown officials, what was intended to be retained was likely to have been three blocks of 5000 acres each. That is not to say that the intention may not have changed during the course of negotiations, but at least it is a useful starting point.

(2) *Towards an agreement on the Crown retained lands: the events of 29 and 30 June 1869*

On 29 June, the first day of its hearings, the Poverty Bay Commission was adjourned at the request of both Crown agent Atkinson and Maori agent Graham because the parties were close to agreeing on the identification of the land to be retained by the Crown.

On the same day, as we have seen, Leonard Williams recorded a conversation he had with Atkinson. He said Atkinson understood that the agreement involved three 5000-acre blocks and 40,000 acres of back country. Westrup also wrote to McLean that same day recording his perception of the agreement; he thought that the agreement amounted to 8000 acres of flat land plus 40,000 acres of hill country.

Either on 29 June or at some date earlier, Graham met with Turanga Maori at Te Poho o Rawiri Marae at the foot of Titirangi Hill.²¹⁸ It is clear that both Graham and Atkinson were present at the meeting. Wi Pere indicated that Atkinson issued an ultimatum:

if the natives did not agree to give to the Government 15,000 acres of land, that they would withdraw the military and leave the Natives to the mercy of the hauhaus.

These very words were told to the Maoris by the interpreter. Mr Wyllie was the interpreter.

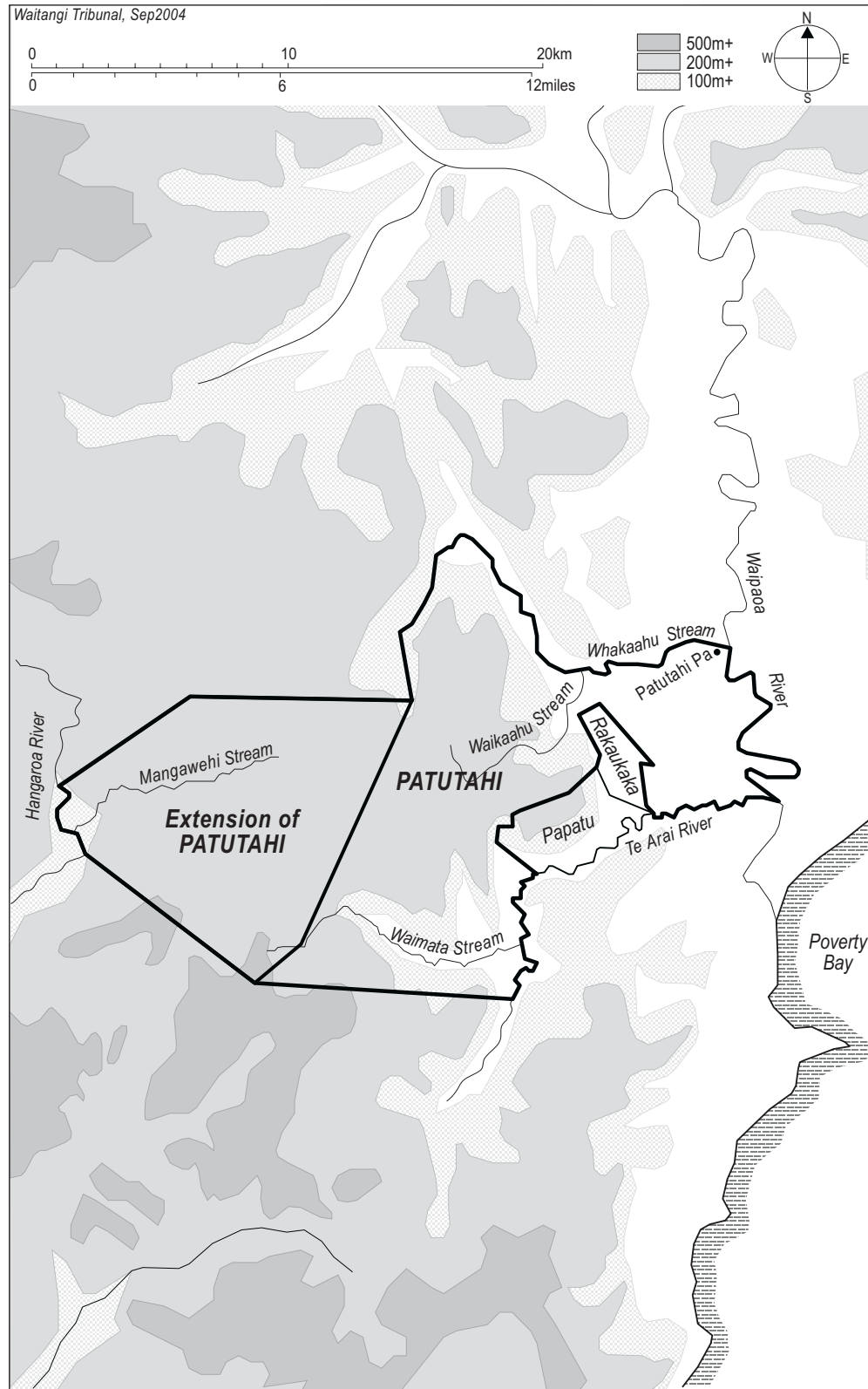
5,000 acres were to be given at Te Muhunga, 5,000 at Patutahi and 5,000 at Te Arai. It was on account of Mr Atkinson threatening to withdraw the soldiers that the Maoris agreed to his proposal lest the Hauhaus should come down and kill them.²¹⁹

An agreement was finally reached, or so the parties separately thought. On 30 June, Graham described the basic terms of the agreement to the Poverty Bay Commission on behalf of Te Aitanga a Mahaki and Rongowhakaata. The terms were recorded officially by (presumably) the clerk of the commission in the commission's minute book.

Te Muhunga, as we have noted, was recorded as containing '5,000 acres more or less subject to the subsequent determination of boundaries on survey'. The commission recorded that 'the land was stated to be of first class quality, and was suited by its situation for a military settlement'. From that, we are able to deduce that the actual boundaries of the land had not been settled. What counted with respect to the Muhunga block, as far as the Crown was

²¹⁸. Document F18, p117

²¹⁹. Le 1 1879/3, petition no 108, box 134 (doc F18, p117)



Map 14: A representation of the survey of 1873, showing the extension to the Hangaroa River and its topography

concerned, was acreage rather than boundaries. This must have been because this was the block to be set aside for Pakeha military settlers; the Crown was clearly anxious to ensure that there was sufficient first class land to suit that purpose.

Patutahi, as we have seen, was described as 'situated on the west bank of the Waipaoa River'. The commission noted the block had yet to be surveyed but that the boundaries had been agreed upon, 'and were here stated by Mr Graham – and pointed out upon the map produced'. However, the acreage was left blank and filled in later. The land was 'of very good quality and in a position in the centre of the bay commanding all the main lines of access'.

On the face of it, the description appears to be of land on, or substantially on, the Poverty Bay flats. We do not consider that a block which was 90 per cent hill country and containing 50,000 or 60,000 acres would have been described by the commission simply as being 'on the west bank of the Waipaoa River' – the block would have been too big for that description to be accurate (see map 14). Rather, the Waipaoa River would have been described as the eastern boundary of the block. Similarly, a block that was 90 per cent hill country would not be described as 'of very good quality'. Rather, the description would have referred to approximately 5000 acres of very good quality land, with a much larger portion of hill country. If the land had been described only as 'very good quality', as recorded in the commission minute book, and if it had not included an estimate of acreage, we would have concluded that the Patutahi block was restricted to land on the flats; that is around 5000 acres. At the end of the commission's description, however, is the following sentence: 'The acreage is estimated at fifty seven thousand (57,000) acres more or less.' The 'more or less' is inserted above the estimated acreage.

Te Arai was estimated in the commission's minute book at about 735 acres more or less, and was situated 'to command the sole other line of access into the District'. As we shall see, the only block surveyed in or around the Te Arai River is a block of 735 acres marked on Bousfield's 1873 survey. It is very likely that this is what was known as the Arai block, although Locke later advised that its proper name was Tapatohotoho.

The geographical location of this block was described by Graham. He described it as 'adjoining the Patutahi block on the western side'. But it is not clear whether this description refers to the western side of the Patutahi block or the Arai block.

The inconsistency between the description of Patutahi and its estimated acreage is not present in the separate note of the proceedings kept by Judge Monro. He recorded:

Mr Graham stated that he on behalf of his clients would give up all claims over three blocks – Te Muhunga, Patutahi and Te Arai – Te Muhunga to contain 5,000 acres – Patutahi unsurveyed (boundaries named).

Reserve of 10 acres asked for at Patutahi asked for as a public reserve (burial) by T Ruatapu. No 3 block Te Arai [?] to Arai rivers (boundaries given.)²²⁰

220. HAH Monro, Poverty Bay Notes, MS366, box 1, folder 3, Auckland War Memorial Library, pp1–2 (doc F18, p104)

6.4.4(3)

The claimants argued, and the Crown accepted, that the acreages for the Patutahi and Te Arai blocks were inserted not on 30 June 1869, when the commission heard W A Graham's explanation, but sometime after that date. That is clearly correct. If the estimated acreages had been given at the time, they would have been recorded by the judge in his own notes. They were not. Mr Parker for the Crown hypothesised that the acreage figure was added sometime in the second half of 1869. We think he is correct in that regard.

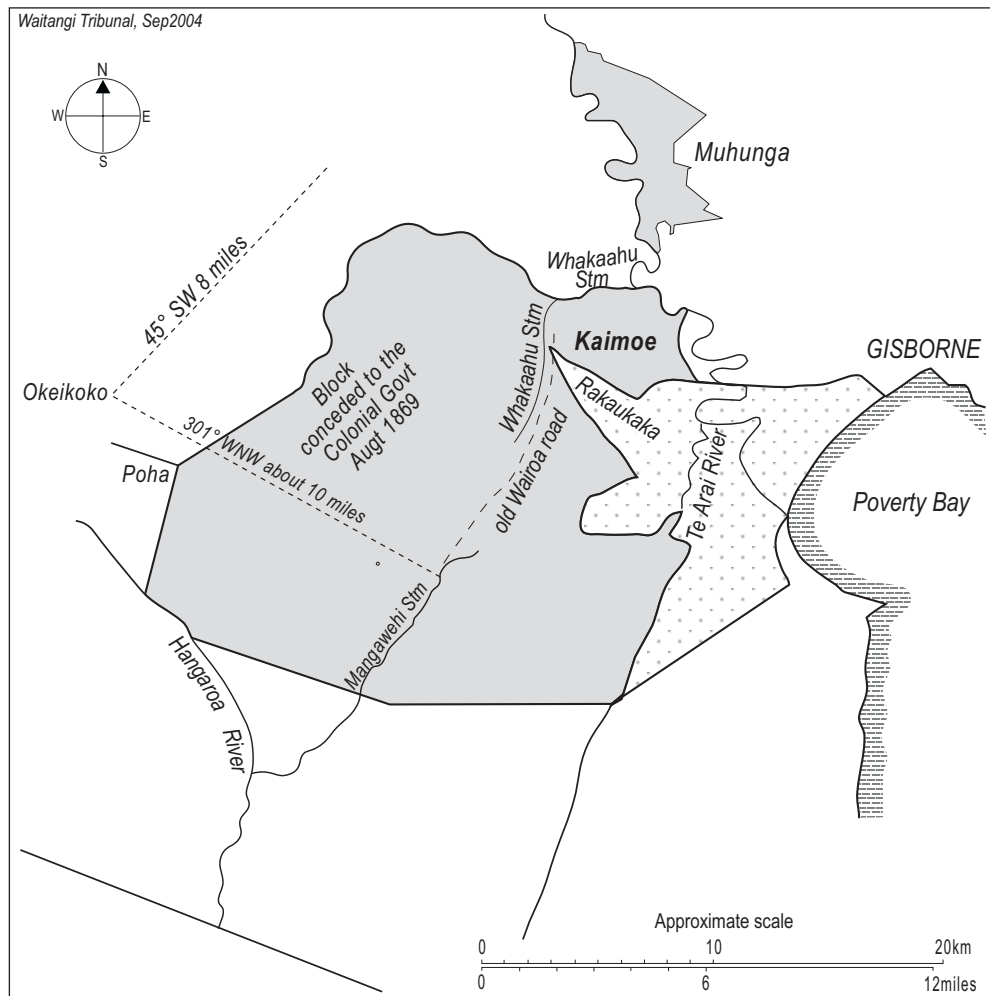
Thus far, we have descriptions given before the commission on the day which appear consistent with the Patutahi and Te Muhunga blocks being completely or substantially on the flats; acreages for Patutahi and Te Arai which were added later; and in so far as Patutahi is concerned, an acreage added later which is consistent with the block being substantially hill country, with about 8 per cent on the flats.

The commission minutes make it clear that the boundaries for Te Arai and Patutahi were described by Graham, but not officially recorded by the commission, nor by Judge Monro in his separate note. We have found this puzzling. The boundaries of the blocks would have been of enormous importance to all sides. Naming the boundaries was the orthodox method by which areas of land were delineated by tradition. The Jones commission in 1920 confirmed that this would be particularly so for the valuable flat country. Maps were still novel to traditional thought, and there had been few made in Turanga. It would have been practice in the Native Land Court to have carefully recorded the boundaries in the minute book, whether or not a plan existed of the block. Both commissioners were land court judges and well used to this practice. Yet this was not done in either the official minute or the judge's notes. It may simply have been that the commission did not wish to dwell too long on the issue in open court in front of a large Maori audience because of its potential to arouse controversy, and for fear that a careful and painstaking recording of the boundary may have provoked dissent from affected right-holders present in court. It may be, alternatively, that the description provided was an interim one only and that it needed to be confirmed by some other means – perhaps by a survey. But it is entirely unclear why a title court should not have recorded Graham's description.

(3) *The significance of the sketch map*

That brings us to the sketch map produced to the court by Graham at the Poverty Bay Commission hearing. Mr Parker argued persuasively before us that the map assumed by the claimant historians to be the sketch map produced at the commission was in fact a copy.²²¹ We agree that the map produced before the commission was in fact sketch map ML6254/1 and ML6254/2, which shows slightly different detail to that focussed on by the claimants.

221. The map referred to by Mr Parker as map A – we refer to it by the notation on the reverse side of the map, NO79/5590.



Map 15: A representation of the 1869 sketch map

We have included a coloured photocopy of the sketch map (see map 10), but because of the size of this reproduction, much of the detail is lost.²²² For this reason, we have produced diagrammatic representations, both of what the Crown has argued was on the map presented by Graham to the Poverty Bay Commission and of what this Tribunal believes was recorded on the map.

It was important to the Crown's case before us that the boundary of the Patutahi block was drafted onto the sketch map that was presented in court by Graham on 30 June 1869 (see map 15). The Crown argued that, while the acreages were not recorded until later, and while the boundary description was not recorded, the boundaries were clearly marked on the plan, were pointed out by Graham to the commission and those present, and were assented to by

222. We note that a copy of the two-sheet sketch map can be viewed at the Waitangi Tribunal's offices, level 2, Caltex Tower, 141 The Terrace, Wellington.

6.4.4(3)

Maori leaders following questioning by the commission. If the Crown was right about this, then the lack of a record of the oral boundary description would clearly be less problematic. We would still have an enduring record of the boundaries described in court and before a large Maori audience.

After considering the evidence, we cannot agree with the Crown's contention. We consider that the map presented before the commission contained place names, topographical information, and details of some of the blocks surveyed by Preece in 1867. These are marked in faded red, but Te Muhunga (as described in 1869), Te Arai, and Kaimoe–Patutahi were not on the map. Our reasons are as follows. First, it is clear that a 5000-acre Te Muhunga block, as set out in reddish brown tint on the 1869 sketch map, could not have been on the map on the day. It is true that an earlier sketch map, made in 1868, identified a smaller block also called Te Muhunga.²²³ (As we have noted, Te Muhunga was a composite block, made up of a number of smaller blocks.) However, the acreage of Te Muhunga, as identified in 1868, was 3518 acres. While the composition of a 3518-acre Te Muhunga block may have been known, the composition of the 5000-acre Te Muhunga block as described in 1869 could not have been.

All that was known about Te Muhunga at this latter point was its acreage. The court's own description indicates that the final boundaries would not be settled until a survey accurately identified how many of the smaller constituent blocks (Wairerehua, Waitawaki, Te Hapua) would need to be consolidated into the overall 'Muhunga' to reach the 5000-acre target. Nor do we think that any indication of the Patutahi or Te Arai blocks was on the map. First, it is to be recalled that agreement on the area to be taken had only been reached the day before. It would have been very difficult for Graham and Bousfield to have plotted the boundary line over night, particularly since Graham had a full slate of cases the next day anyway.²²⁴

Secondly, and more importantly, if the commission's own minutes are read carefully, they say not that the boundaries were drawn onto the map, but that, in the case of Te Arai and Patutahi, the boundaries were in each case 'pointed out' by Graham. If they had actually been recorded on the plan we think it likely that a different form of words would have been used. We would have expected words such as 'and sketch plan produced' or 'sketch plan showing boundaries produced', or even 'sketch plan produced', leaving the presence of boundary lines to necessary implication. These phrases are standard courtroom jargon used to explain that a key exhibit has been produced and that it contained all the relevant information to the matter before the court. Such phrases were commonly used in the Native Land Court. Instead, the boundary was simply 'pointed out'. We consider this choice of words to have been intended. Hape Kiniha, who was there on the day, said: 'There was a map produced of the whole district. I do not know if the boundaries of the ceded land were marked in that map.'²²⁵

223. This is the map titled 'Reduced Copy of Plan and Surveys in the Poverty Bay District in the County of Stafford', made by Williams and Graham, and discussed at section 6.4.1(1).

224. The fact that the 1869 sketch map has faded red markings under the reddish brown tint makes us wonder if in fact they simply reused an old map because of the time constraints.

225. Evidence of Hape Kiniha, 14 March 1877, MA11/2 (doc F18, p116)

Thirdly, it is clear from the sketch map that the tinted ‘ceded blocks’ (the Crown retained lands) have been added in later. Their reddish brown tint covers up parts of the earlier land blocks that Preece surveyed during 1867 and 1868. (In some cases, the name of the original block is only half covered.²²⁶)

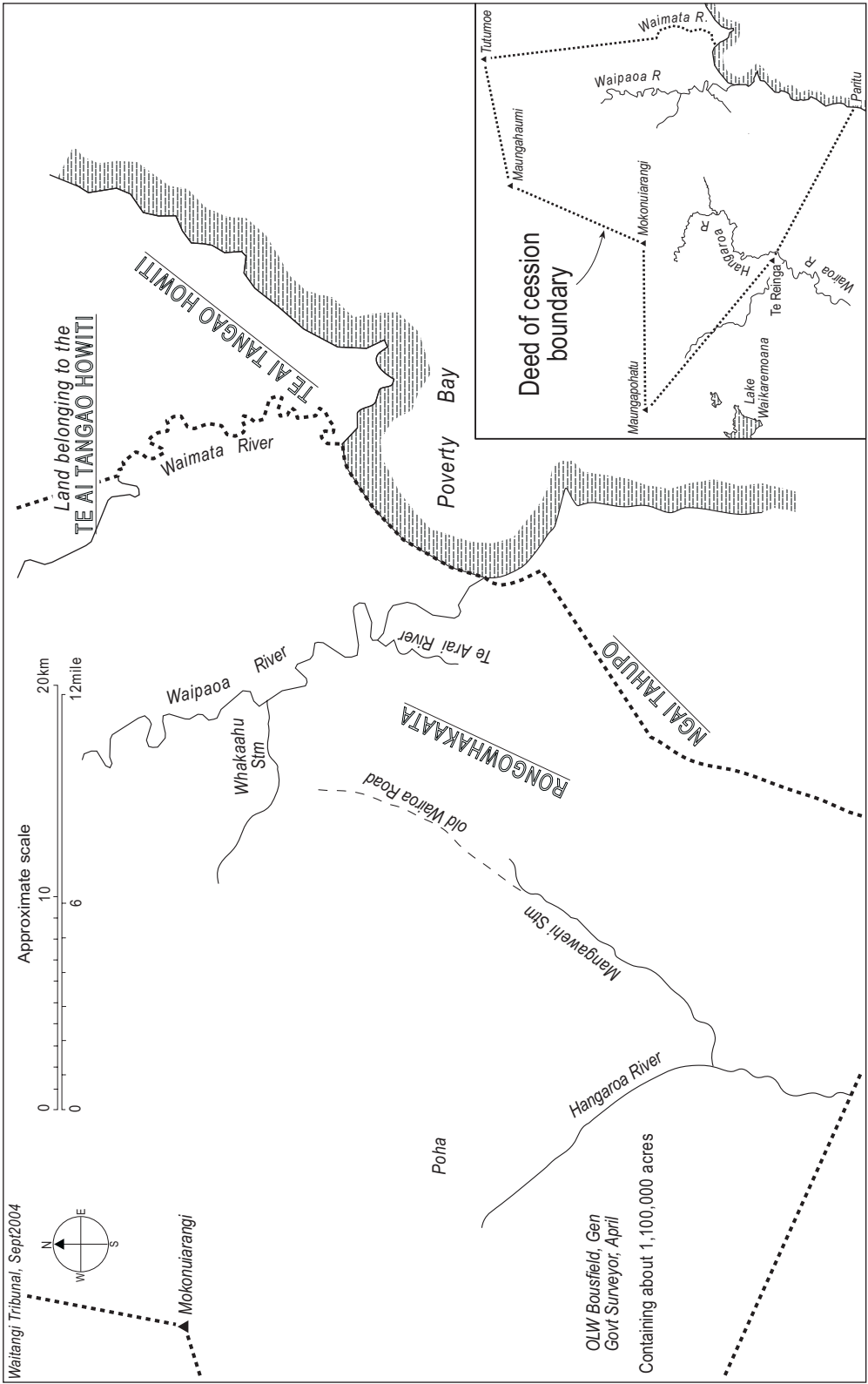
In the circumstances, it seems far more likely to us that Graham did no more than manually point out what he understood to be the boundaries of the agreed Crown take, on a map whose original purpose is shown by its title – ‘Sketch map of the Land Conceded to the Crown by the Native Owners Poverty Bay’ – and above that the words ‘containing about 1,100,000 acres’.²²⁷ The original purpose of the map was to show the entire area of the deed of cession of December 1868. Within the ceded area, the map did not provide, in our view, any detail of the blocks to be retained by the Crown as they were described to Turanga Maori in the courtroom. Map 17 shows what we think was presented to the commission in 1869.

That leaves the question of the ‘inverted “v”’ referred to by Mr Parker for the Crown. Marked on the sketch map is a straight line commencing south of the Mangawehi Stream about two-thirds across the block to its western boundary. The line heads ‘wnw [west-north-west] about 10 miles’ to a point named ‘Okeikoko’, perhaps two miles outside the western boundary (see map 15). Then heading off in a south-easterly direction is a second line at 45 degrees to the first, making ‘Okeikoko’ the apex of an inverted ‘v’. Along that second line are the words ‘45° sw 8 miles’, indicating that Okeikoko was intended to be the end of that line, with its beginning eight miles to the north-east. On the digital sketch map available to us, the line simply fades out and does not have any particular starting point (see map 10).

Mr Parker argued that the first line (the Mangawehi–Okeikoko line) must have been the originally intended southern boundary of the block before it was extended a further 19,000 acres following Bousfield’s 1873 survey. Parker argued that this line was on the map when it was produced before the commission on 30 June 1869. Whatever its purpose, we do not accept that any boundary was drawn onto the map when the ‘agreement’ was announced. The line was plotted later, probably around the same time that the acreages were inserted in the commission’s minute book. We suggest this timing because the block has the following notation written inside the smaller block boundary (ie, within the Mangawehi–Okeikoko line): ‘Block conceded to the Colonial Govt/Aug 1869/Containing about/50,746 acres’. The date of the ‘concession’ is recorded as August 1869, not June. This suggests to us that the writer did not think that the concession had been finally settled on 30 June. No particular date in August is given. This probably indicates that the writer was unable to identify a single concession event, even during August. It was probably a movable feast. Most importantly, as Mr Parker pointed out, the acreage figure has been corrected to the accurate post-Bousfield survey total

226. A careful examination of the 1869 sketch map, reproduced facing page 280, shows this is the case. Again, we note that a copy of the original map is held at the Tribunal’s offices.

227. We note again that the amount of land ceded as described on the map differs to that agreed to by both the Crown and the claimants in the statement of issues.



Map 16: The Tribunal's view of the 1869 sketch map as presented to the Poverty Bay Commission

of 50,746 acres. On the digital copy available to us, the figure '5' does not appear to have been overwritten, whereas all other digits have clearly been written over the top of previous numerals. It is possible also to make out the tail of the '7' underneath the 'o' that appears to have replaced it. It can be deduced therefore that the original estimate on the notation was 57,000 acres – the same as that in the commission's minutes. Locke, before the 1882 Clarke commission, confirmed that 57,000 was the original figure on the map.²²⁸ Clearly, after the completion of the Bousfield survey, and after the block had been extended, the estimate was corrected to the final figure of 50,746 acres.²²⁹ We agree with Mr Parker that the Mangawehi–Okeikoko line was probably intended by Crown officials to be a suggested western boundary line. In our view, it follows that the original 57,000-acre estimate and the Mangawehi–Okeikoko line were likely placed on the map at the same time – probably in the latter part of 1869 – as Mr Parker suggested in respect of the acreage estimate. It is possible that they were placed there at the end of August, the month referred to in the notation, since the individual parts of the Muhunga take had been before the commission on the fourth of that month, with the commission adjourning on the tenth, and it is likely that there would have been a flurry of activity to wrap up loose ends in the following few weeks.

If the Mangawehi–Okeikoko line was intended to be the western boundary, then the 57,000 acre estimate would have depended on it.²³⁰ It is likely therefore that the drawing of the western boundary line and the estimation of acreage formed part of a single task completed and recorded on the map at the same time. As we have noted, the Crown accepted before us that the 57,000-acre estimate was not available to the parties or the commission on 30 June 1869. The estimate was retrospectively inserted into the minutes for that day.

It follows that the evidence does not support a conclusion that the Mangawehi–Okeikoko line was on the sketch map in court on 30 June. It must have been added later at the same time as the 57,000 estimate. We were able to deduce therefore that the boundary of the Patutahi block had not been drawn on to the sketch map when Graham presented it to the commission on 30 June.

(4) Summary of the points, 1869–73

We are left therefore without any evidence of either:

- ▶ a written properly executed agreement describing the concession to be made by Maori and accepted by the Crown; or
- ▶ an independently verifiable event at which both sides were present, and the Crown view of the transaction was put clearly and precisely to Maori for them to confirm it.

228. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 18 October 1882, AJHR, 1884, G-4, sess 2, vol 2, p 8

229. The Clarke inquiry of 1882 described this overwriting as 'a very wrong proceeding': 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 1 November 1882, AJHR, 1884, G-4, sess 2, p 4.

230. Erroneously, as it transpired, for the area inside the line comprised only 31,301 acres.

We come back, then, to the point at which Maori and the Crown were together in a public forum, at the Poverty Bay Commission, discussing the matter of Patutahi. The information before the commission was an orally delivered boundary line identified manually (but not drawn) on a plan of the larger ceded lands (see map 16).²³¹ The commission rather surprisingly did not record the boundary names or direct Graham to submit the names separately in writing. As we have said, given the legal and political importance of this matter, and the likelihood that it might arouse controversy in the future, this is difficult to understand. It may be that the commissioners did not wish to hold proceedings up while the boundary was recorded, or it may be that the description provided was interim only. In any event, we are left with three block descriptions which tend to support the Maori view of matters, later-inserted acreages and boundary lines which tend to support the Crown view of matters, no sketch map showing the Patutahi boundaries at the time of the commission, and no written boundary description.

Subsequently, within weeks of the agreement before the commission, three different figures for the Crown block were officially recorded. Crown agent Atkinson advised McLean on 7 July that the Crown had secured a single large block of approximately 50,000 acres. On August 13, he again wrote to McLean, but the amount that he cited then was 62,395 acres. The commissioners themselves in their report to the Minister of 23 August 1869 recorded that the Patutahi block was 67,400 acres.

By this time, although the Crown officials and the commission itself appear confused over exactly what the acreage of the Patutahi block was to be, they all agreed that it was much larger than the 15,000 acres Maori claimed later they conceded and that the Crown had demanded.

The next point at which the actual size of the Crown's take may have arisen in discussion with Maori was at the hui between McLean as Native Minister and the Turanga leadership in December of 1872, just before the survey of Patutahi commenced. According to the report of the *Poverty Bay Herald*, McLean told the hui:

Patutahi and the adjacent land were to be divided into three parts, one for the Government, one for Ngati Porou and one for Ngati Kahungunu and yesterday he [McLean] had fixed the extent for Ngati Porou at 10,000 acres out of 57,000 or 60,000 acres which belonged to the Government.

It is not completely clear whether the reference to 57,000 or 60,000 acres is McLean's or the reporter's. Inevitably, McLean would have addressed the hui in Maori, and we are left to speculate as to whether he referred expressly to those figures in Maori or whether they are editorial. The comments that McLean had made three days earlier at a meeting with Ngati Porou

231. We have reproduced the features we believe were on the map presented to the commission in 1869. We are, however, unable to reproduce all the survey markings drawn on the map earlier by Preece, in 1868. It must be remembered, therefore, that the map that Turanga Maori saw, if they were close enough to see it, was not a clean map like the one produced in this report but a confusing mix of faded red survey lines.

suggested that the larger figure may not have been used. Again, according to the report in the *Poverty Bay Herald* of that earlier hui, he had said then that:

It has always been decided that this land was to be divided into three distinct pieces; one third to be retained by the government, the other two thirds to be given to the natives who remained faithful to the Queen. 5,000 acres of land have been appropriated by the Government at Te Muhunga for a Military Settlement; and now 10,000 acres at Patutahi; will be given to Ngati Porou.

At that hui, he appeared to make it clear that the take would be only 15,000 acres.

Whatever McLean actually said on 30 November 1869, the size of the Crown's portion does not appear to have been discussed further. However, Wi Pere is recorded as protesting that the Crown should not sell Patutahi but return it to them or their relatives.

(5) *The survey of Patutahi and the extension of boundaries, 1873*

The next opportunity for the parties to clarify their intentions towards each other was the 1873 survey of the block.

The survey of the Patutahi block commenced some time in January 1873. The four year delay reflected, we think, the total confusion that developed because of the poor record kept of what had been agreed. Despite urgings from Turanga Crown officials, McLean understandably chose to sit on the issue for as long as possible.

It appears that Atkinson was a less than meticulous man. In respect of the Muhunga protest, Native under-secretary Cooper advised the public petitions select committee in July 1870 that there were 'no documents in the office connected with the cession of the 5000 acres alluded to' and that Mr Atkinson 'transacted business in a very irregular manner and . . . had been dismissed from the Service since the present Ministry came into office'.²³² Thus, by 1873, Atkinson had long gone and Graham, who had become a member of the Auckland provincial council, was no longer assisting Turanga Maori.²³³

(a) What did Bousfield have with him? As a result, Bousfield had no written description of the boundaries to assist him with the survey. We suspect that no written record of the boundaries still existed in 1873. It is very likely the Patutahi record was in the same state as the Muhunga record. It appears either that Graham had failed to record the description before the commission or, if he had recorded it, that Atkinson had failed to keep that original description or a copy of it.

We have already indicated that it is likely the Patutahi boundaries were placed on the sketch map in August 1869. That was the date in our view that the Mangawehi–Okeikoko line was put on it, and it makes sense that the remaining boundary lines were marked in at the same

232. Cooper to Public Petitions Committee, Le1 1870/13 (doc F18, p151)

233. GH Scholefield, *The Dictionary of New Zealand Biography* (Wellington: Department of Internal Affairs, 1940)

6.4.4(5)(b)

time. It will be recalled that, on 16 January 1873, during the course of the Bousfield survey, Porter wrote to Locke that ‘The lines on the map [were] scaled [?] off by Mr Atkinson’s orders without any previous idea or knowledge of boundaries or distances’.²³⁴ That suggests that the boundary lines were marked in during Atkinson’s tenure – that is, well before the commencement of survey. By August 1870, Atkinson was no longer an employee of the Crown.

It will also be recalled that, in the 1877 Papatu investigation, Porter indicated that, when the sketch map was checked, the northern boundary of Papatu was shown on Atkinson’s orders as the ridge and not an unnamed creek. According to the 1869 sketch map, the ‘Whakaahu Stream’ runs along the northern boundary of the Papatu and Rakaukaka blocks. But, as we have noted, the second arm of that stream, also described on the 1869 sketch map as ‘Whakaahu Stream’ but named on the 1873 survey plan as the ‘Waikaahu Stream’, runs parallel to but outside the boundary of the Papatu block. It was this second stream to which Porter was evidently referring. The sketch map referred to is certainly the Patutahi sketch map. Both the ridgeline and the stream can be clearly discerned – and the Papatu boundary is marked as the ridge. We therefore conclude that, when Bousfield commenced surveying the Patutahi block in December 1872 or January 1873, he had the 1869 sketch map with him. That sketch map contained the original sketch of the Patutahi boundaries, its western perimeter being the Mangawehi–Okeikoko line.

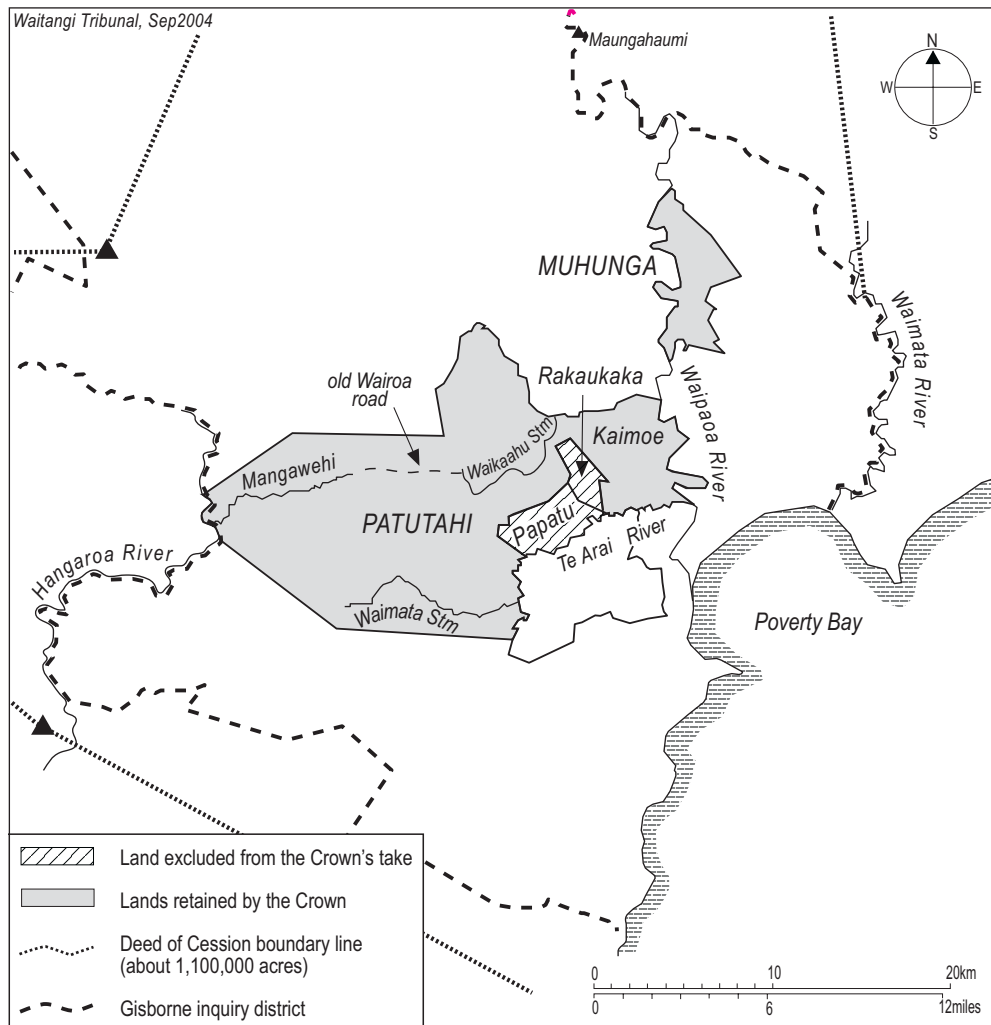
(b) The role of Pere: Captain Porter and Wi Pere assisted Bousfield, and the survey was completed in April 1873 (see maps 13, 17).

It would have taken several days over those months to complete the survey of the hill country, though the flats could presumably have been done more easily. The role of Pere in Bousfield’s traverse of the block was crucial. Did Pere comprehensively describe the boundaries agreed in 1869? Was Bousfield able to rely on Pere’s description? In the end, the difference between the 15,000-acre take accepted by Maori and the much larger take claimed by the Crown before survey comes down to whether Pere accompanied Bousfield for the entire survey.

Pere gave evidence about the survey twice. The first time was in the Native Land Court, in the 1877 *Papatu* case. The second was before the 1882 Clarke commission. In the 1877 case, Pere’s evidence was too focused on the issue of overlap between the Papatu and Patutahi blocks to be of assistance in indicating whether, on walking the Patutahi boundary, he went into the hill country and was alerted of the amount of land the Crown proposed to take.

At issue in the Papatu dispute was whether the boundary between Papatu and Patutahi was a ridge or the Waikaahu Stream. If the latter, then the Maori-owned Papatu block would be 2000 to 3000 acres larger and the Crown block correspondingly smaller. Since, however,

234. Porter to Locke, 16 January 1873, MA11/1 (doc A10, p414; doc F18, p125)



Map 17: A representation of Bousfield's 1873 survey plan, including the Hangaroa extension of Patutahi

neither feature was within the controversial hill country, none of the evidence assists us in resolving whether the hill country was intended to be included within the Patutahi take.

In the 1882 inquiry, that issue was squarely before the panel. Pere explained his role in these terms:

I accompanied Captain Porter and Mr Bousfield over the boundaries at Patutahi. [Map of actual survey of Patutahi block produced.] I did not go round the boundaries, but through the block. I never heard that the Court I mentioned awarded 57,000 acres to the Government. I do not know how the Commissioners came to state in the letter of the 23rd August, 1869, that they had awarded 67,400 acres to the Crown.²³⁵

235. 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', AJHR, 1884, G-4, sess 2, p 15 (doc c2(b), source doc 12, p15). We note that in the record of Wi Pere's evidence the following was noted in brackets: 'Letter of the 23 August, 1869, from the Commissioners, handed in by Mr Locke'.

6.4.4(5)(c)

Pere's evidence in this respect was unchallenged. We are left to conclude that Bousfield undertook the survey without a detailed boundary description and without a representative of the Maori party accompanying him along the entire boundary. It cannot be said, therefore, that the survey provided a clear opportunity for a Maori representative to be appraised of the extent of the Crown's intentions. It is true, we think, that Bousfield had the boundaries marked on the sketch map by this time. Pere may have seen it. But even if Pere was familiar with maps (he may not have been), the sketch map was an extremely rough approximation. As Locke explained, the lines were put in 'without any previous idea or knowledge of boundaries or distances'.²³⁶ It is, in our view, quite inappropriate, given the poor quality of the sketch, to assume that, even if Pere had seen it, he understood the intended size of the take.

(c) Did Maori agree to an extension? Bousfield surveyed what he considered to be the original boundary line, but he fell short of the 57,000 acres estimated by the commission in its minutes and recorded on the sketch map. He found the original block as marked on the map to have contained 31,301 acres. The block was extended a further 19,445 acres to the Hangaroa River, bringing the total area to the 50,746 acres eventually recorded on the survey plan and retrospectively overwritten onto the sketch map (see map 10). As we have said, Porter claimed to have procured the agreement of the owners to the extension, but there is no record of who those owners were or the terms of the alleged agreement. An extension of this size would have required significant consultation among many owners, particularly remembering that the block was originally defined by boundaries and not acreage. Yet, there is no record of any such consultation ever having taken place. We frankly doubt whether any such agreement ever existed in any form.

It is significant that, in our inquiry, the Crown today did not seek to rely on the extended boundary as representing the agreement between the parties. The Crown argued that, if anything was agreed, it was the smaller unextended block. Counsel submitted:

The safest course from the available evidence from immediately around the time of the agreement is that block formed by the boundary names read out to the Commission for Patutahi/Kaimoe was the agreed boundary between the Crown and Maori of the area to be retained.²³⁷

The debate before us was not between 15,000 acres on the Maori side and 50,746 acres on the Crown side; it was between 15,000 acres and 31,301 acres. The Crown effectively conceded that the 19,445-acre extension to the block was not agreed to by Maori at the time, and it was thus common ground that the Crown took at least 19,445 acres too much. Equally significantly, the extension of the southern boundary beyond the Mangawehi–Okeikoko line was not recorded on the sketch map as an extension. The sketch map gives the impression that the

²³⁶ Porter to Locke, 16 January 1873, MA11/1 (doc A10, p 414; doc F18, p 125)

²³⁷ Document H14(8), p 21

Hangaroa boundary line had been agreed to in August 1869, but that, as we have seen, was not possible on anyone's view of the facts.

(d) Contemporary confusion over the Te Arai block: There is one remaining piece of the puzzle to be added. It relates to the seemingly inexplicable way in which the Te Arai and Patutahi blocks became fused into a single contiguous block. As we have said, Pere gave evidence to the 1882 Clarke commission, where he described the boundaries of the Te Arai block. It will be recalled that, following the survey, the Te Arai block was calculated as comprising 735 acres.²³⁸ Notwithstanding this, Pere's boundaries showed a much larger area. He said 'The land ceded at Arai was bounded by the Waimata Stream and went back to the creek named Mangawaki [*sic*], on Mr Bousfield's plan of Patutahi; thence back by the road to the boundary of the land coloured yellow on the same plan.'²³⁹ It is important to note that, while Pere gave his evidence 13 years after the alleged agreement, it is still the only recorded description by a Maori representative of any the boundaries of Te Arai and Patutahi.²⁴⁰

The reference to 'the land coloured yellow' identifies the document that Pere was referring to as the 1873 survey plan. This was the document he had in front of him when he presented his evidence in 1882. See map 13 and our representation (map 17).

The part coloured yellow on the original (which is cross-hatched on our representation) comprises the Rakaukaka, Papatu, and other blocks, which were blocks of Maori land surrounded by, but excluded from, the Crown's take. Papatu formed the north-western arm of that land (see map 17); Rakaukaka its north-eastern arm. It is still possible to trace the boundaries identified by Pere on that map. The Arai River, and Waimata and 'Mangawehi' (*sic*) Streams lead to what we have called the Mangawehi-Okeikoko line²⁴¹ on the 1869 sketch map. Critically, the road to Wairoa is also marked and named.

By contrast, the earlier sketch map of 1869 had all the same features bar one. The alignment of the Old Wairoa Road, is radically different. As we shall see, this misrepresentation of the road may have been significant.

When Pere's description of Te Arai is read in conjunction with the 1869 sketch map (instead of the 1873 map to which Pere referred in court), we can see that the boundaries are formed by Te Arai River, the Mangawehi stream on the northern border, then along the Old Wairoa Road, and across the northern tip of Te Rakaukaka. Te Arai was therefore positioned, according to the sketch map, on the north-western side of Te Rakaukaka, with Patutahi on its

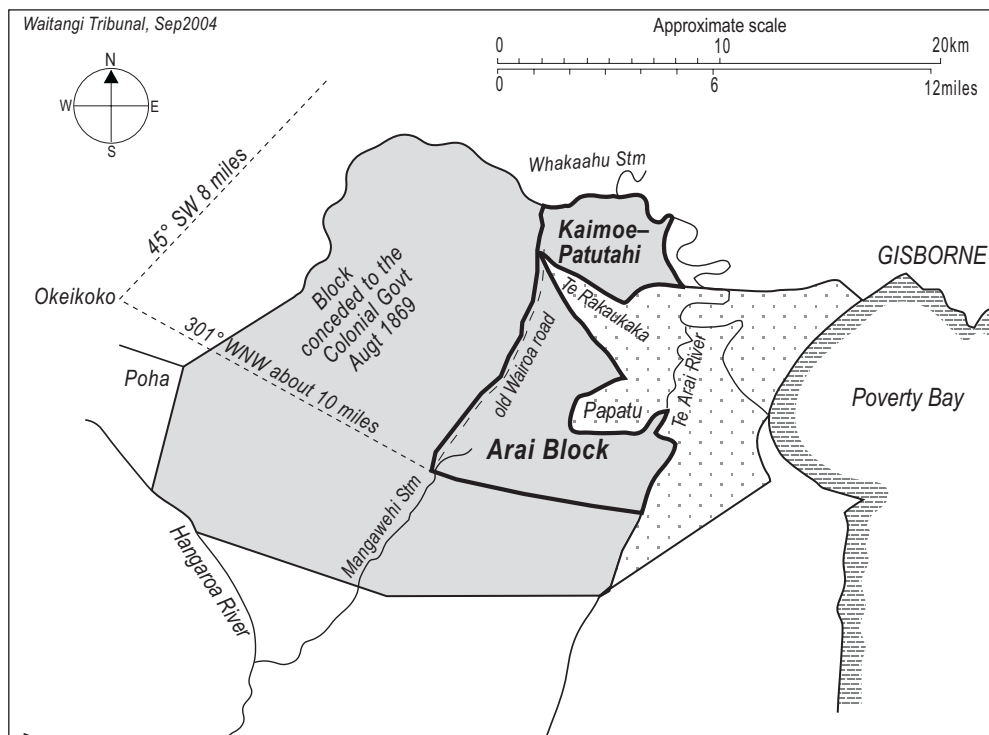
238. We note that this is not the same as the modern-day Te Arai block.

239. 'Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 31 October 1882, AJHR, 1884, sess 2, vol 2, G-4, p15

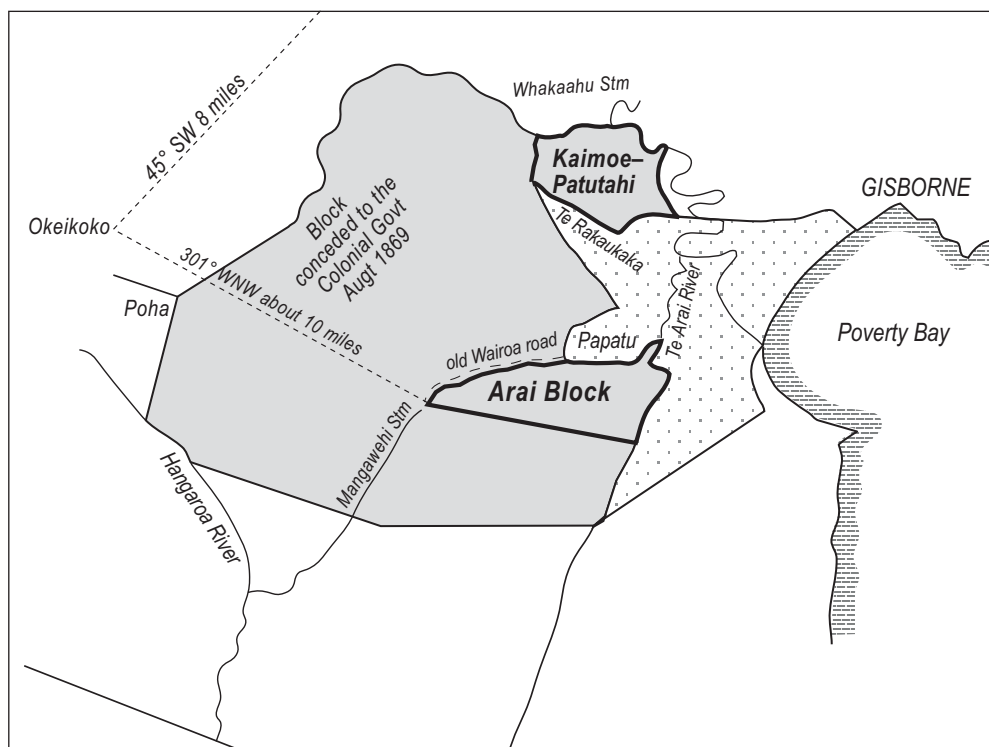
240. As we have noted, the Tribunal was shown two historical maps: the 1869 sketch map that Graham presented to the Poverty Bay Commission and the 1873 survey plan. The former was compiled from various sources – the later was a properly surveyed map. The following discussion relates to the differences between these two maps.

241. Mangawaki is almost certainly a reference to the Mangawehi Stream as we have named it.

6.4.4(s)(d)



Map 18: A representation of the 1869 sketch map, showing the positioning of the old Wairoa Road



Map 19: A representation of the 1869 sketch map, with the repositioning of the old Wairoa Road, as per Bousfield

eastern side. Thus, according to the sketch plan, Patutahi adjoined Te Arai in that they shared a small common boundary as indicated on map 18.

When he surveyed the block in 1873, however, Bousfield made a significant alteration. Instead of taking the Old Wairoa Road to the tip of the Rakaukaka block, he showed it entering the Papatu block on its western boundary some distance away. This appears to be the correct alignment. Graham's 1869 alignment appears to have been a mistake. Map 19 shows the significance of this change. Bousfield's realignment of the old Wairoa Road resulted in a very different image of the three blocks. Instead of Patutahi and Te Arai sharing a common boundary with Te Rakaukaka, as we have shown in map 18, they were now recorded as distinct blocks, several kilometres apart and with no common boundary. Thus, by marking the old Wairoa Road in the wrong position in the 1869 sketch map, Graham appears to have given the impression that the now fused Patutahi–Te Arai block was much larger than its two component blocks.

This difference between the sketch map and the survey plan as to the alignment of the Wairoa Road may show how the two blocks came to be mistakenly amalgamated into a single contiguous Patutahi block. It may well also have led Bousfield to later rely on the Mangawehi–Okeikoko line as a new western boundary for the two blocks which had become amalgamated by this mistake. It is not possible to be definitive about this, but this explanation appears plausible. By 1873 however, the concept of a single contiguous boundary seems to have taken hold. It must have been further cemented in place by the survey of the Hangaroa extension. By then, though the road alignment was still crucial to Pere's conception of the block, the extension had caused it to be superceded as a boundary marker in the mind of Crown officials and the surveyor.

The identifiers used by Pere are all still discernible on modern cadastral maps. We have traced them and estimated the actual acreage of Te Arai as defined by Pere in 1882. The block comprises around 9000 acres, including the 735 acres of 'Te Arai' as surveyed.²⁴² Pere's version of Te Arai included an area of hillier country just, as the Crown argued, the parties intended.²⁴³ The crucial difference was that the hill country contained in Pere's version of Te Arai, was a tiny fraction of the hill country actually taken.

We estimate that separately Patutahi and Te Arai may have amounted to about 14,000 acres. If Te Muhunga is added, the whole package would have amounted to less than 20,000 acres. This is approximately the amount that Richmond thought had been ceded and not much larger than the 15,000 acres Maori accepted had been ceded.

242. 'Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 17 October 1882, AJHR, 1884, sess 2, vol 2, G-4, p7

243. This is substantially larger than the 5000-acre estimate given by Pere to the 1882 Clarke commission. The difference can, we believe, be explained by a combination of factors: Pere was a lay person, unused to estimating acreages, the map was very inaccurate, and the land was very broken.

(6) Conclusions

The evidence suggests strongly that Maori agreed to cede three 5000-acre blocks to the Crown. Pere's boundaries, as given in 1882, suggest that a small area of hill country was to be given up as part of the 15,000 acres. It is equally clear that the Crown, for its part, agreed to accept up to 15,000 acres on the flats and an area of hill country behind the Patutahi-Kaimoe-Te Arai flats. We are left to conclude that the parties simply agreed to significantly different things. In short, there was no mutuality of understanding. No agreement was therefore reached on 29 June 1869, or at any later date.

It may have been that on the day, the Crown agent Atkinson mentioned the Crown desire for a larger portion of hill country as well as the three blocks on or with (in the case of Te Arai) a significant flat portion. It may equally have been that Maori adopted the age-old technique for communicating disagreement without causing offence at a time when so much hung in the balance – that is, they simply did not respond at all. Alternatively, it may have been that Graham also thought that his clients had agreed to the much larger take when in fact they had not. Unfortunately, by 1873, when the problem became obvious, Graham was no longer in Turanga and there is no record of his opinion on the matter either being sought or obtained. In the end, we suspect that we will never know why the Crown and Maori talked past each other on such a significant issue. What we do know is that subsequent events after 30 June 1869 provided the players with at least two opportunities to clarify matters between them before the so-called agreement crystallised into legally enforceable rights from which reversal would have required a back down and loss of face for one side or both sides. Each opportunity for clarification was squandered.

The first opportunity was the commission hearing on 30 June 1869. Had Atkinson prepared and displayed a map showing the boundaries clearly plotted thereon, and had the commission clearly recorded those boundaries in writing before those gathered at the hearing, the Maori leaders present, particularly those such as Rukupo who were losing much of their own tribal land in the expanded take, would have indicated that a mistake had been made.

The second opportunity was the survey. Had Pere walked the entire boundary of the 31,301 acres of the original survey, it would have become obvious that a serious mistake had been made. The survey was a long and drawn out affair completed over several months. It seems likely to us that Pere walked the flats with Bousfield and Porter but did not go into the hill country.

These lost opportunities occurred on top of the most fundamental failure of all. The lands to be conceded and the terms of the concession were not reduced to writing and signed by each side on 30 June 1869. That failure was probably for three reasons: first, Atkinson, as we later discovered, was sloppy and his opposite Graham did not force the issue. Secondly, the notation on the sketch map dating the agreement as August 1869, indicates in our view that an agreement in principle only had been reached on 29 June and communicated to the commission on the next day but there remained more to be done. Thirdly, the commission

had started its sittings but could not proceed until the area to be retained by the Crown had been settled. The commissioners and officials were simply too ready to paper over the cracks of a deal which had not been properly nailed down in order to avoid delaying the commission for any longer than was absolutely necessary. In the end, sloppy officials and impatient commissioners tried to do the job too fast.

It is probable that there was no written agreement on 29 June because it was too early for one to be drafted. The Crown argued that the failure to reduce the concession to writing was a joint failure of Maori and the Crown it argued that both sides bore the responsibility of ensuring that the agreement was accurately recorded. Having carefully considered that matter, we cannot agree. In the end, this was an agreement in form only. It was, in substance, a confiscation of Maori land in breach of the title guarantee of article 2 of the Treaty. The only thing up for agreement was which land would be confiscated. In those circumstances, it must have been for the confiscator to scrupulously record the exact extent of the take and to secure such signatures as were necessary to constitute Maori submission to it. This failure was, in our view, clearly a failure of the Crown alone and it is the Crown alone which must take responsibility today for the unfortunate consequences.

Matters do not, however, end there. It is to be remembered that, in an apparent attempt to regularise the record, both the 1869 sketch map and the 30 June minutes were retrospectively amended in a manner calculated to hide the fact that those later alterations had been made. The 57,000-acre estimate in the minutes was added later. The original boundaries of the Patutahi take were all added later. The extension of the block's southern boundary to the Hangaroa River was added even later still. The original 57,000-acre estimate on the sketch map was rubbed out and replaced with 50,746 acres. None of these changes were recorded at the time as having the status of later additions. Instead, the impression given, and intended to be given, was that these details had been in the minutes and on the sketch map from the very beginning. These matters have caused us considerable concern. We do not consider, however, that the changes were made to deliberately and falsely inflate the amount of land which the Crown was to retain for itself. Rather, they were made in an attempt to give the appearance of a final agreement competently recorded on 30 June, when the agreement was far from final on that day. They were no more than amateurish attempts to cover up what must have appeared at the time to be untidy loose ends likely to cause inconvenient delay.

Subject to our conclusions above as to the flawed nature of the deed of cession itself, we find that, to the extent that Maori agreed to anything at all, they agreed only to concede 15,000 acres in three blocks to the Crown. Those blocks were Te Muhunga, Te Arai, and Patutahi. The Crown for its part agreed to accept those three blocks (if there was sufficient land on the flats to accommodate those acreages) and a larger but imperfectly defined hill country block. Since the take took the form of a concession or agreement, the extent of it was for Maori to make. Subject always then to our overall conclusion that the deed of cession was obtained by duress in any event, we find that it was not open to the Crown to claim any more than Maori

were prepared (albeit under duress) to give. In what we would term a second tier of breach over and above our conclusion that the entire transaction was tainted by duress, we conclude that the Crown, in breach of the Treaty, wrongfully retained 35,746 acres in Patutahi. We conclude that the Crown, in breach of the Treaty, wrongfully retained between 35,000 and 40,000 acres in Patutahi.²⁴⁴

We find further that, in light of the fact that this was in substance a confiscation, it was for the Crown to properly record the concession and ensure that the correct groups consented to it. It was for the Crown to ensure that the agreement was properly explained to the Poverty Bay Commission and to ensure that the blocks to be taken were correctly delineated on the ground by survey.

We find that the Crown failed in all respects to discharge these obligations.

Finally, we find that the various retrospective modifications to the record carried out by various officials as we have set them out, were done in breach of the Crown's obligations of utmost good faith. By this, we mean that they were actions designed to cover up irregularities or to 'fix' the record. They were completed in a manner calculated to avoid public scrutiny and without notice to the Maori most affected by them. They gave the clearest appearance of sharp dealing on the part of the Crown. They were inconsistent therefore both with the Crown's common law and with Treaty obligations.²⁴⁵

In the result, we have no difficulty in finding that these actions by or on behalf of the Crown were in bad faith.

We now turn to address two specific claims: those relating to the Muhunga block and Patutahi.

6.5 THE CLAIM OF JOSEPH ANARU HETEKIA TE KANI PERE ON BEHALF OF TE WHANAU A WI PERE AND OTHERS

Having dealt with the much larger issue of Patutahi, we turn now to claims regarding the Muhunga block, which was also within the Crown's retained lands. This claim is in respect to both the Muhunga block as a whole, and the Waitawaki block, which was part of Te Muhunga. This was a claim by the descendents of Wi Pere himself in respect of the losses he personally incurred.

Counsel argued the Muhunga claim at several levels.²⁴⁶ First, it was argued that the Crown ought not to have taken the land of 'loyal' Maori to compensate for the so-called rebellion. In any event, even if it did, proper compensation should have been given to Wi Pere for his

244. It is impossible to be any more exact because the acreage for Te Arai, as described by Pere, is not known accurately, but is something between 5000 and 10,000 acres.

245. *R v Taylor and Williams* [1981] 3 CNLR 114, 123, per MacKinnon J

246. Documents C25, H6

sacrifice as promised in the deed of cession. Secondly, the Wi Pere whanau argued that only 5000 acres had been agreed to be given up at Te Muhunga, and any amount surveyed over that acreage should have been returned to its owners. It was argued that by this means the Crown took 395 acres more than even it claimed.

It was finally argued that this over-calculation of the Crown's entitlement roughly corresponded with the area of the 444-acre Waitawaki block, one of the five blocks consolidated into the Muhunga block for the purpose of the Crown's take, all of which had been surveyed prior to the deed of cession.²⁴⁷ The Waitawaki block was claimed by Pere as his individual property. Waitawaki included within its boundaries a small but valuable area commonly called 'the orchard'. Wi Pere did not claim Waitawaki as an ancestral block, but as a personal gift from the customary owners.²⁴⁸

The Clarke commission of 1882 considered the Waitawaki claim by Pere. Commissioner Clarke found not only that Atkinson, the Crown agent, recognised that the sub-block was mistakenly included in the larger Muhunga block but also that Donald McLean had promised that it should be returned to Pere by Crown grant:

It was by virtue of his [Wi Pere's] understanding with Mr Atkinson that he applied to the late Sir Donald McLean for a portion of the wood reserve (part of the same block) to be given up to him, and that Mr. Locke was instructed to see what part of it was available, with a view to handing it over to applicant. Mr Locke admits that the late Sir Donald McLean did give instructions, but that it could not be carried out on account of an arrangement that had been made with the military settlers that they should have a right to cut timber there.²⁴⁹

For its part, we have said, the Crown accepted that the original agreement was for no more than 5000 acres. However, once the five pre-surveyed blocks were compiled and it became clear that they together made up a somewhat larger area, both sides agreed that the cost in time and expense of resurveying down to 5000 acres was too great. A new agreement was therefore reached concerning 5395 acres, according to the Crown.

Commissioner Clarke did not however, directly address the argument that Maori had agreed to give up no more than 5000 acres. Rather, he took the August 1869 minutes of the Poverty Bay Commission – 'it was agreed that [Te Muhunga] should contain five thousand acres, subject to the subsequent determination of boundaries on survey' – to mean that if the survey exceeded that amount, that would be the area ceded. Adding up the surveyed areas originally given in the five blocks which finally comprised Te Muhunga, Clarke derived a total of 5349, less 25 acres for burial places, leaving a final area of 5324 acres.²⁵⁰ He compared this to

²⁴⁷ Document c2, pp3–7

²⁴⁸ Wi Pere's father, Thomas Halbert, had asked for land to be gifted for the support of Pere. Wi Pere held a deed of gift for Waitawaki from the owners dated 3 August 1841: doc A10, p494.

²⁴⁹ 'A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay', 3 November 1882, AJHR, 1884, G-4, sess 2, p12 (doc H6, p9)

²⁵⁰ Ibid. In fact, Panapa Waihopi's evidence was that the three urupa were to be of 25 acres each: p15.

a computation presented to the commission in 1882 of 5415 acres for Te Muhunga, one that had been given by Barnard, the chief surveyor of the district.²⁵¹ From this, Clarke calculated that the Crown had taken an excess of 91 acres.

Clarke found in addition that the area taken in excess belonged to Wi Pere. He recommended that the land be returned to Pere, including the orchard of 11½ acres, with the balance to be made up of the Kohe bush reserve nearby.²⁵² While the Crown was able to return the orchard to Pere, the bush reserve was no longer available. After further discussions an equivalent area of land by value was awarded to Pere – a total of 1752 acres of land in the Motu block.²⁵³ This arrangement was given effect in the Wi Pere Land Act 1889.

It is very clear in our view that the agreement between Crown and Maori over Te Muhunga involved only 5000 acres. The record of the Poverty Bay Commission hearing on 30 June 1869 confirms this, as do the separate notes of Judge Monro. It is true that in the official commission minutes the phrase ‘more or less’ is inserted above the reference to 5000 acres, but that was clearly inserted later and almost certainly after survey compilation showed the area to be 5395 acres. Te Muhunga was earmarked for military settlers. Atkinson and his colleagues must have insisted on certainty as to acreage, and that is why all of the early references to Te Muhunga state acreage so unequivocally at 5000.

In our view, Pere’s loss of the 444-acre Waitawaki sub-block within Te Muhunga confirms this analysis. Atkinson, McLean, and Locke all agreed with Pere that the inclusion of Waitawaki had been in error. Commissioner Clarke ultimately accepted Pere’s claim. He recommended that 91 acres be returned to him. Having said that, it does appear to be the case that Graham, the surveyor and advocate on the Maori side, knew of the excess acreage and accepted it because the cost of resurvey appeared to be greater than the value of the 395 acres in excess of the 5000 acres. Atkinson was clear this had been ‘definitely arranged’.²⁵⁴ Judge Rogan, one of the two commissioners present at the time, indicated in a later inquiry, that he had been initially opposed to the extension but was overruled by the parties.²⁵⁵ Given the vehemence of Pere’s subsequent protest, it may be that Graham consented to the extension (knowing the costs involved in further survey) without checking with Pere, but that can be no more than conjecture so long after the events in question and with no actual signed agreement expressly recording the views of both sides. In light of the specific recollection particularly of Judge Rogan, we are, on balance, of the view that there was indeed a second agreement allowing for the extension. We therefore find for the Crown on the Te Muhunga–Waitawaki claim. While we suggest that Graham took it upon himself to agree on Pere’s behalf without

251. We are uncertain how this figure was arrived at.

252. Clarke also recommended that five acres be purchased by the Government for an urupa: ‘A Report by Henry Clarke upon Certain Native Claims to Land, etc, Poverty Bay’, 3 November 1882, AJHR, 1884, G-4, sess 2, p12.

253. Document C2, p13

254. Poverty Bay Commission minutes, 4 August 1869 (quoted in doc A10(a) vol 4, p2194)

255. Document F12, pp18–19

checking, there is not sufficient evidence to find, on balance of probabilities, that this is what happened.

The failure of the Crown through its agent, Atkinson, to carefully record the 1869 agreement over Te Muhunga, is at the heart of the problem. As we have said, Native Affairs under-secretary Cooper expressed his exasperation to the public petitions select committee in July of 1870 about the lack of a record of the arrangement. We can do no more than echo that sentiment and reiterate our findings in that respect as they related to the Patutahi block.

We now turn to the question of the compensation paid for the Patutahi lands taken under the deed of cession. As we will show, this remained an issue of concern for Turanga Maori, both in terms of how much Turanga Maori received, and who the compensation money was paid to.

6.6 COMPENSATION FOR THE PATUTAHİ CESSION

6.6.1 Introduction

In October 1950, the Crown offered and Rongowhakaata accepted ‘the settlement of the Patutahi claim by the payment of the sum of £38,000’, in compensation for the wrongful extinguishment of Rongowhakaata land rights in the Patutahi cession.²⁵⁶ The settlement was based on the analysis of the Jones commission in 1920. It will be recalled that the Jones commission concluded that the original 31,000-acre taking was justified, but the 19,000-acre extension to the Hangaroa River was not.

The settlement made Rongowhakaata the sole beneficiary. Te Whanau a Kai, who argued that they had interests in Kaimoe, ‘the kainga at the heart of what would later be called “Patutahi proper”’, were excluded.²⁵⁷

Two important issues arise from this ‘settlement’. The first is, did the settlement deal finally and durably with such claims as Rongowhakaata had over the Patutahi ‘cession’? The second relates to the Crown’s conclusions, based on the Jones commission and a subsequent inquiry, that Te Whanau a Kai had suffered no wrong in the Patutahi cession and were not entitled to receive compensation in 1950. Was the exclusion of Te Whanau a Kai from the 1950 settlement appropriate?

Before we address these issues it is necessary to set out a chronology of the negotiations which led to the Rongowhakaata settlement and Whanau a Kai protests. The two issues are closely intertwined: both were discussed in the fora of the day. We have separated them for clarity, but we note that the complexity of the Rongowhakaata and Te Whanau a Kai claims confused officials for more than 50 years.

256. Memorandum for the Minister of Maori Affairs, 10 October 1950, CM(50) 69 (RDB, vol 66, p 25,482)

257. Document c1, p17

We first set out the events that are important in understanding the Rongowhakaata claim up until 1947. We then retrace our steps and record the events that are important in understanding the Whanau a Kai claims in the same period. At this point, the two strands converge and the events leading to the settlement are discussed.

(1) *Rongowhakaata claims: a chronology*

During the late nineteenth century, Turanga Maori including Rongowhakaata presented numerous petitions to the Crown. Successive petitions resulted in the Clarke commission of 1882 and the Jones commission of 1920. Details concerning the petitions are set out in appendix III. The deliberations of the commissions have been discussed at length above and are also referred to in appendix III. Except for a brief reference to the Jones commission below, we do not propose to refer any further to those matters in this section.

It will be recalled that in 1920 the Jones commission was convened to investigate (among other claims) the Rongowhakaata claims in respect of the Patutahi lands. The Jones commission supported Maori claims in part, finding that the Crown was entitled to take about 30,000 acres, rather than the 15,000 acres argued for by Maori.²⁵⁸ From a total take of 56,161 acres in both Muhunga and Patutahi, this meant an excess of 26,161 acres. From this, the commission deducted 5824 acres, the amount of the land either returned to Maori ownership or for which compensation had already been separately paid.²⁵⁹ The commission argued that any excess land received by the Crown must have been situated at the back of the Patutahi block, and was therefore less valuable.

The findings of the Jones commission were not disputed by the Crown, which acknowledged in principle the need to compensate for the excess taking but was uncertain how much should be paid, and to whom.

After some delay the Native Land Amendment and Native Land Claims Adjustment Act 1922 was passed. Under this Act, the Native Land Court was authorised to determine ‘the persons that are entitled to any relief that may be granted, and in what relative interests’, in respect to a settlement. The Native Land Court was not to be bound by ‘any former grant, title, or order’. The Crown, however, retained full discretion as to ‘what (if any) relief’ would be granted.²⁶⁰

In other words, the beneficiaries of any settlement would be established by the court, but the amount of compensation, if any, remained to be determined by the Crown in its political processes. This led to considerable tension both between those members of Rongowhakaata

258. RN Jones, John Strachan, John Ormsby, ‘Report No 4, Patutahi Block’, ‘Reports of the Native-Land Claims Commission’, 5 November 1920, AJHR, 1921–22, G-5, pp 19–20

259. Document A23, p 333. This amount included 4214 acres of the Arai Matawai reserve given to Rongowhakaata, 1019 acres of the Rakaukaka block which had been included in Patutahi and for which compensation had been paid, 500 acres awarded to Te Whanau a Kai, and the 91 acres of the Muhunga block for which Wi Pere had received compensation. We discuss the awarding of 500 acres to Whanau a Kai more fully below when we address the Whanau a Kai claim.

260. Document C1, p 64. The Act also referred to the Aorangi block and the Waipuku–Patea reserve.

and Te Whanau a Kai who may have held customary interests in the Patutahi block, and within Rongowhakaata itself. It fostered an environment of bitter competition as Maori came before the Native Land Court. Over the next year, the Crown received numerous petitions from Whanau a Kai members, who sought to be included as beneficiaries in the compensation claim. We discuss the results of the petitions, as well as the impact of the interiwai rivalry on Whanau a Kai, below.

In 1928, the Native Land Amendment and Native Land Claims Adjustment Act was passed. Section 47 provided for the Native Land Court to inquire into what compensation could be awarded. It remained up to the Government as to whether, and to what extent compensation would be paid. A hearing under that Act was held in early 1929. The claimants argued for a figure of £122,022, being based on an 1869 value of 30 shillings per acre, with interest of 5 per cent per annum. The Crown, however, considered that the value of the land in question was low. It also argued that interest should not be paid. In an extraordinarily frank admission about the unfairness of the Maori land regime, the Crown stated that had the land remained in Maori hands in 1869, the value would 'have been eaten up with rates & taxes'.²⁶¹ The Crown suggested an amount of £2500.²⁶²

The court rejected the amount proposed by the claimants, reasoning that it was based on the more valuable flat land of the block, when the actual excess taking was in the hilly back country. It also rejected the Crown's suggestion. The court set a value for the land at £7500 (or seven shillings fourpence ha'penny per acre), to which it added 60 years of interest (although not compound interest) at 5 per cent per annum, giving £22,500. This made a total of £30,000.²⁶³

Further efforts were made during the 1930s to reach settlement. Yet another Act, the Native Purposes Act 1931, allowed the Crown to give effect to the Native Land Court's 1929 recommendation. The Great Depression, however, limited the Government's ability to pay compensation and the claimants put off their request to settle. In 1935, a delegation of Rongowhakaata leaders met with the Native Minister, GW Forbes, and asked that the matter be progressed. This was supported by Sir Apirana Ngata, who commented that when Sir James Carroll had been alive, the claimants were prepared to accept £50,000 (hence also the 50,000 shares that the Native Land Court had divided compensation entitlements into).²⁶⁴

The Native Purposes Act 1935 (s21), allowed for the settlement to take place, but there were further delays. In 1938, a delegation of Rongowhakaata leaders and Sir Apirana Ngata met with the Acting Native Minister, Frederick Langstone, where they set out their desire to settle for an amount of £50,000.²⁶⁵ Treasury added its view on the compensation, voicing a strong

261. Gisborne minute book 52, p77 (doc c1, pp112–113)

262. Ibid, pp74–80 (doc A23, pp342–343)

263. Document c1, pp114–115

264. Ibid, pp138–139, MA1 5/13/189, pt2 (RDB, pp2408–2410)

265. Notes of conference, 22 February 1938 (doc A23, p345; RDB, pp25,249–25,254)

reluctance to settle claims with substantial payments.²⁶⁶ The Second World War then intervened and all negotiations were put on hold.

In 1947, two years after the end of the war, Prime Minister Peter Fraser (who was also the Native Minister) visited Turanga. He indicated to the claimants that the Government wished to reach a settlement for Patutahi. On a second visit, in June 1948, Fraser was informed that the claimants were prepared to accept £50,000. Learning that the Native Land Court had earlier set a figure of £30,000, Fraser asked that a delegation of claimants visit him in Wellington to discuss the matter.²⁶⁷ No meeting appears to have taken place, although in April 1949 Fraser asked his staff to ‘push these matters ahead as rapidly as possible’.²⁶⁸

Before we complete this review of the Rongowhakaata compensation claim, we first retrace our steps and consider the claims of Te Whanau a Kai.

(2) *Whanau a Kai claims: a chronology*

Alongside, and often in competition with Rongowhakaata, Te Whanau a Kai also sought redress for land it considered unfairly taken.

It will be recalled that the Clarke commission investigated the Patutahi claims in 1882. Though it expressed considerable sympathy for the Maori arguments, the commission ultimately concluded that the Maori case in respect of the overall block had not been made out to the necessary standard of proof. The commission concluded: ‘We also think that, while there is much to be said in favour of the Native’s claim that only 15,000 acres was intended to be reserved [for the Crown], there is no evidence sufficiently conclusive for us to find it to be so.’²⁶⁹ Among his many roles in that inquiry, Wi Pere spoke specifically for Te Whanau a Kai. In that role he appealed to the Government’s sense of compassion. Owing to the confiscation of Patutahi, he submitted, the hapu no longer owned any flat land in Turanga. Pere’s request impressed Clarke who recommended that ‘five hundred acres of land be set apart in the Patutahi Block; if possible on the Patutahi Stream, of fair average quality (having due regard to fair proportions of flat and hilly country)’.²⁷⁰ Pere submitted a list of 113 named individuals to be placed on the title of the block.²⁷¹

266. Ashwin to Minister of Finance, 31 March 1939, T52/587 (doc c1, pp152–155; RDB, pp2542–2544)

267. Fraser to Nepia, 28 September 1948, MA1 5/13/189 (RDB, vol66, p25223)

268. Document c1, pp156–157

269. ‘Native-Land Claims Commission’, 9 August 1869, AJHR, 1921–22, G-5, p19; RDB, vol65, 25,097 (doc c1, p57)

270. ‘Report of ET Clarke upon Certain Native Claims to Land, etc, Poverty Bay’, AJHR, 1884, sess 2, G-4, p12 (doc c2(b))

271. Ibid, p16. We note that there are two lists, one which followed Wi Pere’s evidence (p 16), and the other which was signed by HT Clarke (pp 12–13). Aside from some differences in spelling and the order of names, these two lists are identical. We note that the list does not appear to be made up solely of individuals who belonged to Te Whanau a Kai. This matter was raised in the cross-examination of Te Whanau a Kai witness Bryan Gilling: see doc 5.4, pp29–30, 39–42, 47–48; doc c1, pp37–38. Rather, names were differentiated between three groups, the majority being described as ‘Hapu o Ngatikohuru’. The two other groups listed, Ngapotiki and Ngai Tuketenui, are well recognised hapu of Te Aitanga a Mahaki: see doc A25, pp182–183. We note that Ngapotiki, Ngai Tuketenui, and Ngati Kohuru were also described by Wi Pere as holding rights in the ceded Muhunga block: see AJHR, 1884, sess 2, G-4, p13 (doc c2(b)). Both spellings – ‘Ngatikohuru’ and ‘Ngatikahuru’ – are used.

Following the loss of the wider case in the Clarke commission, Whanau a Kai, again like Rongowhakaata, petitioned the Government to have their lands restored to them. Once again, the details of the petition are provided in appendix III.

As with Rongowhakaata, the Jones commission of 1920 provided Te Whanau a Kai with the next opportunity to present their claim. Among the witnesses who appeared before the commission was Pimia Mills (Pimia Aata). Aata was born around 1840. She had signed the deed of cession in 1869. While giving an account of events between 1865 and 1869, she recalled that 'Whanau-a-Kai Hauhaus built a pa at Patutahi called Pukeamio'.²⁷² This was the pa from which Anaru Matete led reinforcements to those besieged at Waerenga a Hika. She also stated that Te Whanau a Kai were 'living at Patutahi' at the time of Te Kooti's attack on Matawhero.²⁷³ In this instance, the 'Patutahi' referred to was almost certainly the settlement of that name located near the junction of the Waipaoa River and the Whakaahu Stream. Pimia Aata's evidence placed Te Whanau a Kai in the heart of the Kaimoe block at the eastern end of what became the larger Patutahi block. No other witness contradicted her.

As we have already noted, the Jones commission found that the Crown was entitled to about 30,000 acres, rather than the 15,000 acres argued for by Maori.²⁷⁴ In the process of so finding, the commission effectively deleted Te Whanau a Kai from the list of those who lost land to the Crown in 1869. It recorded the taking of 'nearly 51,000 acres from one tribe [ie, Rongowhakaata], and only 5395 from another tribe [ie, Te Aitanga a Mahaki]'.²⁷⁵

In 1923, the Native Land Court, as we have said, investigated which of the Turanga iwi were entitled to compensation. It did so in two parts. On 4 August of that year, the court delivered its first judgment. It ruled that the only people who were entitled to relief were Rongowhakaata. Te Whanau a Kai were to have no part in a settlement. Te Whanau a Kai were not included as a separate entity: they were, therefore, to have no part in a settlement.²⁷⁶ Following the court's decision, a hearing was held to determine exactly who was entitled to be included on the 'Rongowhakaata' list of beneficiaries. As with the previous hearing, Te Whanau a Kai did not present a united front, appearing instead as a series of whanau groups. On 1 November 1923, the court presented its second judgment. It dismissed most of the

Footnote 271 continued

It appears, therefore, that the individuals listed constituted some kind of community selected by Wi Pere from various Te Aitanga a Mahaki hapu who held rights in close proximity to one another. The community was possibly those who were living on Wi Pere's land in the Makauri block, although this too is uncertain. Some may have been people who Wi Pere believed had lost land through the cession of Te Muhunga, or who had been excluded from lands by the Poverty Bay Commission. A number of the names on the list are also on the original blocks that came to constitute the ceded Te Muhunga block. We note also the inclusion of Hira Uatuku (probably Te Hira Te Uatuku), a member of Ngariki Kaiputahi, who does not appear on any Poverty Bay Commission awards, but whose main residence was at Mangatu.

272. 1920 commission minutes, MA1 5/13/189 (RDB, vol 65, p 25,122)

273. Ibid (pp 25,122–25,123)

274. 'Native-Land Commission', 5 November 1920, AJHR, 1921–22, G-5, pp 19–20

275. Ibid, p 17; RDB, vol 65, p 25,096 (doc c1, p 56)

276. Document c1, p 79

Whanau a Kai claims advanced by emphasising the Rongowhakaata affiliations of the claimants. One exception was a claim by Patu te Rito and some individuals who ‘would have been included in the Rongowhakaata [list] if they had not chosen to take separate proceedings’.²⁷⁷

To be included, Whanau a Kai had to prove they had occupied ‘Rongowhakaata’ areas of Patutahi, south of the area they had previously claimed as Te Whanau a Kai.²⁷⁸ Despite their desire to come under a Rongowhakaata whakapapa, some witnesses repeated earlier statements that Te Whanau a Kai had rights in the northern part of the block. We note also that the allocation of relative interests provoked bitter competition within Rongowhakaata.²⁷⁹

Following the court’s decision, Te Whanau a Kai appealed. The appeal was heard by the Native Appellate Court, with Chief Judge Jones and Judge CE MacCormick on the bench. It will be recalled that Judge Jones conducted the inquiry of 1920.²⁸⁰ The Appellate Court disallowed the Whanau a Kai claim, referring back to the original cession of Kaimoe:

The land on which Patutahi pa stands was known as Kaimoe. It seems probable that it was a separate block. It was so surveyed at the request of Tutere, Tamehana Ruatapu and others prior to the Deed of Cession to the Crown. These elders belonged both to Whanau-a-Kai and Rongowhakaata.²⁸¹

Rather than seeing this as a confirmation of Te Whanau a Kai rights in the area, the Appellate Court stated:

When the 1869 Commission sat it was agreed that 3 areas should be awarded to the Crown. One of these areas was out of Ngaitahupo [Ngai Tamanuhiri] land, another at Muhunga out of Aitanga-a-Mahaki land and the third at Kaimoe. Whanau-a-Kai are a leading hapu of Aitanga-a-Mahaki. It is reasonable to assume that the area at Kaimoe was taken as being Rongowhakaata land.²⁸²

In addition, the Appellate Court found that as Kaimoe was one of the areas that had been ceded by agreement, it was not part of the excess taking at the western end of the block. Rights in the Kaimoe area were therefore not in question.²⁸³

277. Document c1, p89. A transcription of the court decision can be found in RDB, vol 65, pp 24,973–24,981.

278. Document c1, pp 86–90

279. Ibid, pp 92–94; see also cross-examination of Gilling by counsel for Rongowhakaata, doc 5.4, p34

280. Document c1, pp 94–100. For extracts of the Appellate Court’s decision, see also MA1 5/13/189, pt1 (RDB, vol 65, pp 24,952–24,968, 25,001–25,004).

281. Appellate Court decision, 25 May 1925 (RDB, vol 65, p 25,003)

282. Ibid. This was, as Dr Gilling noted, ‘a largely novel perspective’ (doc c1, p98). Ngai Tamanuhiri had not lost land through the cession. Moreover, this interpretation differed substantially from that of the Jones Commission of 1920, who stated that the Poverty Bay Commission had ‘in error, adopted at some later date the outside tribal boundaries of the Rongowhakaata Tribe as showing the boundary of the land arranged to be given by that section of the people’. ‘This’, according to the Jones Commission, was the only way they can account for them ‘taking nearly 51,000 acres from one tribe’: ‘Native-Land Commission’, 5 November 1920, AJHR, 1921–22, G-5, p17.

283. Appellate Court decision, 25 May 1925 (RDB, vol 65, p 25,004)

Te Whanau a Kai continued to petition against the decision of the Appellate Court.²⁸⁴ They continued to maintain that they held customary rights in the Patutahi block and that they should properly benefit from a settlement. In 1930, Rongowhakaata and Te Whanau a Kai jointly asked the Government to empower the Native Land Court to further consider Te Whanau a Kai claims in Patutahi.²⁸⁵ The Government responded with more legislation. The enabling legislation was however tightly circumscribed. Rather than empowering the court to reconsider Te Whanau a Kai entitlements at the outset, it admitted investigation only into whether there were members of Te Whanau a Kai who could rightly claim Rongowhakaata bloodlines (and therefore an entitlement to participate in the settlement), who had been excluded from the beneficiary list.²⁸⁶ The investigation, which was held in 1931, resulted in 38 Te Whanau a Kai individuals being allocated shares in the block, on the basis of their Rongowhakaata whakapapa.²⁸⁷ As noted, the matter of a settlement quantum had yet to be decided.

(3) *Negotiation and settlement: Rongowhakaata and Whanau a Kai*

After the Second World War, the two claims of Rongowhakaata and Te Whanau a Kai coalesced. We now consider the chronology of events that led to the 1950 settlement of Patutahi.

As we have discussed above, various attempts had been made to complete the settlement of the Patutahi compensation during the 1930s and 1940s, but by 1949 closure had not been achieved. In May 1949, Te Whanau a Kai delivered a submission arguing for their possible inclusion in a settlement for Patutahi.²⁸⁸ At a meeting with T Ropiha, under-secretary for the Department of Maori Affairs, Te Whanau a Kai outlined their view that Rongowhakaata might accept £30,000, while they would accept an additional £60,000, thus bringing the total to £90,000.²⁸⁹ If, they argued, the land was valued at £1 per acre as at 1869, and if 80 years of interest at 5 per cent was added, the amount would total £101,685. A settlement of £90,000 was thus considered ‘not excessive nor unreasonable’.²⁹⁰ In addition, they argued, the amount taken by the Crown exceeded the 20,337 acres identified in 1920 by the Jones commission, but they were prepared to let this matter lie.

However, before the Crown formulated a response to Te Whanau a Kai, it was notified of a resolution that had been passed at a hui held by Te Whanau a Kai and Rongowhakaata.

284. Document c1, pp100–105

285. The previous year, the court sat under the Native Land Amendment and Native Land Claims Adjustment Act 1928 to investigate Te Whanau a Kai rights in Patutahi. However, owing to the problematic nature of the 1928 Act (which in part allowed for a new hearing, but which required the Native Land Court to review the decision of a higher court), the presiding judge declined to introduce new parties onto the list of beneficiaries: doc A23, pp340–341; doc c1, pp117–120.

286. Document A23, p341; doc c1, pp125–131

287. Document c1, pp134–135

288. MA1 5/13/189, pt2 (doc c1, p157; RDB, vol66, p25,213)

289. Document c1, p157

290. ‘Submissions of the Whanau-a-Kai’ to T Ropiha, 9 May 1949, MA1 5/13/189 (doc c1, p157; RDB, vol66, p25,213)

The resolution stated: 'That the amount of Compensation to be paid in respect of Patutahi Confiscation be fixed at £100,000 allocated to the two tribes in the proportion of Rongowhakaata £60,000 Whanau-a-Kai £40,000'.²⁹¹ The hui signified an important coming together of Rongowhakaata and Te Whanau a Kai, after many years of competition and conflict. Seemingly, both parties were prepared to put aside their differences and work together to acquire what they considered fair compensation for their loss.

The Crown's position, however, was that the amount of compensation had been set by the Native Land Court at £30,000, and that the persons so entitled had been determined by the court. The under-secretary of the Department of Maori Affairs was initially confused as to 'why so much play is being made of a reconciliation between Whanau-a-Kai and Rongowhakaata'.²⁹² He felt that it was 'an attempt to bolster up a claim for a larger sum'.²⁹³

Yet again, matters were delayed, this time by a general election. Peter Fraser's government lost the election and a new national government, led by Sidney Holland, took office. The new government came into office on a platform of reduced public expenditure. In April 1950, the new Minister of Maori Affairs, EB Corbett, sought advice from his under-secretary on the Patutahi matter. He was informed that the sum of £100,000 mooted by Te Whanau a Kai and Rongowhakaata was 'far in excess of what is fair and reasonable', and that Te Whanau a Kai had failed twice to substantiate their claims before the courts.²⁹⁴ Corbett was advised that by sticking to the original sum set by the Maori Land Court of £7,500, with interest to 1950, a figure of £37,875, or a round sum of £40,000, could be paid.

The Crown believed that it should deal with only one tribe, Rongowhakaata. As Corbett explained, any attempt to deal with a separate claim by Te Whanau a Kai would mean that 'the whole matter would have to be thrown open to the Court again'.²⁹⁵ For Corbett, 'The only way to deal with the matter was on the basis of the existing claim and the Whanau a Kai should accept the decision'.²⁹⁶ This left the Rongowhakaata representatives in a difficult spot. To support Te Whanau a Kai would mean considerable delay in settlement, or indeed might put the entire settlement at risk.

As to quantum, the Minister admitted that there 'had been procrastination on the part of other Governments', but he did not feel that £60,000 was a viable sum.²⁹⁷ A sum of £100,000 was out of the question. He could offer about £37,000. After some discussion, Rongowhakaata

291. Nikora to Minister of Maori Affairs, 10 July 1949, MA1 5/13/189 (doc C1, p158; RDB, vol 66, p 25,199). We note that this is the reverse of the proportions used earlier.

292. Under-secretary to Minister of Maori Affairs, 30 August 1949, MA1 5/13/189 (RDB, vol 66, p 25,200)

293. Ibid (pp 25,200–25,201)

294. Ropiha to Minister of Maori Affairs, 18 April 1950, MA1 5/13/189 (RDB, vol 66, p 25,186)

295. Notes of representations made to Minister of Maori Affairs (EB Corbett), at Parliament Buildings, 24 May 1950, MA1 5/13/189 (RDB, vol 66, p 25,139)

296. Ibid

297. Ibid (p 25,141)

lowered their offer to £45,000.²⁹⁸ Corbett later put a figure of £45,000 to Cabinet.²⁹⁹ Seemingly on the advice of Treasury, on 2 October 1950, Cabinet argued that £38,000 be set aside for the settlement of Patutahi.³⁰⁰ Three weeks later Rongowhakaata gathered at Manutuke, where the offer was placed before them. A vote to accept the offer was passed, but only ‘after due expression of disappointment at the smallness of the offer made by the Government’.³⁰¹ Section 58 of the Maori Purposes Act 1950 provided for the settlement.

We now consider the claims of Rongowhakaata and Te Whanau a Kai claims in turn.

6.6.2 Tribunal findings and analysis

(1) *Rongowhakaata claim*

Did the payment to Rongowhakaata represent a full and final settlement of the tribe’s Patutahi claim? The answer is clearly no. The settlement was premised on the Jones commission’s conclusion that the only valid claim was that to the western extension of the Patutahi boundary to the Hangaroa River. In fact, we have found, there was no basis upon which the Crown could justify any taking at all. That leaves at the least, the Rongowhakaata interest in the remainder of Patutahi and the Te Arai block unsettled.³⁰² That is, a total of around 32,000 acres of Rongowhakaata interests (shared or otherwise) had yet to be addressed.

Even in respect of the extension land, it is difficult to accept that the payment of £38,000 was a full discharge of the Crown’s responsibilities. The compensation would have been in the order of £2 per acre – hardly a fair value in 1950. We note, for example, that seven years later, when the Crown was evaluating the cost of establishing protection and production forests, it assessed the value of the hilly and substantially degraded land around Gisborne. The Mangatu block was valued at approximately £6 an acre and land in the Tawhiti station, at approximately £10 per acre.³⁰³

The claimants before us criticised the Crown for paying the compensation to individual title holders, rather than keeping it a single tribal endowment to assist Rongowhakaata in repatriating some of its lands. The case for the claimants in this regard is somewhat weakened, as it appears that the recipients requested individual payment.³⁰⁴

In the event, we find that the Rongowhakaata claims with respect to the Patutahi and Te Arai Crown acquisitions remain unsettled.

298. Ibid (p 25,142)

299. In the interim, Te Whanau a Kai lodged a final petition and met once more with Corbett. No result for Te Whanau a Kai was forthcoming: see doc c1, pp170–175.

300. Document c1, pp175–177

301. Ibid, p177

302. We assume without deciding that Rongowhakaata hapu had no interests in their own right in Te Muhunga.

303. Document f1, p71

304. Document c1, p177

(2) *Whanau a Kai claim*

Did Te Whanau a Kai have a separate claim in the Patutahi block? There seems little doubt but that they did. The evidence before the Jones commission establishes at least that Te Whanau a Kai had rights in the Kaimoe block – the portion at the northern end of Patutahi. Te Whanau a Kai witnesses spoke of their occupation of Patutahi pa, they named the chiefs who resided in that place, they named relevant carved houses, and they gave the location of urupa, pa, tuna, cultivations, and kainga, particularly along the Whakaahu Stream. That evidence of extensive occupation was not denied by Rongowhakaata witnesses. Heni Materoa of Rongowhakaata stated: ‘I know the Whanau a Kai occupied Patutahi Pa before the Hauhau raid. After the Hauhau raid their occupation there ceased.’³⁰⁵

The Native Land Court appeared to accept the evidence of Whanau a Kai occupation at Patutahi Pa but added an important qualifier. According to the court: ‘they do not seem able to disassociate themselves from the Rongowhakaata for the majority of the persons who occupied there were admitted to be half-caste Whanau-a-Kai and Rongowhakaata.’³⁰⁶

There is little doubt that this was true, but that fact alone hardly disproved the Whanau a Kai claim. It seems that the court’s lack of sympathy for the Whanau a Kai claims sprang from the judge’s belief that the claims had been only recently conceived. The court expressed its scepticism in the following terms:

One peculiar feature about this Whanau-a-Kai claim is that Kaimoe is included within their alleged boundary – at least the Court presumes that it is although the limits of their claim on that side have not been specified and Kaimoe is comprised in that part of the 5,000 acres of the Patutahi block which it has been understood [on] all sides was ceded to the Crown by Rongowhakaata. Yet if the Whanau-a-Kai claim is correct they have allowed the Rongowhakaata all along to take credit for the cession and as far as this Court knows have never made any protest nor asserted that it was their land that was ceded and not Rongowhakaata’s nor did they until 1917 petition Parliament as to the land taken in error although Rongowhakaata had been petitioning more or less continuously since 1878.³⁰⁷

If this was indeed the underlying basis for the court’s dismissal of Te Whanau a Kai’s claim then the court’s view was in error. Te Whanau a Kai had already attempted to secure redress for the loss of lands at Patutahi. They were represented by Wi Pere before the Clarke commission of 1882. They made petition to parliament in 1903 as well as 1914. It appears that the court was unaware of this.

What then was the extent of Te Whanau a Kai’s loss? Did Te Whanau a Kai have rights beyond Kaimoe? One of the difficulties in responding to this question with precision is

305. Gisborne minute book 51, p92 (doc C1, p76)

306. ‘Patutahi Judgment, Native Land Court, 4/8/23, Gisborne Minute Book 51/140–152’ MA1 5/13/189 (RDB, vol65, p24,990)

307. Ibid

that the experience of dislocation for the community of owners at Patutahi Pa during the turbulent years of the 1860s, contributed to the sometimes conflicting or disjointed evidence later put before the Native Land Court in 1923 and subsequently. A further petition by Te Whanau a Kai in 1927 rather candidly described the problem:

The Courts based their finding against Whanau-a-Kai principally on the ground that there were discrepancies in the descriptions of the boundary of the portion which was claimed, but the Courts did not regard the following facts which sufficiently explain and account for any such discrepancies, namely, that the old people who knew the boundaries are now dead, that there is now no systematic teaching of history and boundaries, that the land has been out of Maori possession for two generations and has thus been more or less a dead issue, and further that, whether or not the boundaries could be accurately given, the admitted and proved occupation of Whanau-a-Kai was absolute proof of their ownership of the parts occupied.³⁰⁸

While the Kaimoe portion of the larger Patutahi block was closely held and rich in evidence of occupation and usage by both Rongowhakaata and Te Whanau a Kai, the possession of the larger hinterland area of the Patutahi block was far less clear. Unlike the rich river flats, this was not a place of large-scale settlement or cultivation by any tribe; resources there were more likely to be used on a seasonal basis, with smaller pa and kainga, as well as mahinga kai sites.

While we cannot be certain, it seems likely that Te Whanau a Kai had rights in the area to the west of Kaimoe, including the extended portion of Patutahi. Te Whanau a Kai were well recognised right holders in the adjacent Repongaere and Okahuatui blocks. The southern boundary of those blocks was in fact established by the Crown's extended and mistaken survey of the northern hinterland portion of the Patutahi block in 1873. It would follow that customary rights of Te Whanau a Kai are likely to have intersected with those of Rongowhakaata through the northern part of Patutahi. It is not possible to be absolutely certain of this but it does seem to us to be more likely than not. One of the difficulties we face is that many of the more subtle distinctions between hapu and whanau rights which were clearly evident in the nineteenth century in other surrounding blocks which had not been taken, were no longer evident here because of the Crown's taking. This is likely to be a natural product both of intermarriage between Rongowhakaata and Te Whanau a Kai and of the long-term dislocation of the two kin groups from the land in question.

The fact that the July 1950 hui of Rongowhakaata and Te Whanau a Kai produced an agreement that the Maori parties would share a Patutahi settlement in 60:40 proportions respectively showed, we suspect, that the Maori side believed they were negotiating for settlement of the entire Patutahi claim, not just the Hangaroa extension.

308. Katerina Takawhaki Kerekere and others, petition 237/1927, MA1 5/13/189 (RDB, vol 65, p25,033)

Whatever the position as to rights in the area west of Kaimoe, it is perfectly clear that no Whanau a Kai claims in Patutahi were settled in 1950 and they must now be dealt with. We find accordingly. The proportion adopted by the claimants in 1950 – 60 per cent for Rongo-whakaata and 40 per cent for Te Whanau a Kai seems still to provide the most robust guideline as to proportions in the Patutahi grievance today. No doubt it was arrived at by these communities with due consideration of the traditional rights on each side. There seems little to be gained now in going behind that understanding.

6.7 CONCLUSION

As we have said, Maori acceptance of the deed of cession represented an acceptance under duress of the Crown's absolute authority. Though that was its purpose on the Maori side, the cession took the legal form of a purported land transfer on a huge scale. The fact that the transfer was forced meant it breached the principles of the Treaty as well as British law. This breach was exacerbated by the fact that the cession purported to extinguish not only the title of those who did sign but also that of the individuals and communities who did not sign, even though the latter probably represented the majority of right-holders in the district. It was therefore confiscation both in its underlying motivation and, as far as the non-signatories were concerned, in its technical effect as well. It could, for those reasons, have had no legal effect at either level.

Then came the failure of the usually meticulous colonial paper trail with respect of the lands to be retained in Crown title: the failure by the Crown to record in detail what it was that Maori were being forced to transfer to the Crown for the Crown's own use. In the case of the three blocks to be retained, the Crown made mistakes, covered them up, made mistakes in the covering up, and covered up those mistakes. In the event, Maori were left to endure over 120 years of unnecessary complaint, with all of the wasted resources, effort, and hope that this must have entailed.

But the story does not end there. Indeed, it had hardly begun. The deed of cession was the doorway through which the machinery of the civil empire would enter Turanga. The Poverty Bay Commission, the creation of the deed, had yet to commence its work.

CHAPTER 7

THE POVERTY BAY COMMISSION, 1869–73

The proceedings of the court, in the final settlement of these long pending questions, will be found to have been productive of a very satisfactory effect upon the Native Population of the Poverty Bay District; the good results of which will be shown, we believe by a peaceable attitude on their part towards both the Government and their European neighbours; and by a general disposition amongst them to invite Colonisation within the limits of their District.

—Rogan and Munro to Native Minister, 3 September 1869

7.1 INTRODUCTION

The deed of cession was published in the *New Zealand Gazette* on 13 February 1869. Governor Bowen deemed ‘Native title to and over’ the lands described in the deed to have been extinguished from 18 December 1868.¹ At the same time, an Order in Council, dated 10 February 1869, appointed Judges Rogan and Monro, both of whom were Native Land Court judges, to be commissioners. The Poverty Bay Commission, as it became known, was empowered to hear the claims of ‘loyal persons’ to those lands which the Crown had decided to return, provided their claims were lodged by 18 March 1869.²

The establishment of the Poverty Bay Commission marked a significant turning point for Turanga Maori. By the deed, Turanga Maori relinquished approximately 1.195 million acres of land to the Crown. As we have discussed in the previous chapter, the Crown retained approximately 50,000 acres of this land as punishment for the purported ‘rebellion’ of some Turanga Maori and to establish military settlements in the area.

The Poverty Bay Commission’s first task was to record which of the lands ceded by Turanga Maori would be retained by the Crown. This was done (albeit unsatisfactorily) on 30 June 1869 – the commission’s second day of hearings. The remaining lands were to be returned to ‘loyal’ Turanga Maori. This required a process of title adjudication to identify the customary owners of the many blocks within the ceded lands. It also required a process to

1. *New Zealand Gazette*, 13 February 1869

2. *Ibid*

establish whether any of those customary owners had been in ‘rebellion’. The test for rebellion was to be that contained in section 5 of the New Zealand Settlements Act 1863. That section provided for two distinct tests of rebellion: bearing arms against the Crown and assisting others to bear arms (see sec 7.3.1). Those whose actions fitted the section 5 tests would be excluded from titles.

The commission had a further duty – it was charged with investigating the ‘old land claims’ (as they were popularly called) of local settlers. These claims were based on private transactions made between settlers and Maori after the 1840 proclamations had forbidden such transactions.³ The commission was to recommend awards to settlers following investigation.

Once it turned to the work of hearing Maori title claims, the Poverty Bay Commission came to function like the Native Land Court, hearing evidence on applications made to it and ruling on the ownership of various lands (a crucial difference though was that ‘rebel’ owners would be excluded from the title).⁴ It also encouraged Maori to resolve their own lists of owners among themselves outside the court.

The commission sat twice: once in 1869 and again in 1873. Its first sitting in Turanga lasted 33 days. In those 33 days, 101,000 acres were awarded to ‘loyal’ Maori and 1230 acres of land were awarded to settlers. In its second sitting, only 15 claims were heard: two resulted in awards, two in succession orders, and one block was subdivided. The commission awarded a further 37,278 acres.

In between these two sittings of the commission, some claims were adjudicated by the Native Land Court, sitting in place of the commission and carrying out its functions. This was because, in 1870, the new Government had decided not to use the commission proper but to replace it with the Native Land Court, sitting under the East Coast Act 1868. After the hearings began, a serious question then arose as to whether the court had the legal power to hear the claims, given that native customary title had purportedly been extinguished by the cession and proclamation. Once the issue surfaced, the court was abruptly adjourned. It had heard claims to only 14 blocks comprising 758 acres. The problem had to be remedied retrospectively by legislation purporting to validate the mistake. There is a question about whether it succeeded.

A total of 138,278 acres was therefore awarded to Turanga Maori by the Poverty Bay Commission and the Native Land Court in its place (acting under the East Coast Act 1868).

Over the course of the hearings, the attitude of Turanga Maori to the commission and the court underwent a marked change. The 1869 hearings were considered a success by both

3. Donald Loveridge, in his report on the origins of the Native Land Court wrote of Governor Gipps’ proclamation: ‘The Crown had proclaimed, firstly, that land titles which were not derived from and confirmed by a Crown grant would not be recognised as valid, and, secondly, that purchases of land from Maori after 14 January 1840, would “be considered as absolutely Null and Void, and will not be confirmed or in any way recognised by her Majesty”’. The two sets of proclamations are reproduced in BPP 1840 (560), pp2–3 Enclosures in no 1, and pp8–9 Enclosures no 2 [BPP, vol3] (Donald Loveridge, ‘The Origins of the Native Lands Acts and Native Land Court in New Zealand’, 2000 (Wai 674 ro1, doc 07), pp26–27).

4. We discuss in detail the working of the Native Land Court in chapter 8.

the commissioners and the settlers. WS Atkinson, an agent who appeared on behalf of the Crown, believed that Turanga Maori were equally satisfied.

This was not the case in subsequent hearings. In 1870, the Native Land Court (sitting as the commission) heard claims against a murmur of disquiet about the Crown's failure to survey the lands it would retain. By the 1873 hearing, which began in August of that year, there was considerably more tension among Turanga Maori. This tension could be attributed to three factors. First, Maori had by then finally received Crown grants for awards recommended by the commission at the end of its first hearing in 1869. They found that the titles had been issued to grantees as joint tenants, rather than as tenants in common, and the ramifications of this for Maori were to be far-reaching. Secondly, as we have seen, the Crown had finally surveyed the Patutahi lands, and it had become apparent that it proposed to take considerably more land than had been expected by Maori. Thirdly, adherents of the Hawke's Bay 'repudiation movement' – a Maori initiative that arose from general dissatisfaction with the Native Land Court – arrived in Turanga, and their leader, Henare Matua, had publicly challenged the work of the commission. As a result of these factors, the commission faced widespread opposition and was forced to adjourn, more than once, during the course of its second and final sitting.

The Poverty Bay Commission finally reconvened in November 1873. On that occasion, the upcoming Turanga leader Wi Pere proposed that the commission return all the lands not retained by the Crown to 12 trustees, with authority to administer them on behalf of Te Aitanga a Mahaki, Ngai Tahupo (Ngai Tamanuhiri), and Rongowhakaata.⁵ The commission did not accede to the request.

The commission was disestablished. The Poverty Bay Land Titles Act 1874 provided that any further claims to lands within the returned tribal blocks might be heard by the Native Land Court sitting under the Native Land Act 1873. Land over which native title had purportedly been extinguished by the deed of cession was thus to be treated as if native title still existed. The 1874 Act also provided retrospectively that land which had passed through the Poverty Bay Commission was to be treated as if it had received title through the Native Land Court process.

A number of key issues arise from the work of the Poverty Bay Commission:

- ▶ Did the commission have the power to confiscate land in Turanga and, if it did, did it exercise that power appropriately; that is, were the processes it established rigorous and fair?
- ▶ Should the commission have had the power to adjudicate on settlers' private land claims dating from 1840?
- ▶ Did Maori consent to that power being granted to the commission and was the process of adjudication on the settlers' private land claims fair?

5. We will return to Wi Pere's suggestion regarding tribal control of Turanga Maori land in chapter 9.

- Was the form of title issued to 'loyal' Turanga Maori in respect of the blocks awarded to them prejudicial to their interests?
- Did the Crown provide appropriate safeguards for aggrieved applicants and did it provide a means of ensuring that the applicants retained sufficient lands to meet their foreseeable needs?

7.2 ADJUDICATING CLAIMS TO THE RETURNED LANDS: PROCESS AND JURISDICTION

We begin this chapter with an account of the establishment of the Poverty Bay Commission. We outline the proceedings of the two Poverty Bay Commission hearings, in 1869 and 1873, and that of the Native Land Court (sitting under the East Coast Act 1868). In particular, we note the questions that emerged in respect of the jurisdiction of both institutions over the lands ceded to the Crown in the deed of cession.

We then consider the work of the Poverty Bay Commission and the Native Land Court in three sections. Each section examines one of the three tasks undertaken by either or both of these institutions: first, they provided a mechanism by which 'rebels' could be identified and their lands be confiscated; secondly, they provided a forum for the validation of previously illegal transactions with settlers; and, thirdly, they provided a means by which titles awarded to 'loyal' Maori could be transformed into Crown-derived estates.

In the course of this chapter, we frequently use three terms: 'ceded lands', 'retained lands', and 'returned lands'. In order to avoid confusion, we define these terms here. By 'ceded lands', we mean the lands that Turanga Maori ceded to the Crown under the 1868 deed of cession, which lands amounted to 1.195 million acres. By 'retained lands', we mean the three blocks of land – Te Muhunga, Patutahi–Kaimoe, and Te Arai – that the Crown retained for military purposes.⁶ (As we have found, the area of these three blocks was intended to be approximately 5000 acres each, but, ultimately, 50,000 acres were retained.) And, by 'returned lands', we mean the lands that were returned to Turanga Maori through the Poverty Bay Commission process. These 'returned lands' are the focus of this chapter.

7.2.1 Establishing the Poverty Bay Commission

As discussed in the previous chapter, the deed of cession outlined a process by which the title of lands owned by 'loyal chiefs and all the men of those tribes [Te Aitanga a Mahaki, Rongo-whakaata, and Ngai Tahupo] who have adhered to the Queen' could be investigated. The deed specified that, following the Governor's acceptance of the cession, a new process of adjudication would commence. Those who sent in their claims:

6. In contemporary usage, 'retained lands' are sometimes referred to as 'ceded lands', or land 'conceded' to the Crown.

within three months of the date of this writing shall have their claims adjudicated by a Commission of Judges of the Native Lands Court of New Zealand and in case they are found correct the Governor will issue Crown Grants of the pieces found by the . . . Commission to be correct.⁷

In the wake of the deed of cession, the Governor proclaimed the extinguishment of native title over the lands thus ceded to the Crown. The commissioners' appointment dated from an Order in Council of 10 February 1869, which was published in the *New Zealand Gazette* on 13 February. The commissioners were authorised to:

make inquiry into all such claims [of loyal persons] as aforesaid which may be referred to you by the Colonial Secretary, and to ascertain whether the claimants making the same have done any of the things described in the fifth Section of the New Zealand Settlements Act 1863 and further to make inquiry into the character of certain purchases and gifts of land within the said boundaries alleged to have been made by and to Europeans.⁸

Judges Rogan and Monro, both of whom were Native Land Court judges (as the deed specified), were appointed commissioners. Unlike the quorum requirements of the Native Land Court, the Poverty Bay commissioners were to sit jointly. That was, however, the only direction the two commissioners received. The 10 February Order in Council stated that the commission would 'rule its own mode of proceeding' and have 'wide discretion within the terms of the deed of cession'.⁹

JC Richmond, then in effect the Native Minister, appointed WS Atkinson Crown agent.¹⁰ Atkinson was instructed to act as the 'representative of the Crown' when the Poverty Bay Commission commenced hearings.¹¹ In particular, he was told to make himself generally acquainted with the merits of the claims and with the 'character for loyalty or otherwise of the claimants'. Where the demands seemed excessive, or where claimants had been 'actively and persistently disloyal', Atkinson was told to 'press these facts on the Commission in such way as may be open to you'.¹²

As we discuss below, the question of jurisdiction was raised early in the first hearing of the commission and the first hearing of the court.

7. HH Turton, 'Deed No 490' *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1877, p699 (doc A10(a), vol4, p2326)

8. Copy of the Proclamation of Appointment of Commissioners, 10 February 1869, MA62/8, PBC inwards correspondence (doc G6, p14)

9. JC Richmond file note, 10 February 1869, MA62/8 PBC inwards correspondence (doc G6, p13)

10. Document G6, p10. Richmond was not the Native Minister in 1869, because there was no such portfolio. However he was in effect 'Minister of Native Affairs' from August 1866 to June 1869.

11. Richmond to Atkinson, 13 February 1869, MA62/8, Poverty Bay Commission inwards correspondence (doc G6, pp14–15). Atkinson, Richmond's brother in law, had acted as Crown agent in compensation court hearings in Taranaki.

12. Richmond to Atkinson, 13 February 1869, MA62/8, Poverty Bay Commission inwards correspondence (doc G6, p15)

7.2.2 1869 – the commission’s first hearing

The first hearing of the Poverty Bay Commission was advertised for 29 June 1869. Before it could begin its work, the commission had to clarify which land the Crown would retain out of the cession for its own purposes. We have dealt fully with this issue in chapter 6. As we noted there, the issue preoccupied the commissioners on the first day of the hearing. Once agreement had been recorded, the commission was free to begin hearing claims to the remaining lands.

The commissioners were given complete autonomy as to how they should proceed. They elected to base their procedure on that of the Native Land Court, with which, being judges of that court, they were very familiar. As each case came before the commission, the claimants’ agent, William Graham, and, in later cases, Preece, called their witnesses. The leading claimant briefly stated his take and then submitted the names of those who, as joint claimants, were to be included in the commission’s awards. This provided an early opportunity for the claimants to be challenged on the grounds of rebellion. As the claim proceeded, ‘Further corroborating witnesses were called, often one of the named co-claimants’. Where there were counterclaimants, ‘they put their case, calling their own witnesses and being cross-examined by the claimants’ agent and sometimes by the Court’.¹³ The surveyor (often the agent, Graham) then gave evidence that the survey of each block had been completed.

Where claims were contested, the commission encouraged the parties concerned to ‘resolve their own differences if at all possible, and resort to the commissioners making judgments between parties only where settlement proved impossible’.¹⁴ In fact, by far the majority of the claims brought before the commission were settled before the claimants entered the court. Competing claimants usually resolved their differences out of court and filed agreed lists of owners for the commission to rubberstamp with formal awards. In his role as agent for many of the claimants, Graham encouraged this practice as a means of resolving contested customary rights.¹⁵

The commission also considered unresolved settler claims to land within the ceded area. It will be remembered that the earlier land claims commission in 1858 had failed to resolve such claims in Turanga because it lacked the jurisdiction to make awards in respect of transactions that were neither pre-Treaty nor entered into during Governor FitzRoy’s failed attempts to waive Crown pre-emption by proclamation. A clause in the 1868 deed of cession stated that, at the request of the Maori signatories, the commission would investigate claims to land which had been transferred to them by Maori. Twenty-two such claims were brought before the commission, and we discuss these claims in greater detail below.

13. Document G6, pp18–19

14. Ibid, p19

15. Document A19, p12. For example, Rongowhakaata and Ngai Tahu disputed the 14,622 acre Maraetaha block. Through Graham’s facilitation outside the courthouse, an agreement was reached. One part of the block was awarded solely to Ngai Tahu, while the remaining block, Te Kuri, was awarded to both iwi.

Though the commission's first hearing appeared to proceed smoothly, with a large number of claims being heard and little apparent dissension, a major difficulty soon emerged. A week into the hearing, the commissioners wrote to the Native Minister to report that, in their view, the commission lacked sufficient power to complete its work – the commissioners had no power to make binding orders or even to tell the claimants what form their titles would take. They were therefore anxious that steps be taken to validate their proceedings and to enable the issue of Crown grants at their request.

Special legislation had to be drafted. Section 2 of the Poverty Bay Grants Act 1869 provided for the Governor to 'execute Crown Grants of any parts of the said lands to such persons as he shall consider entitled there to under the said deed or under any contract engagement or promise'. Titles to returned lands on which the Poverty Bay Commission had adjudicated could then be issued. The Act was, however, somewhat inadequate as a remedy; in 1871, it had to be amended to validate transactions that had occurred after the awards made by the commissioners but prior to the formal issue of Crown grants by the Governor.¹⁶ Administrative difficulties delayed the release of the first Crown grants until November 1870.¹⁷

The Poverty Bay Commission adjourned *sine die* on 10 August 1869, after having sat for 33 days. During that time, it had awarded title to 102,200 acres of Turanga land, of which 101,000 acres had been awarded to Turanga Maori and 1230 acres to settlers. These blocks, which are listed in the table over,¹⁸ were located on the Turanga flats and included the best land in Turanga.

When they wrote their final report, the commissioners expressed their hope that:

the proceedings of the court, in the final settlement of these long pending questions, will be found to have been productive of a very satisfactory effect upon the Native Population of the Poverty Bay District; the good results of which will be shewn, we believe, by a peaceable attitude on their part towards both the Government and their European neighbours; and by a general disposition amongst them to invite Colonization within the limits of their District.¹⁹

A number of issues, however, remained unresolved. A number of applications for title investigation to the returned lands remained unheard. And, although a decision appeared to have been made as to which blocks the Crown would retain, the surveys of the retained lands were not complete. Thus, the boundaries of these lands were not clear.

16. The Poverty Bay Grants Act Amendment Act was passed in 1871.

17. Document F8, p11

18. Edwards stated that 'Of the 76 claims presented by Preece and Graham, 20 were not heard in 1869, one was found to be outside the ceded area (and therefore not heard under the Commission), and four were not heard because they were claims to land included in the blocks ceded to the Crown (for Crown retention)'.

19. Rogan and Monro to Native Minister, 3 September 1869, MA62/6, Archives NZ (doc A10, p384)

TURANGA TANGATA TURANGA WHENUA

Claims	Area (where listed in sources) acres, roods, perches
Kahanui	—
Kaimoe	—
Kairourou	26-0-0
Karaua	—
Kohangakarea	—
Makauri	3596-3-0
Maraetaha	—
Matawhero	3718-0-0
Ngakoroa	12,360-0-0
Ohinekura	91-0-0
Opou 1	3-0-15
Paria	93-0-0
Pukaraka	—
Pukepapa	11,000-0-0
Pukewhinau	74-0-0
Rakaukaka	—
Repongarae	9900-0-0
Ruangarehu	3146-0-0
Tahoka	144-0-0
Tangotete	77-3-21
Taruheru	202-0-0
Taumata o Tauraihu	—
Tauranga	5-2-28
Tawhiritu	120-0-0
Te Ahimanawa	—
Te Karaka	1000-0-0
Te Koru	—
Te Rahui	21-0-0
Waiari	107-0-0
Whakatare	—
Whakawhitira	175-0-0
Whataupoko	19,000
Whenuakura	641-0-0
Wherowhero	21-0-0
Te Poroporo	—
Matawhero 7	—
Pakirikiri	—
Wainui 3	—

Claims presented to the Poverty Bay Commission, 1869. Source: document G6,
pp22–25

7.2.3 The Native Land Court sits under the East Coast Act 1868

In 1870, the newly formed Fox Ministry decided, in a surprise move, to substitute the Native Land Court, sitting under the East Coast Act 1868, for the Poverty Bay Commission. The Stafford Ministry had left office at the end of June 1869, just before the Poverty Bay Commission began its first hearing. Donald McLean became Native Minister in the new Fox Ministry. JD Ormond, his close political colleague, was appointed agent for the general government on the East Coast.

The Fox Ministry had its own views on the best way to deal with Turanga Maori lands. McLean and Ormond had both been critical of Richmond's efforts to resolve the 'Poverty Bay land question' by establishing the commission. Ormond thought that the East Coast Act 1868 empowered the land court to undertake all the necessary title adjudication on Turanga land. He was also critical of the outcomes of the commission's work. He thought too many 'Hauhaus' had been let into the titles and that Atkinson had failed to secure enough land for the Crown's defence needs.²⁰ 'I am afraid,' Ormond wrote McLean in October, 'the Commission has done its work badly and that any amount of trouble has to be encountered in regard to it.'²¹

McLean also wanted to see the Native Land Court resume operations on the East Coast.²² A number of settlers who had been occupying East Coast land since the end of hostilities in 1865 were anxious to see the lands which they occupied processed through the court, so they could gain title.²³

In fact, nearly a year passed after the Poverty Bay Commission's first sitting before the Government took further action. In August 1870, Chief Judge Fenton was informed that the Native Minister wished the land court to sit as soon as possible at Turanga. On 24 September, Fenton scheduled a hearing to be held in exactly two months' time. He also alerted the Government to the fact that there might be problems with the court's jurisdiction over the ceded lands.²⁴ Two weeks later, Fenton was asked whether any of the cases notified for hearing fell within the ceded territory. Fenton replied that all but three claims did.²⁵

Fenton did in fact send Judge Rogan to Turanga, although Rogan remained uncertain as to the court's jurisdiction and sought clarification from Wellington. In fact, the Government was still debating the matter. McLean thought that the 'confiscated block' at Patutahi should not go through the court at all but that the court could deal with any other Poverty Bay land.²⁶

20. Document A10, p385

21. Ormond to McLean, 13 October 1869, McLean papers, MS papers 0032–0483 (doc A10, p385)

22. Document A10, p394. Ormond could not understand why the previous government had not used the East Coast Act 1868: doc A10, p384.

23. Document A10, p394. The Poverty Bay Commission, after all had dealt with a comparatively small number of claims, mostly dating from the 1840's–1850's.

24. Document A10, pp394–395

25. Fenton to McLean, 16 November 1870, MA62/7, Poverty Bay Commission inwards correspondence, Archives NZ (RDB, vol130, pp 49,883–49,885) Fenton's tone in the letter, is distinctly cynical. He implied that the government had tied itself in legal knots with its various measures in respect of the ceded lands since 1868

26. McLean to Ormond, 22 November 1870 (telegram), AGG-HB3/3, Archives NZ (doc A10, pp396–397)

But Henry Sewell, the Minister of Justice, consulted with the Attorney-General. They agreed that the 1868 cession could not be annulled. The 'proper course' was for the Native Land Court to sit under the East Coast Act 1868. Judge Rogan was to sit as sole judge, in keeping with the court's procedure. He was also to be instructed to confirm the title to the lands which were to be made over to Ngati Porou and Ngati Kahungunu.²⁷ The Government's decision was conveyed to Rogan on 29 November 1870.²⁸ Rogan, in the meantime, had proceeded to hear cases outside the boundary of the ceded lands.

On 2 December, Rogan notified Maori that he would hear Turanga claims the following day. On 3 December (a Saturday), the hearing of Maori claims to the ceded lands began. GS Cooper, Native Affairs under-secretary, appeared before the court. He announced that he was present in the capacity of agent for the Attorney-General 'to waive any objections that the Crown may have had to the Court hearing claims to land within the boundaries of the ceded block'.²⁹ Few Maori appeared, however, so the court was adjourned to the following Monday. On recommencing, approximately 20 claims from around Manutuke that had not been previously heard were brought before the court. Some lay outside the ceded block. Fourteen blocks in all, with a combined area of 758 acres, were investigated.³⁰

On 8 December, Joshua Cuff, a claimant solicitor, objected to the hearing proceeding, on the ground that the court did not have jurisdiction. Cuff pointed out that the 'land within the ceded block was not "native land" within the meaning of the 1865 Native Lands Act'.³¹ He argued that only the Poverty Bay Commission could hear claims to the Turanga lands. The hearing continued until 10 December, when it was 'abruptly adjourned' *sine die*.³²

When concerns were later raised about the validity of the Crown grants issue in the wake of the hearing, Parliament passed the Poverty Bay Lands Titles Act 1874. Section 3 provided:

The validity of any Crown grant of land heretofore made under the provisions of 'The Poverty Bay Grants Act, 1869', or any Acts amending the same, shall not be questioned by reason only of any informality attending the issue of any such grant, or of any irregularity in the times and manner in which the said Judges or either of them held sittings as aforesaid, or by reason of the fact that one of such Judges sat and acted alone.³³

27. Sewell to Ormond, 28 November 1870, MA62/5, Archives NZ (doc A10, pp396–398)

28. Document A10, p398

29. Ibid, p399

30. Document A23, p252

31. Ibid, p252

32. Document A10, p400

33. The Native Land Court hearing of 1870 represented something of an anomaly. Despite this, however, the claims heard by the court were not reheard when the Poverty Bay Commission reconvened in 1873. In attempt to remedy the situation, Parliament passed the Poverty Bay Titles Act 1874, which retrospectively declared that 'the validity of any Crown grant for the Turanga district could not be questioned on the basis of any informality or irregularity in the manner in which the title had been investigated'.

7.2.4 The return of the Poverty Bay Commission

By 1873, as we have noted above, the Government had a problem. It had been critical of the commission created and operated by the previous administration, but its own solution, the Native Land Court, had now been found without jurisdiction. As a result, there were complaints from both settlers and Maori who were unable to sell or lease the land, due to lack of title. The Crown's solution was to reintroduce the Poverty Bay Commission.

This decision was made easier by the fact that McLean had finally reached a conclusion on the Turanga lands. On 2 December 1872, he decided to proceed with the Patutahi survey, to define the Crown's take. (It began at once and was completed in March 1873.) Once the Crown's lands at Patutahi had been surveyed, the deed of cession could then be cancelled; the ceded land reverting to its status of Maori land, as under-secretary George Cooper noted, 'as if the 1868 Deed had never existed'.³⁴ Maori would then be able to take their lands through the land court in the 'ordinary way'.³⁵ McLean believed that the commission would have to sit again before the deed could be cancelled, and arranged for Rogan and Monro to reopen proceedings at Gisborne.³⁶

The reintroduction of the Poverty Bay Commission was not, however, a solution that was universally accepted. As Crown historian Cecilia Edwards noted: 'there were two groups of people involved in the 1873 hearings – those who sought to have their title investigated, and those who no longer supported the process and wished to delay or prevent the commission from sitting'.³⁷ There was a noticeable increase in tension within the Maori community. The issue of Crown-derived native titles as joint tenancies, the survey of the Patutahi block, the realisation that the Crown would retain a larger block than expected, and the arrival of repudiationists from the Hawke's Bay all led to opposition to the work of the commission.³⁸

The 1873 hearing of the Poverty Bay Commission was in fact notable less for the number of claims it heard, than for the Maori protest that the re-appearance of the commission generated. Between August and November 1873, the commission had to adjourn a number of times. It heard evidence in only three cases: Waikohu block (22,000 acres), Waihau (13,800 acres), and Awapuni. The latter block was contested by different groups of claimants and on 21 November, the commission decided not to proceed.³⁹ By this time, Turanga Maori and the Crown agent had agreed that the remaining unadjudicated lands would be returned to Maori so that the work of the commissioners could be brought to a close.

We will return to the final hearing of the Poverty Bay Commission at the end of the chapter but first we will discuss the impact each of the Poverty Bay Commission and the Native Land Court hearings had on Maori. We arrange our analysis around the three functions

34. Cooper file note, Harrison to Native Office, 25 November 1872, MA62/7 (RDB, vol129, p 49,773)

35. Ibid

36. Document A10, p 411

37. Document G6, p 129

38. We discuss the nature of the titles that the grants were awarded in that of joint tenants, below.

39. Siân Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997, p107 (doc A23, p271)

undertaken by the commission: the confiscation of 'rebel' lands, the investigation of settler claims, and the transformation of Maori titles.

7.3 AN INSTRUMENT OF PUNISHMENT

It was an essential task of the Poverty Bay Commission to confiscate land from so-called rebels. The land so confiscated would not be kept by the Crown but transferred to those who had demonstrated themselves to be 'loyal'. In this way, the commission was the Crown's primary instrument of punishment for the events of Waerenga a Hika and Matawhero. The commission was required to undertake two functions within this overall task. The first was to identify these so-called rebels. The second was to address the issue of the means by which the land rights of 'loyal' Maori would be protected. Before we go on to address the arguments advanced by the claimants and the Crown, it is necessary to set out some background under each of these headings.

7.3.1 Identifying rebels

The Poverty Bay Commission was established to return land to 'loyal' Turanga Maori only. 'Rebel' interests would be in effect confiscated block by block. The commissioners therefore had to make a judgement as to what did or did not constitute rebellious behaviour. When the commission was first established, it was instructed to 'ascertain whether the claimants making . . . [application] have done any of the things described in the fifth section of the New Zealand Settlements Act 1863'.⁴⁰ Section 5 was unequivocal – 'any person':

(1) Who shall since the 1st of January 1863 have been engaged in levying or making war or carrying arms against Her Majesty the Queen or Her Majesty's Forces in New Zealand or—

(2) Who shall have adhered to aided assisted or comforted any such persons as aforesaid or—

(3) Who shall have 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 in New Zealand or to join with or assist any such persons as are before mentioned in Sub Sections (1) and (2) or—

(4) Who in furtherance or in execution of the designs of any such persons as aforesaid shall have been either as principal, or accessory concerned in any outrage against person or property or—

40. Document H2, pp59–60

(5) Who on being required by the Governor by proclamation to that effect in the *Government Gazette* to deliver up the arms in their possession shall refuse or neglect to comply with such demand after a certain day to be specified in such proclamation.

The Act provided, therefore, for two distinct tests of rebellion: bearing arms against the Crown and assisting others bearing arms.

Though the instructions were clear, the practical application of them was not so simple. Before the first hearing of the Poverty Bay Commission opened, Richmond issued separate instructions to Atkinson, the Crown agent (but not, we note, to the commissioners), which subtly modified how the definition of ‘rebellion’ was used.⁴¹ Rather than investigate all ‘rebels’, Atkinson was told to scrutinise only those who had been ‘actively and persistently disloyal’. Under Richmond’s new instructions, Atkinson was to ‘temper his role where former rebels had “shown themselves friendly” during the campaign against Te Kooti’.⁴²

At some point before the opening of the first hearing, and in the wake of Matawhero, the settler James Wyllie gave Atkinson a list of ‘rebel’ names entitled the ‘Rongowhakaata List of Claimants to Land under the provisions of the deed of cession’. Wyllie had been recently appointed as interpreter under the Native Lands Act. He was also, it will be remembered, instrumental in shaping the cession agreement and played a large role in persuading Turanga Maori that they should offer their lands to the Crown. ‘Wyllie’s list’, as it came to be known, was a detailed document containing information which was valuable to the Government. It gave the names of ‘loyal’ claimants, the block claimed, the merits of the claim, and the location, size, and quality of each block. In particular, it gave a long list of ‘rebels in claims’.⁴³ Over 300 Rongowhakaata people were classified on the list as ‘rebels’. It is likely that this was a large proportion of the adult population of Rongowhakaata, perhaps even a majority. We discuss the significance of this list below.

When the commission hearings began, Atkinson indicated whether he objected to any of the names submitted being included on the title, as each case was presented. When the first case, the Pukepapa block (11,000 acres), came before the commission, and the claimant Panapa Waihopi of Te Aitanga a Mahaki put in a list of 12 names, Atkinson stated that, although ‘suspicious’ of some of the claimants, he was not prepared to bring any evidence of rebellion against any of them. Later the same day, however, Waihopi added two names and Atkinson objected to one of them, Rihimona Te Tau, ‘as a Hauhau’. Waihopi agreed that Te Tau should be struck out.⁴⁴

41. Richmond was effectively the Native Minister, that portfolio not having been created.

42. Richmond to Atkinson, 13 February 1869, MA62/8, Poverty Bay Commission Inwards Correspondence (doc G6, p29)

43. [Wyllie James], Rongowhakaata list of claimants to land, under the provisions of the deed of cession, [1869], Tucker papers, 84–3, 7BB 7/8, Gisborne Museum and Arts Centre (doc A23, p223)

44. Poverty Bay Commission minute book, 30 June 1869, MS micro coll 06-022, ATL (doc A10(a), vol4, pp1892–1894)

The following day, 1 July 1869, when the Repongaere block (9900 acres) came before the commission, Atkinson raised an objection which would arouse more interest than any other. Hoera Kapuaroa of Rongawhakaata had been taken prisoner after Ngatapa, and was 'handed over' by Rapata Wahawaha. However, Atkinson had also received a letter from 'the residents of Poverty Bay', testifying to his having helped save lives on the night of the Matawhero attack. A number of witnesses spoke at the hearing, including Hoera Kapuaroa himself. The court gave judgment on his case several days later. Though the evidence as to his bearing arms was exceedingly conflicting, it appeared to the court that 'the balance of credibility . . . appeared to be in favour of Hoera'. In addition, given that his warning to settlers appeared to have saved many lives, he was entitled to 'any consideration that the court might be able to accord him'.⁴⁵ Kapuaroa was not excluded from any titles and subsequently played an active role in the commission hearings.

In general, however, Atkinson made few objections and, with the exception of Hoera Kapuaroa's case, discussion of 'rebel' claims took little of the commission's time.

The following year, when the Native Land Court was instructed to hear claims within the ceded boundary, 'rebel' claims assumed a higher profile. On this occasion, GS Cooper, Native under-secretary, arrived to act as agent for the Attorney-General. When he appeared before the court, on 3 December 1870, Cooper ensured that Maori were reminded of the section 5 tests of rebellion. Cooper made it clear that he would not initiate objections to claimants. On the contrary, he stated that objections must be raised by a 'loyal' native claimant, where he or she considered that any other named claimant had done 'some of the things mentioned in the fifth section of the New Zealand Settlements Act 1863'. Providing that the allegation was substantiated, Cooper would, on behalf of the Crown, object to that person being registered by the court as a claimant to the land in question.⁴⁶

Although Cooper objected on several occasions, he did not play a substantial role in cross-examination. Claimant witnesses themselves gave evidence in support of the allegations that other names claimants were 'rebels'. Those who were challenged made their own statements and were cross examined. The court then decided whether the claimant would be admitted to the title.

Comparatively little land was investigated in the 1870 land court hearing (about 758 acres), and only a small number of claimants were excluded. But the evidence in relation to these claims occupied more of the court's time than had been the case in the previous commission hearing.

In the second session of the Poverty Bay Commission, in 1873, the question was raised whether claimants who were alleged to have been in 'rebellion' were acceptable to the commission. The commissioner stated that 'Hauhaus' would be excluded. James Wyllie, acting as

45. Poverty Bay Commission minutes, 6 July 1869, MS micro coll 06-022, ATL (doc A10(a), vol 4, p1936)

46. Gisborne Maori Land Court minute book, 3 December 1870, MS micro coll 06-019, ATL (doc A10(a), vol 4, pp1854-1855)

agent for some claimants, accused a number of other claimants of rebellion when the substantial Waikohu block (22,720 acres) came before the commission on 26 August 1873. The challenges revealed that the Crown agent and the commissioners had different views of how the process should work. The commissioners indicated to Wyllie, that such objections should come from the Crown agent, Samuel Locke. ‘The Court would not for they the Court could not discriminate as to who were hau haus or otherwise.’⁴⁷ Locke however, stated that the deed of cession ‘had been explained to the natives’ and that any objections should come from Maori themselves.⁴⁸ Panapa Waihopi subsequently stated that ‘he would not object to well behaved Hau haus’.⁴⁹

The second major block which the commission adjudicated on was the Waihou block. One charge of being a ‘hauhau’ (against Petera Te Hone Tapu) was dismissed, on the basis that Te Hone Tapu had already been tried and acquitted in an earlier hearing.⁵⁰ Eleven claimants were struck out after Major Rapata Wahawaha identified them as ‘rebels’.

7.3.2 The land rights of ‘loyal’ Maori

The deed of cession implied (and Turanga Maori believed), that those who had supported the Crown would not be disadvantaged in the long run. According to Richmond, ‘the effect of the deed, when its provisions have been carried out will not be to divest the ceders of any property.’⁵¹ Prior to the Poverty Bay Commission hearings, the Governor had the authority to reserve blocks of land for military settlement – ‘to give to each settler whether European or Maori a piece of land for himself’. But if any of that reserved land belonged to ‘loyal’ natives, ‘pieces of land of the Hauhau of equal value [would] be awarded in place of the land so taken.’⁵² ‘Loyal’ Turanga Maori might thus lose some land, if it was required for a military settlement, but they would be compensated.

Two of the three blocks on which Maori and the Crown apparently reached an agreement were Kaimoe (a part of Patutahi) and Te Muhunga. These blocks subsequently came before the commission. On each occasion, ‘loyal’ Maori formally abandoned their claims on the blocks to the Crown. The Crown agent stated that the land contained within the blocks would be taken by the Crown ‘as part of the land to be accepted in satisfaction of the Crown rights over rebel claims.’⁵³ However, neither the names of the claimants nor those deemed to have rights in these blocks were recorded in the minutes. It remained to be seen whether the Crown would compensate ‘loyal’ Maori for the claims within these blocks.

47. Poverty Bay Commission minute book, 23 August 1873, MA62/4, Archives NZ (RDB, vol129, p 49,548)

48. Ibid (p 49,551)

49. Poverty Bay Commission minute book, 27 August 1873, MA62/4, Archives NZ (RDB, vol129, p 49,552)

50. Poverty Bay Commission minute book, 1 September 1873, MA62/4, Archives NZ (RDB, vol129, p 49,559)

51. Richmond, memorandum for Governor, 10 February 1869, MA62/8, Archives NZ (doc A10, p 351)

52. HH Turton, ‘Deed No 490’, *Maori Deeds of Land Purchases in the North Island of New Zealand, 1877*, p 699 (doc A10, p 343)

53. Poverty Bay Commission minute book, 4 August 1869, MS micro coll 06-022 (doc A10(a), vol 4, p 2194)

The second reason for dissatisfaction among ‘loyal’ Turanga Maori was that the processes of both court and commission failed to successfully distinguish between ‘rebel’ and ‘loyal’ Maori. According to Crown agent Locke:

I found that the prevailing opinion respecting the settlement of the land question by the late Commissioner [*sic*], was, that many of those Natives who had been in rebellion were allowed to have their names inserted in the Crown Grants. And a feeling of dissatisfaction is apparent amongst many of those who have been firm in their allegiance from the first.⁵⁴

7.3.3 The claimants’ case

The claimants had three key arguments regarding the Crown’s treatment of ‘rebel’ and ‘loyal’ Maori claims. First, they submitted that the Poverty Bay Commission could not try and punish ‘rebels’.⁵⁵ The claimants argued it was the criminal courts that had jurisdiction to decide whether or not people were guilty of rebellion. The executive did not have the authority to confer that jurisdiction on a mere commission of inquiry.⁵⁶

Secondly, claimant counsel argued that the jurisdictional invalidity might have been mitigated if the commission had undertaken a fair and transparent investigation into each allegation.⁵⁷ This, they submitted, was not done. Instead, Wyllie’s list meant that most ‘rebel’ names were excluded by claimants themselves, so that the list that would not draw objection. Where objections were raised, the individuals identified were swiftly removed from the lists of claimants. Neither the commission nor the Native Land Court, acting in its stead, investigated the reasons for exclusion or removal.

Counsel for Rongowhakaata submitted that Rongowhakaata were specifically disadvantaged by Wyllie’s influence with the commission. Only eight of the 323 names on Wyllie’s list of rebels were granted any land. Claimant historian Bruce Stirling argued that the list gave the Crown agent Atkinson a tool that allowed him to ‘challenge the inclusion of any alleged “rebels” on ownership lists during the hearing.’⁵⁸ He cited the hearing of the Kohangakarearea block as one example of the way in which the list was used against Rongowhakaata. Fourteen Rongowhakaata claimed this block. The Poverty Bay Commission awarded the title to 10. However, 100 ‘rebels’ were also acknowledged to have had interests in the block. All were excluded from the title. Mr Stirling argued that the same thing happened for each of the other 86 Rongowhakaata claims: the exception being the 47-acre Te Koru block at Matawhero, for which Wyllie wrote: ‘Cannot find any rebel owners in this claim’.⁵⁹

54. Locke to agent for general government (Ormond), 25 October 1869, AJHR, 1870, A-16, p11 (doc A10, pp 385–386)

55. Document H2, p60

56. Ibid

57. Ibid

58. Document A23, p223

59. Ibid, p224

Mr Stirling argued that many of those listed had not been ‘actively and persistently dis-loyal’. Te Kooti took approximately 300 prisoners to Ngatapa, most of whom were Rongowhakaata. According to Mr Stirling, the evidence showed that it was the survivors of this group who were excluded from land titles by the commission. Given their circumstances, these individuals were, he argued, completely innocent.⁶⁰

Thirdly, counsel submitted that both the commission and the court failed to protect the interests of ‘loyal’ Maori, as required under the deed of cession. The Crown failed to investigate through the commission whether ‘loyal’ Maori had interests in the 50,000 acres it wished to retain. Neither did it establish a system to enable those ‘loyal’ Maori to be compensated with land that belonged to those judged as ‘rebel’.⁶¹

7.3.4 The Crown’s case

Crown counsel essentially argued that the Poverty Bay Commission did the job it was set up to do. First, counsel argued that the commissioners were both Native Land Court judges experienced in dealing with Maori issues and Maori communities. The commissioners were required to weigh evidence and apply tests in order to determine ‘rebel’ status. This, the Crown argued, was familiar territory for the judges.⁶² However, they did not know who should be excluded from a title and so relied on the Crown agent to identify potential ‘rebels’. This, the Crown argued, was reasonable practice, and there was a process to deal with questionable claims. If there was doubt as to whether a claimant could be excluded under section 5 of the Act, evidence was presented and witnesses tested by cross-examination in accordance with normal procedure.⁶³ The mechanism and process were, in the Crown’s submission, appropriately judicial given the nature of the subject matter.

Secondly, counsel submitted that the process was one that Maori engaged with fully and supported wholeheartedly. It was Turanga Maori who determined the lists of claimants, rather than the Crown, and it was Turanga Maori who chose to remove claimants on the basis of their ‘rebel’ status. Beyond that, the Crown argued, it was in fact Turanga Maori who drove the process, not the Crown.⁶⁴ The process by which ‘rebels’ were selected largely took place outside commission hearings.

In fact, it was argued, Crown agents rarely played an active role in this process. Atkinson made only a few applications for determination of rebel status and Locke made none, being of the view that ‘it was for Maori to raise the matter if it concerned them’.⁶⁵ Crown historian

60. Ibid

61. Document H2, p59

62. Document H14(9), p8

63. Ibid, p24

64. Ibid, p30

65. Transcript 4.25, p132

Cecilia Edwards did admit, however, that ‘where the commissioners were forced to adjudicate, the minutes offer little evidence as to the factors that guided their decision making’.⁶⁶

The Crown rejected the claimants’ arguments that the Poverty Bay Commission was a mere rubber stamp lacking any transparency or fairness of process. Relying on the evidence of Ms Edwards, the Crown argued forcefully that the relative lack of conflict between the claimants in 1869 and 1870 showed that the process was working well. It showed that applicant communities were discussing and resolving their issues in their own systems out of court, and then presenting them to the commission for confirmation. Rather than being condemned, the commission should be commended for giving effect, as far as possible, to the directly expressed wishes of applicant communities. The Crown argued further that the requirement to secure the confirmation of the commission in a public hearing provided the appropriate checks and balances. If any party was aggrieved by agreements reached out of court, that party could appear in the commission and object. The Crown submitted that this was all that was necessary in the circumstances.

Crown counsel submitted that there was not enough evidence to determine how many Turanga Maori were affected by not attending the hearings.⁶⁷ Certain categories of non attendees can be identified, they argued, but not precise figures. There were, for example, people under the care of ‘loyal’ chiefs at Waiapu and Torere, who may have joined those communities after the fighting ceased. Being no longer ‘actively and persistently disloyal’, it was unlikely that they would have been classified as ‘rebels’ had they attended the commission, but they might not have been considered ‘sufficiently rehabilitated’ to attend the hearings. It is possible, according to the Crown, that these people were included in the lists of owners of their new community.⁶⁸

Others who may not have attended the commission hearings were those who were excluded from the community because they were on the Rongowhakaata list, or any other similar list. These people included those who might have been ostracised in terms of awarding land interests because of their past behaviour and present disloyalty in the eyes of other Maori. It also included those who had left the community permanently and were making new lives for themselves elsewhere.

The Crown conceded however, that while the process around the commission hearings was transparent, the process that translated the awards into grants, was less so: ‘Because the Commissioners had investigated the claims, as put to them, and had not been empowered to investigate proportionate shares or site specific land interests, we cannot be entirely sure that the outcome of their awards was entirely transparent or fair.’⁶⁹ The Crown argued that

66. Document G6, p28

67. Document H14(9), p35

68. Ibid, pp11–12

69. Ibid, p23

the commission performed well in 1869, but accepted that it was inconsistent in the way it proceeded at the 1873 hearing.⁷⁰

Crown counsel also accepted, to a limited extent, that one outcome of the process (rather than the process itself) was unfair. The failure of the Crown to make other provision for ‘rebel’ Maori out of the area the Crown retained, meant that they could have become landless. This, the Crown accepted, was a breach of its duty of active protection. The Crown continued:

In considering this breach of Treaty principles it can be seen that it was a mistake to deal only with the loyal Maori over the retained land agreement of 1869. A consequence of that agreement was that Maori who were not actively and persistently disloyal effectively appropriated to themselves the rebel land not included within the retained area and subject to awards by the Commission.⁷¹

Finally, Crown counsel also accepted that its failure to provide a process to compensate ‘loyal’ Maori who had lost land within the retained area was a breach of the principles of the Treaty.⁷² Crucially, the Crown did not accept that either it or the commission was responsible for ‘loyal’ Maori being excluded from lists. Essentially, the Crown argued that Maori themselves controlled who would be included on the list, and if ‘loyal’ Maori were not included then that could be no fault of the Crown or the commission.⁷³

7.3.5 Tribunal analysis and findings

We turn now to consider the three key arguments relating to this issue: the legality of the commission, the quality of its processes, and the treatment of so called ‘loyal’ Maori’.

(1) *The power to confiscate*

The Poverty Bay Commission operated as an instrument of punishment. By the implicit terms of the Proclamation which created it, the commission was to confiscate the lands of those engaged in acts of rebellion against Her Majesty. In an interesting variant on the usual imperial form of co-option, the Crown did not intend to keep the land so confiscated. Instead it would be transferred into the ownership of those within the hapu who had remained ‘loyal’. Tribal land holdings would not change (with the exception of the Crown retained lands), but the lists of owners would be drastically reduced and the shares of those who managed to stay on these titles would be proportionately increased.

70. Ibid, p7

71. Document H14(8), p7

72. Ibid, p8

73. Document H14(9), p30

The Crown accepted before us that, in effect, the commission confiscated ‘rebel’ land notwithstanding the formal cession of the district by ‘loyal’ Maori.⁷⁴ Whatever view one took of the cession itself, only ‘loyal’ Maori signed it, and only their signatures were sought out. It was not seriously contended before us that those who were ‘loyal’ could lawfully extinguish the land rights of those of their relations who were identified as ‘rebel’. It must follow that the land rights of those ‘rebels’ were not extinguished by the deed of cession, even if there was no question as to the validity of the extinguishment of ‘loyal’ land rights.⁷⁵ The land rights of those ‘rebels’ had not been legally taken away therefore at the time the commission began its hearings. The question for us to confront was accordingly whether the commission could properly carry out the task assigned to it by the Governor in Council. Could it lawfully confiscate the enforceable land rights of those it dubbed ‘rebel’?

The commission was a creation of the Crown’s common law powers – known generally as the royal prerogative. There was no statute of the Colonial Government authorising its establishment or its work. Did the Crown have the power of confiscation in the royal prerogative?

In 1862, when the New Zealand Government first considered confiscation as a method of punishment in the Taranaki wars, Francis Dart Fenton, then assistant law officer with the colonial government, argued that no such power existed. In a legal opinion to an under-secretary, he cautioned that confiscation by royal proclamation would breach both English law and the Treaty. By English law, he said, ‘a subject might not be disseized of his land’ except by authority of an Act of Parliament.⁷⁶ Such rights were too fundamental to be abridged by mere Executive power. Moreover, Fenton reasoned, it could not be argued that it was a prerogative of the Crown to take lands compulsorily from Maori, since to exercise such a power would be ‘in derogation of the honour of the Crown and in contravention of its own promises contained in the treaty’.⁷⁷

The colonial government accepted Fenton’s view that legislation was necessary before Maori could be deprived of their property. The New Zealand Settlements Act 1863 was enacted so as specifically to provide for the Governor in Council to be empowered to confiscate Maori land by proclamation.

In Turanga in 1869, no legislation had been enacted providing for confiscation by royal commission. Nor had the proclamation powers in the New Zealand Settlements Act been invoked there.

Fenton’s opinion was clearly correct. The Magna Carta itself declared that the Crown had no prerogative of confiscation: ‘No man of what estate or condition that he be, shall be put

74. Cross examination of Crown counsel by Tribunal. Crown counsel: ‘we are saying that it [consent] was only obtained from loyal Maori, and that no attempt was made to obtain it from rebel Maori, and that that is taking land from rebel Maori without payment and without their consent . . . its appropriate to call it confiscation’: transcript 4.25, p00096.

75. We have concluded of course that the entire agreement was entered into under duress and therefore invalid.

76. Fenton to under-secretary, 28 November 1862, encl in Grey to Newcastle, 24 February 1863, AJHR, E-3, p 47

77. Ibid, p 48

out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of the law.⁷⁸

Following the deed of cession, the proclamation of 13 February 1869 was issued. In it, the Governor in Council declared that native title had been extinguished throughout the district pursuant to the deed. But a mere proclamation cannot extinguish native title if it has not been lawfully acquired by the Crown in the first place.⁷⁹

The Poverty Bay Grants Act 1869 made it lawful for the Governor to execute Crown Grants ‘to such persons as he shall consider entitled under the Deed of Cession’. But the draconian power to confiscate was nowhere expressed in that provision, and it is clear that such an extraordinary power could not be read in by mere implication.

Even the Poverty Bay Lands Titles Act 1874 failed to retrospectively provide jurisdiction for the commission to confiscate ‘rebel’ interests. Section 2 of that Act referred to native title having already been extinguished, so it did not itself purport to extinguish that title. If the deed which Parliament and the Crown mistakenly thought had extinguished title was not effective, then it seems to us that section 2 would not have made it effective retrospectively. In other words, since section 2 was based on a wrong assumption, it could not have retrospectively validated that assumption.

Section 3 of the 1874 Act then provided that the validity of any Crown grant made by the Governor following recommendation of the Poverty Bay Commission may not be questioned because of informality in its issue, or irregularity in the manner in which the claims were heard. It is clear that section 3 of the Act was not designed to empower the commission to confiscate. It was designed, as the wording makes plain, to correct procedural and technical flaws in the grants, not to ratify confiscation. That is, it appears to have proceeded on the wrong premise that the Native Land Court, when it sat, had no jurisdiction and that its orders had to be retrospectively validated. The Act did not attempt to validate the commission’s processes, because it assumed that they were valid. As we have said, we consider that they were not.

The Crown in our view also had a second problem with the way in which it chose to punish ‘rebels’. The Crown through the commission not only lacked the power to take land from citizens except by authority of Parliament but was also precluded from constituting new courts for the trial of offences otherwise provided for in the ordinary law. As the claimants argued, criminal courts had been established in the colony. It was there that the alleged rebels should

78. Magna Carta (doc H3, p 29)

79. See *Tamehana Korokai v Solicitor General* (1912) 32 NZLR 321, 331, per Stout CJ. Nor, on our consideration of the legislation which preceded and followed the Order in Council, was that power provided either prospectively or retrospectively. The East Coast Act 1868 provided the power in section 4 to exclude those who had done anything fitting the description in section 5 of the New Zealand Settlements Act 1863, from the ownership of native land, though it did not itself import the New Zealand Settlements Act in toto. But section 4 empowered the Native Land Court to confiscate. The commission, though comprising Native Land Court judges, was not itself the Native Land Court. Thus, the 1868 Act did not empower the commission to exclude ‘rebels’ from titles.

have been tried and punished, if at all.⁸⁰ It was contrary to long-established principles of English constitutional law, for the Crown to establish a court of its own motion and without parliamentary sanction in order to try and punish citizens. The King's infamous court of Star Chamber had been abolished because of this.⁸¹

A leading text on the subject matter, *Anson's The Law and Custom of the Constitution*, relied on the ancient authority of the opinion of Sir Edward Coke in *The Case of Proclamations* as to the prerogative right of King James I.⁸² Coke summed the position up in the following succinct statement:

The King's prerogative is ascertainable by rules of law, and is limited by those rules; he cannot make new nor alter existing laws, nor create new offences, nor constitute new courts for the trial of offences otherwise provided for. He is the executive, his business is the enforcement of existing law.⁸³

If there was no special statutory process, the 'rebels' should have been tried in the ordinary criminal courts or in courts martial if that was appropriate.⁸⁴ It is clear that the commission did not have the power to do so.

For completeness, we add that the position is not affected by the fact that the commission's power was merely recommendatory. First, the Governor, who exercised the technical power to make Crown grants (as he did with the Native Land Court), did not have the power to confiscate either. Secondly, the recommendations, with only a few exceptions, seem to have operated like orders anyway.

We therefore find that the Crown acted unlawfully by purporting to create a new court to try 'rebels' and in purporting to grant it the power to confiscate their lands. Thus, the Crown breached its *kawanatanga* obligation to act reasonably and above all in accordance with the law. The Crown further breached its Treaty obligation to actively protect the Maori interests. Equally, by the terms of article 3, Maori were entitled to the rights and privileges of British subjects. Perhaps the most important of all those rights was the right to be ruled by a sovereign which acts in accordance with the law. By failing to so act, the Crown also breached article 3 of the Treaty.

80. As we shall see in chapter 13, five prisoners in fact were tried and punished by criminal processes, but the vast majority of 'rebels' were subjected to the more summary commission process.

81. See *Cock v Attorney General* (1909) 28 NZLR 405. In that case, the Court of Appeal held that the power of appointment of a commission must be exercised in accordance with the law and constitutional practice and that it did not extend to the appointment of a commission to inquire into a matter triable under the criminal law. The reasons advanced by the Court of Appeal for their conclusion were that the Observants of Due Process of Law Statute 1368 (42 Edw3,c3) had enacted that no man shall be put to answer for a crime unless in the manner prescribed by law and that the Star Chamber had been abolished': doc H2, p 63n.

82. ML Gwyer, ed, *Anson's The Law and Custom of the Constitution*, 5th ed (Oxford: Clarendon Press 1922), pp 340-345 (doc H2, p 60)

83. *Ibid* (p 60)

84. For example, section 2 of the Suppression of Rebellion Act provided for the trial of 'rebels' by court martial, but the Act was not invoked in Turanga.

(2) *Legal process and the confiscation of 'rebel' lands*

As claimant counsel accepted, it might be possible to excuse the illegality of the commission if the breach was merely technical and if the processes utilised by the commission to identify and then punish rebels had been transparent and fair. The commissioners were, after all, experienced Native Land Court judges familiar with legal process. If the commission's processes were fair, then, while the claimants may have been able to establish a technical breach of Treaty principle as we have found above, they would find it difficult to show actual prejudice. How then did the process of confiscation operate?

In 1869, close to the events at Matawhero, Native Minister Richmond instructed the Crown agent, Atkinson, to object to the inclusion only of those who had been 'actively and persistently' disloyal. The implication was that he was concerned with the rebellion of the Whakaraui, not with those who fought at Waerenga a Hika and who had subsequently mended their ways. It is difficult to tell how Atkinson applied this instruction. He objected to Rihimona Te Tau 'as a Hauhau', and to a claimant in the Tara o Paea block, without stating any grounds at all.⁸⁵ No further evidence was given in these cases. In one other case, Renata Punua (Mokena) admitted to being with Te Kooti, though he added, it was not of his own free will, and that he escaped. It was agreed that his name should be withdrawn and his interest represented by his sister, Riria.⁸⁶

The only case in which there was clearly a process based on evidence and cross-examination, was that of Hoera Kapuaroa. In this instance, the process was transparent: a number of witnesses spoke, Kapuaroa was able to cross-examine if he wished, and was invited to address the court. But this was clearly a special case, largely because of the gratitude expressed to him in a letter from settlers (including Wyllie). They wrote that his warning on the night of Matawhero, had saved their lives. In the end, the commission decided that, in the light of his actions on the night of Matawhero, he should not be excluded from titles.

By 1870, when the Native Land Court was sent (also without jurisdiction) to do the commission's work, it was immediately evident that Crown agent Cooper intended to adopt a more rigorous approach to the lists of title holders submitted. First, there was now a process for those who were challenged. And, secondly, claimants were now challenged on the basis of their presence at Waerenga a Hika as well as Matawhero. The softer approach of Richmond was reversed.

The process appears to have been as follows. Maori claimants explained their objection to the inclusion of alleged 'rebels'; those 'rebels' had the right to speak in court and were examined by the court. Erahia Kotuku, for example, was charged with being a 'Hauhau'. He

85. The objection against Rihimona Te Tau: Poverty Bay Commission minute book, 30 June 1869, MS micro coll 06-022, ATL (doc A10(a) p1895); the objection against the claimant in the Tara o Paea block, 4 August 1869, MS micro coll 06-022, ATL (doc A10(a) p2185).

86. It is not entirely clear whether this was because he had been with Te Kooti, or because a speech impediment made Punua seem 'idiotic', according to the minutes. Atkinson had also asked whether Riria and Punua were at Waerenga a Hika: Poverty Bay Commission minutes (doc A10(a), vol 4, pp1977–1978).

admitted to having been in arms at Waerenga a Hika. On the basis of this, and the charges made by other witnesses, his name was struck off the list of claimants.⁸⁷ Meri Hira also had her name withdrawn. The charges against her ranged from being a 'Hauhau' at Waerenga a Hika, to having gone with her husband to Ngatapa. Her solicitor, Josiah Cuff, argued that she had gone with Te Kooti because her husband had gone. The argument did not help her case, particularly as her husband was still with Te Kooti. The court stated that the charges against her had been established and they 'did not see their way clear to allow of Meri's name appearing in any of the Crown Grants of lands now before the Court'.⁸⁸ Challenges did not, however, always result in claimants' names being struck off the list. Sometimes Cooper withdrew his objection. Sometimes the court ruled that the charges had not been substantiated, as in the case of Hariata Wahapeka (who stated that the reason for her presence at Ngatapa was that she had been taken prisoner by Te Kooti).⁸⁹

In 1873, when the commission reconvened, the approach to 'rebels' changed again. Waihopi stated bluntly that his list for Waikohu included 'Hauhau' yet both Crown agent Locke and the commission were reluctant to intervene. According to the commissioners, they had no basis on which to draw independent conclusions; they had to rely on the evidence presented before them. At least some 'rebels', in fact did make it onto titles.⁹⁰ We might be tempted to conclude that the general Maori opposition to the commission in its second sitting, which continually stalled its proceedings, had some impact on the attitude of the commission and the Crown agent. But we find it hard, in this case, to explain the attitude of Waihopi to one claimant in particular: he told the court that he had excluded Rima Perewhai 'in consequence of her joining with Henare Matua' (the Hawke's Bay repudiation movement leader).⁹¹ Later, Waihopi would admit Perewhai's claim to the land. She does not, however, appear on the award.

The claimants argued that this level of active cooperation with the commission by certain Maori leaders was necessary, because the presentation of lists including 'rebels', was likely to lead to objections from the Crown or other Maori anyway.

As the Crown accepted, the evidence suggests that the processes adopted by the court and the commission were at best uneven in quality. The definition of rebellion actually applied seems to have changed midstream. This appears to have been a direct result of a change of government, in 1869.⁹² The evidence suggests that both the commission and the court (acting in its stead) were, in dealing with the Turanga ceded lands, no more than compliant mechanisms implementing the policy of the government of the day. As to the actual cases, some

87. Gisborne minute book 1, 6 December 1870, pp165–167

88. Gisborne minute book 1, 9 December 1870, pp204–208

89. Gisborne minute book 1, 6 December 1870, pp168–169

90. Three adult male prisoners of Te Aitanga a Mahaki were placed on the title to Waikohu.

91. Poverty Bay Commission minute book, 26 August 1873, MA62/4, Archives NZ (RDB, vol129, p49,549)

92. Document G6, p10. The Stafford Ministry fell in June 1869. Donald McLean became the Native Minister under the Fox Ministry. However, he did not take responsibility for the matters pertaining to the Poverty Bay Commission until August 1869. The ideology of the Fox Ministry did not, therefore, make an impact until the Native Land Court hearing of 1870.

allegations were carefully and fully considered when they fell to be decided by the commission or court. Others were dealt with summarily and superficially.

In reality, as the Crown argued, by far the majority of ‘rebels’ were excluded before the applications got to court. These exclusions were at the hands of ‘loyal’ applicants for title who simply excluded their rebel kin from the lists they compiled for production to the commission. Thus, the great majority of the Whakarau and whoever else could be fitted within the catchphrase ‘rebel’ did not have the benefit of a trial before their lands were forfeit. Most of the adult male Whakarau had of course been killed, but their children would have been entitled to succeed to their interests if they had not been confiscated. A small number of the Whakarau were with Te Kooti far inland and could not attend. Still others had been taken off to the East Coast or Opotiki to live with kawanatanga hapu there. There is little chance that they could have objected to the lists in any practical way.

The claimants argued that, in excluding ‘rebels’ from titles, Maori were simply pre-empting inevitable objection by the Crown. That may well be so. The existence of Wyllie’s independently compiled list of Rongowhakaata ‘rebels’ tends to support this thesis. All parties before us, including the Crown, accepted that the list had been prepared for and utilised by the Crown as a guide to the exclusion of rebels from the Rongowhakaata blocks.

In the alternative, pre-emptive exclusion may well have been merely a tempting means for ‘loyal’ Maori to significantly increase their landholdings at the expense of their kin. It is to be remembered that many hapu, particularly those of Rongowhakaata, had considerable cause to be angry at the Whakarau for their actions at Oweta and elsewhere. Some exclusions could well have been seen as just retribution for injuries suffered by Turanga Maori who had not joined Te Kooti.

We initially considered that ‘loyal’ Maori most likely cooperated with the Crown’s confiscation strategy, for a mix of these and perhaps other reasons. It seemed likely that the process which prompted Maori to seek the punishment of their own relations must inevitably have placed considerable strain on internal hapu and whanau relationships, even if in some cases the ‘loyals’ had been personally wronged. However, in the light of the fairly clear evidence that ownership lists were stacked in order to prevent reduced awards (see our discussion on this in the section on joint tenancy below), we now consider that reason to be less plausible.

However it happened, through adding names of ‘loyals’ to ownership lists, removing ‘rebel’ names or a combination of both, the self-policing approach cleverly exploited existing tensions within the Maori community to the Crown’s ultimate advantage. What then was the result? How badly affected were individual members of the Turanga iwi?

The extent to which out of court exclusion of claimants to Turanga land took place is dramatically revealed by a comparison of the lists of adult male prisoners sent to Wharekauri, with a nominal index of awards made by the Poverty Bay Commission.⁹³

93. A number of sources are available to do this. First is an 1866 list of adult male prisoners sent to Wharekauri. (AJHR, 1868 A-15E, p10, as quoted in document F3, p17) It identified by name a total of 116 adult male prisoners from

The early 1869 list attempts to identify those who died between 1866 and early 1869. There are six categories: 'died at different times' (22 persons named), 'killed in battle' (29), 'killed' (71), 'Wharekauri prisoners released' (17), 'prisoners in custody' (10), and 'Wharekauri prisoners at large' (53). The category 'died at different times' appears to relate to deaths on Wharekauri. Ms Edwards noted that, by cross-checking the 'died at different times' category with names given in a return of deaths on Wharekauri, it is possible to confirm that 10 of those who died were Te Aitanga a Mahaki.⁹⁴ The list contains 12 other individuals who died on Wharekauri, three of whom were probably women. Others may have been children. We cannot trace their iwi or hapu affiliation.

Of the 123 adult males on the 1866 list of Wharekauri prisoners, 77 also appear on the larger 1869 list.⁹⁵ That leaves 46 Wharekauri prisoners absent from the 1869 list. These 46 were unlikely to have become 'reformed rebels', entitled to receive land interests. None of them appear as grantees in Poverty Bay Commission awards. We are unable to establish their fate either way.

The early 1869 list also names 100 people who were either 'killed in battle' or 'killed', although there may be little difference between the two categories. Only 19 of the 100 prisoners on Wharekauri can be identified. Many were probably Turanga Maori (or Ngati Kahungunu and Urewera, who are listed separately) who were taken prisoner by Te Kooti, or joined him upon his return to the region, and were later killed during fighting prior to or at Ngatapa. Only seven of the 48 individuals listed as 'killed' and identified as 'Ngati Maru' or 'Ngatikaipoho, Ngaitakoki, and Ngatiaweawe' (hapu of Rongowhakaata) are on the 1866 list of prisoners. Twenty-three of the 48 Rongowhakaata can also be found on Wyllie's list.⁹⁶ We cannot tell if these persons had been taken captive, or whether they had joined Te Kooti voluntarily. They all appear to have died. Of 123 Te Aitanga a Mahaki and Rongowhakaata adult male prisoners, we can identify only nine who were awarded land by the Poverty Bay Commission.⁹⁷ Of these nine men, six are described as having been 'released'.⁹⁸ They must

Footnote 93 continued

Turanga. Second is a list compiled some time in early 1869, the authorship of which is unknown: AD31/15 (cited in doc A10(a), vol1, pp506–509). This list identified a total of 203 names, 23 of whom were identified as being from Ngati Kahungunu and Te Urewera. The rest are from Turanga, with hapu of Rongowhakaata being detailed separately. A number of women were also included on this list. Third is Wyllie's list, discussed previously, which included 323 individual Rongowhakaata described as 'rebels': doc D34, pp12–58. Finally, the Crown provided a nominal index of awards made by the Poverty Bay Commission: doc F28(a), pp9–21 This index identified a total of 385 Maori, a number of whom appeared to be women. While we acknowledge the limitations of this index, it has provided a useful basis for our analysis: doc F28(a), p2N.

94. Document F3, p44

95. Ibid, pp60–61

96. Document D34, pp 5–6

97. We note that Ngariki Kaiputahi individuals detained on Wharekauri were unlikely to have received interests in land passed through the Poverty Bay Commission, because no blocks that included their customary interests were brought to the commission (with the exception, perhaps, of the Whirikoka block, outside the hearing district).

98. Rawiri Noti presents the only contradiction between the releases recorded in F3, pp60–61, and his listing as 'At Large' in the undated list (early 1869) in AD31/15: see doc A10(a), vol1, p508.

have been from among the small number of prisoners released early for good behaviour. They were more likely to be included on Poverty Bay Commission awards; they were presumably considered ‘safe’ or ‘rehabilitated’. The remaining three men (Karawina Te Ua, Wharetotara, and Rawiri Noti) were placed on the Waikohu block only in 1873, but that block is probably the exception that proved the rule. It is the only block where ‘rebels’ were actually acknowledged to have been allowed on the title.

The evidence suggests therefore, that there was an almost complete exclusion of those sent to Wharekauri from the title to lands awarded by the Poverty Bay Commission. This pattern appears to have applied irrespective of an individual’s hapu or iwi affiliation. Because we are unable to identify by name the women and children who were also sent to Wharekauri, we cannot say for certain that such an exclusion applied to them also. On balance, we think it probably did. The daughter of Anaru Matete, for example, was excluded because her father was identified as a ‘rebel’. Wives were not in quite the same position as children because they did not usually inherit land interests from their husbands in the way that children did from their parents. On balance, we none the less think it likely that wives were also excluded. We have already referred to the treatment of Meri Hira by the commission. This supports our conclusion.⁹⁹

As to the exclusion of non-Whakarau ‘rebels’ from Rongowhakaata lands, Mr Stirling’s comparison of the 323 names on Wyllie’s list with the names of individuals placed on the title for Rongowhakaata blocks establishes with little doubt that almost all individuals identified on the list as ‘rebels’ were excluded from title to land, though clearly, not all were Whakarau. Mr Stirling identified between eight and 12 possible exceptions to this general rule.¹⁰⁰ We note that we have found 23 individuals listed as ‘killed’ in the 1869 list who also appear on Wyllie’s list. This may explain their exclusion from awards. That leaves around 288 individual Rongowhakaata who were alive (or at least not recorded as dead) during the sittings of the commission and were excluded. As we have noted, that must have been a significant proportion of the adult Rongowhakaata population at the time.

We have found no equivalent to Wyllie’s list of rebels in respect of Te Aitanga a Mahaki or Te Whanau a Kai, so it is not possible to reach any firm view about the fate of the land interests of non-Whakarau from those groups who may have been tagged as ‘rebels’. We have found evidence to suggest however that blocks awarded to these two groups by the Poverty Bay Commission did have considerably reduced ownership lists.

We would, for example, have expected greater numbers of Whanau a Kai and Mahaki owners listed on the titles for blocks such as Whataupoko (19,200 acres, 47 owners), Ngakora (12,360 acres, 33 owners), Pukepapa (11,000 acres, 13 owners), Makauri (2930 acres, 58 owners), and Repongaere (9900 acres, 75 owners),¹⁰¹ when compared to the numbers of owners

99. Gisborne minute book 1, 9 December 1870, pp 204–208

100. Document D34, pp 5–6

101. Document F28(a), pp 3–5

placed on similarly large blocks by the Native Land Court a few years later when the court had no confiscatory function: Tangihanga (11,600 acres, 71 owners); Okahuatū (31,637 acres, 99 owners); Wharekopae (33,735 acres, 98 owners); Puhatikotiko 7 (3800 acres, 112 owners); Whakaongaonga (14,492 acres, 110 owners); and Tarewauru (8781 acres, 113 owners). Of course, some individuals – particularly those who resided further inland – may have been unable to claim customary rights in the blocks that passed through the Poverty Bay Commission, but we suspect they would have been a minority.

This level of exclusion is reflected also in the small number of owners generally on the ownership lists for the blocks on the Turanga flats. According to Robert Hayes, a Crown historian, 80 per cent of the Turanga blocks had fewer than 20 owners. This may in fact have reflected large-scale culling of owners from Turanga blocks for implication in rebellion.

Thus, while it is not possible to be as specific about the overall reduction in owners, the broad comparison to which we have referred suggests that perhaps 30 per cent of owners were excluded from titles in the commission's processes. These people would have been included but for the commission's confiscation function.

(3) The failure of the process

What is clear, however, is that the process overall could not be said by any stretch of the imagination to have been fair or transparent. Once a list of owners had been prepared by the claimants and submitted, it was accepted as a matter of course. We cannot accept that this was an appropriate treatment for alleged 'rebels'. These 'agreed' lists were prepared either using the problematic Wyllie list of 'rebels', or by those who stood to gain directly by the exclusion. There is no evidence that those excluded were consulted, let alone consented to their exclusion. Nor is there any evidence that the successors of those killed (whether as fighters or prisoners) consented to the exclusion of their parents from the list. Any 'rebels' excluded from titles were entitled to have the allegations against them tested in a public and independent forum against a consistent set of fair rules. The claimants argued and the Crown accepted that this did not happen. Instead the overwhelming majority were excluded in an out of court process conducted by those with an obvious conflict of interest. Even where allegations were brought openly before the commission, we have found only one case where it can be said the allegations were properly tested. In the remainder, inquiry was perfunctory and superficial and the rules were inconsistent.

We come back to the entitlement of Maori by article 3 and the obligation on the Crown by article 1 of the Treaty, to provide a system of investigation consistent with the rule of law. It is essential to the rule of law that the law be rationally and consistently applied by independent office holders acting in open forum. Those entitlements of Maori and obligations of the Crown were clearly breached in this aspect of the work of the commission and the court.

It does seem that this failure of access to justice was of more than academic interest. We say this for two reasons. First, even those who had been active supporters of Te Kooti were

entitled to object to the confiscation of their lands and to state the reasons why they took the actions that they had in 1868 and 1869. They were entitled to argue that they had been wrongly accused of rebellion at Waerenga a Hika, and that the Crown had acted unjustly in exiling them without trial and in harassing them upon their escape and return to the mainland. It may well have made a difference. They were entitled to argue that the commission lacked the power to confiscate their lands if they wished to make that argument. As we have said, that argument had considerable merit and ought properly have been put to the commission. By failing to insist that those to be excluded from title, be present, or represented through family or other advocates before their lands could be forfeit, the commission precluded any defence to confiscation in most cases where broader defences were clearly arguable. What is more the confiscation did not just affect the alleged rebels. It affected their children and descendants equally harshly. Those descendants still have no land in Tauranga.

Secondly, Te Kooti took 300 prisoners when he left Turanga for Ngatapa in late November 1868. Most of them were Rongowhakaata. It is obvious that those people lost their land as well, without ever having supported Te Kooti at all. Most of the Whakarau were Mahaki, Te Whanau a Kai and Ngariki. The 323 on Wyllie's list can only be explained if they included Rongowhakaata prisoners of Te Kooti as well as the Whakarau. By failing to require each exclusion to be justified, and by failing to provide an adequate opportunity for the individuals or whanau most directly affected, to challenge such justification, the commission failed to prevent Te Kooti's prisoners and their descendants from being wrongly punished.

It is also possible that some of the persons excluded from awards were being detained elsewhere at the time of the sitting, such as at Opotiki. For instance, Te Mahenga Taihuka was in one of the first groups of prisoners sent to Wharekauri.¹⁰² He escaped with the Whakarau in 1868, but left Te Kooti in 1870, after which the Government held him. Taihuka was not released until 1875. He received no land through the commission.

By article 1, the Crown was obliged to provide a system of investigation into the events from Waerenga a Hika through to Ngatapa which was consistent with the rule of law. The rules to be applied had to be clear and consistent. They had to be administered in public by independent office holders. And those who stood to lose their lands as a result of the investigative process ought to have had a right of access to those office holders in order to object to such action if it was proposed. Finally, those independent office holders ought to have required proof, to an appropriate standard, that confiscation was justified in each case. These are basic standards in any civilised legal system. They were standards that clearly applied in nineteenth century colonial New Zealand.

Neither the commission nor the court, when it sat as the commission, met those standards. As we have said elsewhere, a key component of the Treaty bargain was that, by its terms, the

102. Document A26, p76

rule of law would be introduced and applied to all. We find the principles of the Treaty were breached accordingly.

(4) *Compensation for land lost by ‘loyal’ Maori*

Our conclusions in respect of the process by which ‘rebels’ were excluded from title apply with equal force in respect of those Maori who identified themselves as ‘loyal’.

It will be recalled that ‘loyal’ Maori lost rights within the Crown’s retained lands. The Crown was careful to promise compensation in the deed of cession: ‘if the Commission shall decide that any pieces of the blocks so reserved belong to loyal Natives, pieces of land of the Hauhau of equal value shall be awarded in place of the lands so taken.’¹⁰³

The Crown accepted before us that it failed to provide:

a systematic or principled process to consider and act to compensate well-founded claims by loyal Maori that they had wrongly lost land within the retained area. This failure broke a promise by the Crown in the 1868 Deed of Cession. This was a breach of the relationship principle, the duty to cooperate and act reasonably and in good faith . . . No evidence has been located that loyal Maori abandoned their expectation that those who lost land as a result of this process would be compensated. It seems the Crown failed to do this.¹⁰⁴

We agree. It is clearly consistent with the honour of the Crown today that this concession has been made and we think it appropriate to acknowledge the Crown’s acceptance in this respect.

7.4 CLEANING UP PAST MISTAKES – THE COMMISSION VALIDATES SETTLER TITLES

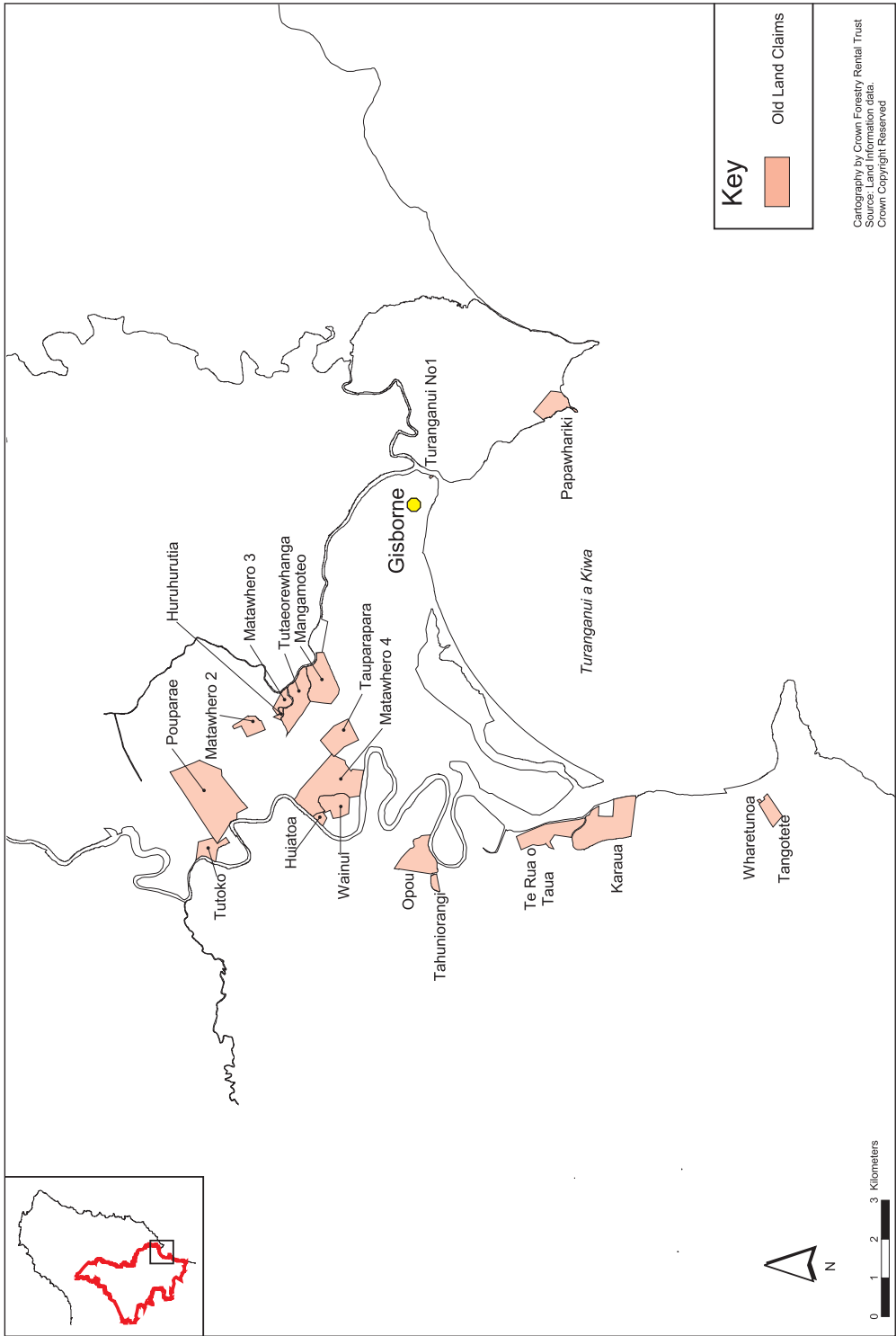
The second function of the Poverty Bay Commission related to land transactions between Turanga Maori and settlers, entered into after 1840, despite the Crown’s monopoly on the purchase of native land. The Poverty Bay Commission was instructed to investigate these settler land claims, at the time popularly called ‘the old land claims’. This gave effect to a request purported to have been made by Maori in the deed of cession:

They the loyal chiefs and men of those two tribes [Rongowhakaata and Te Aitanga a Mahaki] request on behalf of Europeans to whom before the date of this agreement they have promised to give or sell pieces of land that the Governor will finish such gifts and sales if the Commission finds them to be correct.¹⁰⁵

103. HH Turton, ‘Deed No 490’, *Maori Deeds of Land Purchases in the North Island of New Zealand, 1877*, p 699 (doc A10(a), vol 4, p 2326)

104. Document H14(8), pp 7–8

105. HH Turton, ‘Deed No 490’, *Maori Deeds of Land Purchases in the North Island of New Zealand, 1877*, p 699 (doc A10(a), vol 4, p 2326)



These claims were first investigated in 1859, by the land claims commission, under Commissioner Francis Dillon Bell.¹⁰⁶ However, Bell's jurisdiction was restricted to the validation of pre Treaty transactions. As the majority of Turanga transactions he investigated had been entered into in the 1840s and 1850s, Bell could not make formal awards in these cases. According to section 9 of the Land Claims Settlement Act 1856, Bell nevertheless had the power to make recommendations for the award of titles in particular cases to the Governor. Bell, for some reason, chose not to make any recommendations in Turanga.

By 1869, when the Poverty Bay Commission began its hearings, the number of early settler claims to Turanga land had been reduced to 30. Of these, 22 were actually heard.¹⁰⁷ They included claims by long-standing Turanga settlers such as GE Read, W Wyllie, JW Harris, and T U'Ren. If the claims proved to be 'correct' (or tika), the transactions would be completed; that is, the Pakeha claimants would gain a clear title.¹⁰⁸

Maori objected to only three of the claims presented during the first hearing; those Maori who did appear as witnesses being 'largely supportive'.¹⁰⁹ Wi Pere initially objected to two claims, Pouparae and Turanganui 1, but in each case withdrew his objection at the beginning of the hearing.¹¹⁰

The total amount of land awarded by the Poverty Bay Commission to settlers pursuant to the deed, was 1230 acres. This increased to 1400 acres after two other claims, Pouparae and Opu 3, were later granted by the land claims commissioner.¹¹¹

7.4.1 Claimant submissions

Claimant counsel argued, first, that the private settler transactions were repudiated by Turanga Maori at the Bell commission hearing in 1859, because the transactions were invalid. Secondly, counsel argued that Maori did not 'freely agree to the inclusion of the old land claims' in the deed of cession, which allowed the commission to revisit the validity of these

106. Few Turanga transactions dated from the late 1830s to early 1840s, and correspondingly few claims were advertised for hearing before the Land Claims Commissioners Godfrey and Richmond, in January 1844. The claims were to be heard in Tauranga (in the Bay of Plenty), and perhaps because of this, none of the claimants appeared before the commission. All the claims were thus marked 'no grant recommended': doc F2, pp18–19.

107. Document G6 p24. The Commissioners recorded, in their final report, that they had considered 19 European claims. (See Rogan and Munro to Native Minister, 23 August 1869, MA62/6 (RDB, vol129, p49,650). Edwards noted however, that this differed from the number of claims listed in the third schedule to the Poverty Bay Commission minutes. Edward's list of 21 claims excluded JW Harris's claim to Matawhero three, on the grounds that the hearing was adjourned. We have, however, included it.

108. Document A23, p236

109. Document F2, p34. The claims that were objected to were: Mangamoteo, Karaua and Turanganui 1. In each case, however, one or more witnesses also appeared in support of the claim.

110. Pouparae block remains the subject of a claim before this tribunal and will be addressed later in the chapter.

111. Document F2, p36 Of the 1,230 acres, 111 acres were awarded to children of dual descent. Lands which were the subject of several post 1859 claims were awarded to Maori on the basis that they would be transferred to settlers. These grants totalled 195 acres. If this land is included in the figures, the total is 1595 acres: doc F2, p96.

Settlers	Blocks claimed
Thomas U'Ren	Mangamoteo
James Wyllie	Tutoko and Kahanui
William Scott Greene	Te Arakari, Wainui 2, Kaiariki 1–3, Pukarakanui 1, Te Kupenga 1
William Smith	Whakatere
JW Harris	Opou 3, Turanganui 1
John Espie	Tutae o Rewanga
Charles Goldsmith	Huiatua
George Read	Huruhuruhutia, Waiongaruawai, Matawhero 4
Richard Poulgrain	Matawhero 2
John Harvey	Wharaurangi
James Dunlop	Te Kupenga 2
John Walsh	Waireporepo
Heirs of Robert Newnham	Kopuakairongoua
A Blair for Cadle deceased	Tauparapara 1
W Barnes Rhodes	Karua, Wharetunua
JW Harris	Matawhero 3 (adjourned)

Claims by settlers heard by the Poverty Bay Commission

transactions.¹¹² The statement in the deed, that Maori had requested the reconsideration of transactions, therefore falsely represented the position. Mr Stirling cited a letter from land claims commissioner Domett to his predecessor (Bell), as evidence of Domett's concern about the Poverty Bay Commission's proceedings. He wrote that he was concerned that many of the settler claims granted would have been disallowed under the existing legislation governing the settlement of early land claims. Bell's response was 'leave these alone . . . and we may wink at any little irregularity provided the ghosts of these claims do worry you and me no more'.¹¹³

Thirdly, claimant counsel argued that the Poverty Bay Commission hearing itself was inappropriately cursory and 'notable for the absence of any real investigation into the true nature of the transactions'.¹¹⁴

Fourthly, counsel argued that while the amount of land awarded to settlers by the Poverty Bay Commission was small, they constituted the 'high value lands of their day in Pakeha terms as well as being extremely valuable to Maori'.¹¹⁵

One additional claim was the subject of detailed evidence and argument: the Pouparae claim pursued by the descendants of Wi Pere. We will address this matter separately below.

112. Document H2, p70

113. Bell Note, 12 July 1871, OLC4/21, Archives NZ (doc A23, p243)

114. Document H2, p69

115. Document H1, pp68–69

7.4.2 Crown submissions

Crown counsel argued first, that there was no evidence that Maori were forced to accept a reconsideration of the private settler transactions in the deed of cession. It is sufficient, according to the Crown, to rely upon the expressed words of the deed, that the reference to settler transactions had been included at the request of Maori.

Secondly, counsel accepted that a climate of fear existed in the district after the killings of 1868, and even at the signing of the deed of cession in December that year.¹¹⁶ However, the Crown argued that, by June 1869, the climate had ‘considerably eased’.¹¹⁷ The absence of challenges to settler claims was, they submitted, evidence that these claims were ‘for the most part no longer contentious’.¹¹⁸ Moreover, the award to settlers of such a small quantity of land (1230 acres) could hardly be said to have had a major impact on Turanga Maori interests.

Thirdly, Crown counsel rejected claimant arguments that the Poverty Bay Commission process for dealing with the settler transactions was inappropriately cursory and biased toward the interests of settlers. Instead the Crown relied upon Maori support for and participation in the process. ‘Assessment by the Commissioners of how best to protect Maori interests was dependent on those interests being articulated by Maori.’¹¹⁹

In essence, the Crown submitted that, if Maori did not appear before the commission to articulate objections or otherwise advocate for their interests, then that was a matter for Maori and the commission ought not to be blamed.

7.4.3 Tribunal analysis and findings

All parties agreed that the transactions investigated by the commission, whether ‘sales’ to settlers or ‘gifts’ to dual descent children, were illegal because they breached the Crown’s preemptive right provided for in the proclamations of 1840, and the Land Claims Ordinance of 1841. The parties were also agreed that: the Bell commission of 1859 partially investigated a number of these transactions; that it did not have the jurisdiction to make awards; and chose not to make recommendations to the Governor about such awards. We think it very likely that Bell’s failure to do other than record the evidence reflected the level of anxiety felt among Maori in Turanga over the question of these transactions. The mood of repudiation appeared to have been strong in 1859. Bell wrote that ‘They [Turanga Maori] opened the discussion by a very decided intimation of their intention to resume all the land; but in order to strengthen their position, they adopted a course quite novel namely that of repudiating their sales.’¹²⁰ No

116. Document H14(10), p15

117. Ibid, p15

118. Ibid

119. Ibid, p6

120. Memorandum of the Lands Claims Commissioner, 24 February 1860, Enclosure 2 in No 1, in Despatches from Governor Gore Browne CB (RDB, vol15, 5373)

doubt, Bell considered that even the making of recommendations could have inflamed an already volatile atmosphere.

These settler transactions remained unfinished business in December 1868, the date of the deed of cession. The deed contained the following provision with respect to these transactions:

A ko ratou ko nga rangatira me nga tangata Kawanatanga o aua iwi e rua e tono atu ana ano mo te taha ki nga pakeha kua oti i aua iwi nei te ki i mua o te ra i tuhituhia tenei puka-puka kia hoatu kia hokona ranei tetahi pihi whenua kia whakaotia te Kawana aua hokonga hoatutanga ranei mehemea ka kitea e te Komihani ka tika to ratou ki.¹²¹

And they the loyal chiefs and men of those two tribes request on behalf of the Europeans to whom before the date of this agreement they have promised to give or sell pieces of land that the Governor will finish such gifts and sales if the Commission finds them to be correct.¹²²

The provision was expressed in both languages as a request (tono) on behalf of (mo te taha kii) the Europeans to have the matter finally resolved by inquiry. We think it most unlikely that this request was freely made.

We have already concluded, with respect to the deed as a whole, that the Maori will was overborne. The inclusion of this clause must be seen as further evidence of that fact. Given their fierce repudiation of the claims 10 years earlier, why then did Turanga Maori agree to the inclusion of the clause in 1868? There are, we believe, only two possible explanations for the change in attitude. Either we must accept that the contrast is simply too stark to be explained by the passage of years and that Turanga Maori agreed under duress, or, that those who repudiated the claims in 1859 were dead or on the run. We think it likely that it was a combination of the two: that Maori felt threatened by the threat of the removal of Crown protection and that those who were most opposed were, in any event, dead. The circumstances unfairly pressured 'loyal' Maori into agreeing to declare that they had requested the inclusion of the clause.

It is to be remembered that there was considerable doubt about whether the commission had the legal authority to validate any of these transactions in the face of Maori objection. That was particularly so, given that there was a statute (the Land Claims Settlements Act 1856, as amended in 1858) already providing for a separate process of inquiry and recommendation to the Governor in cases identical to those before the Poverty Bay Commission in 1869. In other words, like the problem with the commission's process of confiscation, there already existed a statutory process for dealing with this issue and the Crown could not by mere prerogative circumvent that. We therefore think it likely that the clause was inserted to create

121. HH Turton, 'Deed No 490', *Maori Deeds of Land Purchases in the North Island of New Zealand*, 1877, pp 694–695 (doc A10(a), vol 4, pp 2321–2322)

122. Ibid, p 699 (p 2326)

a paper trail: officials decided that they would solve the problem by recording that this questionable power had been included at the request of those who were most prejudiced by it and most likely to challenge it. They could then argue that whatever the technical legalities of the situation, Maori had consented to the jurisdiction of the commission in this regard by making the request, and it would be appropriate for the commission to proceed.

We find, as we did in respect of the deed of cession as a whole, that the request that the Poverty Bay Commission revisit and validate pre-1865 settler transactions was obtained under duress and therefore was, unenforceable and in breach of the Treaty. What is more, those most likely to resist the verification of these early transactions had either been killed or had been forced out of the district. We have already made findings about these events.

The Poverty Bay Commission heard applications by private purchasers or by Maori to transfer to Europeans an area initially totalling 2100 acres. As we have noted, the commission awarded 1595 acres.¹²³ We turn now to the role Maori played in the commission hearings.

The claimants argued that the commission's inquiries into these claims were cursory. It is true that in general objections were rare.¹²⁴ As we have said, many Maori who had been involved in the original transactions were either dead or absent. However, we do know something of the process the commission followed. In 1857, before he began hearing claims in the land claims commission, Francis Bell published the rules he intended to follow.¹²⁵ He also followed a standard procedure in the hearings. The settler claimant gave evidence first, 'outlining his understanding of the purchase details'.¹²⁶ The Maori witness then appeared, and either confirmed or disputed the evidence. William Brown, for example, produced the original deed of a transaction entered into on 2 January 1840. Kahutia stated:

I gave the land at Makaraka to William Brown. No payment was made to us for the land. The ground[s] on which we made a present of the land to Brown was, my niece was living with him. We gave him the lands for himself – at that time there no children were born to Brown by my niece. We are all agreed, who have any original claim to this land, that is should go to Brown. When the land is surveyed I will go over the Boundaries with the Surveyor.¹²⁷

In 1869, a similar process was followed. A letter from Commissioner Domett stating 'the

123. This consisted of 1230 acres to settler and dual descent claimants. If the later Opou 3 and Pouparae awards of the Land Claims Commission are included in these awards, then the total increases to 1400 acres. Once lands which were the subject of several post 1859 claims were awarded to Maori on the basis that they would be transferred to settlers are added, the grants total 195 acres. If this land is included in the figures, the total is 1595 acres.

124. Some, it is true, were more extensive. In the Karaua claim of WB Rhodes, Wainui II (Greene's claim), and Mangamoteo (U'Ren's claim), a number of witnesses were called, and cross-examined.

125. FD Bell, 'Rules': Framed and established by the undersigned Land Claims Commissioner, Francis Dillon Bell, in pursuance of the powers vested in him in that behalf of the Land Claims Settlement Act, 1856', *New Zealand Gazette*, 1857, pp 144–145 (H33, vol 6, pp 02162–02163)

126. Document F2, p30

127. Minutes from the Land Claims Commission hearing into Makaraka–Matawhero 3, December 1859, OLC1/1019, Archives NZ (doc F33, vol 6, p02146)

requirements to be complied with on the part of the claimants' was read in the courtroom.¹²⁸ Furthermore, we know that Maori were present in the courtroom. In the commission hearings, as with the land claims commission hearings of 1859, Maori evidence had to be given in support of the sale or gift. Though some transactions were disputed, in each case, the settler was also able to call on evidence to support his claim. Matawhero 3 provides an example where the lack of support led to the rejection of the claim. In that case, the commission accepted that the Bell commission had in fact approved JW Harris's claim. Yet the hearing was adjourned until Harris could provide a survey plan, copies of the original papers, and 'for the appearance of Wi Paraone to show the boundaries of the original purchase by or gift to his father'.¹²⁹ Harris later provided the survey plan, but 'as the native witness was not at hand', the case was further adjourned to the next hearing of the commission.¹³⁰

It is true that a number of claims proceeded quickly through the commission. It is also true that to some extent, the events of Matawhero must have removed some objectors. None the less, most claims were accompanied by Maori support to allow the commission to validate the claim and that ought to be acknowledged.

Why was there this level of active support after the deed was signed? The Crown has argued that the climate of fear present in December 1868 had considerably eased by June 1869. We agree that there is some substance to this suggestion. The picture is, however, rather more complicated than this. The Poverty Bay Commission commenced its first hearing on 30 June 1869. A number of the settler transactions were presented for validation during the first hearing. Although the sharp edge of the events of November 1868 may have been blunted by this time, an important event occurred in Turanga which must have acted to refresh emotional tension within the district. On 1 July, Graham, the surveyor and advocate for Maori, requested that the commission adjourn until 3 July. He advised the commission that on 2 July a number of the settlers who had been killed at Matawhero and buried there would be disinterred for 'solemn interment' elsewhere.¹³¹ The remains for disinterment included those of Major Biggs, Lieutenant Wilson, and a number of others. Clearly, and perhaps appropriately, the opportunity presented to the settler community by the presence of the Poverty Bay commissioners and senior Crown officials, was being taken in the timing of the proposed ceremonials. We think it likely that the re-interment would have produced an emotional outpouring in the entire community, both Pakeha and Maori. It is also likely that the general lack of objections at hearings over the course of the next two weeks (or in some cases, their withdrawal), and the presence of Maori in the courtroom upholding settler claims, occurred either out of a renewed sense of fear or (perhaps more likely) because Maori considered that the making of such a gesture out of *aroha* was appropriate in the circumstances.

128. Poverty Bay Commission minute book, 12 July 1869, MS micro coll 06-022, ATL (doc 10(a), vol 4, p 2007)

129. Ibid (p 2009)

130. Poverty Bay Commission minute book, 9 August 1869, MS micro coll 06-022, ATL (doc 10(a), vol 4, p 2207)

131. Poverty Bay Commission minute book, 1 July 1869, MS micro coll 06-022, ATL (doc 10(a), vol 4 p 1909)

7.5 SPECIFIC CLAIM – THE WI PERE WHANAU AND THE POUPARAE BLOCK**7.5.1 The substance of the claims**

Joseph Anaru Hetekia Te Kani Pere lodged a specific claim on behalf of himself and the descendants of Wi Pere regarding the Pouparae block.¹³² The claim concerned the transfer of the Pouparae block of 493 acres first to Thomas Halbert and then William Williams, Bishop of Waiapu.

Riria Te Mauaranui was Wi Pere's mother and Thomas Halbert was his father. In 1839, Halbert acquired 1100 acres from Riria Te Mauaranui's whanau. During the later hearing of the land claims commission in 1859, Halbert produced a deed of transfer, signed by 63 named Maori. Halbert stated that he had given merchandise and cash to the value of £300, which was paid in instalments. The deed also contained the standard clause that the land was 'given "to him and his heirs and assigns for ever"'.¹³³

Halbert's heirs never took possession of the land. In 1841, William Williams acquired Halbert's interest in the land.¹³⁴ Maori opposed this as they stated that the original transfer of land had been for the maintenance of Wi Pere, as a dual descent child.

The chronology of the passage of the Pouparae block through the various commissions is as follows:

- ▶ In 1844, Halbert applied to have the claim heard before the first land claims commission. This is curious, given that Williams was now the owner. It is likely that Halbert and Williams agreed between them that Halbert would process the application on Williams' behalf to simplify the matters before the land claims commission. Having made application however, Halbert failed to appear. He complained that he was 'unaware his claim had been notified' and it was recommended that he not be given a grant.¹³⁵
- ▶ In 1859, Halbert again took his claim to the new land claims commission headed by Bell. During the hearing, Halbert denied that the land sold to him was to be held in trust for his son: 'It is untrue that at the time of the purchase any arrangement was made or spoken of for giving the land to him. I never heard before I arrived here the day before yesterday, that any such claim had been set up by my son nor any natives whatever.'¹³⁶
- ▶ Wi Pere objected. Several Maori appeared in support of Wi Pere's objection; Halbert could find no supporters.
- ▶ Thirty years later, Wi Pere claimed that on the day of the hearing, Halbert, along with James Wyllie told him that if he pursued the claim, his father would be in great trouble, and could even be imprisoned. Pollock conceded that this indicated that 'not only did

132. This claim was given the number Wai 895.

133. Deed of Transfer, 18 December 1839, OLC1/211 (doc F2 p 47)

134. Document F2, p 47

135. Ibid, p 48

136. Claim 211, Land Claims Commission, 30 December 1859, OLC1/211 (doc F2, p 48)

Halbert know about the land being held in trust, he also actively attempted to prevent this from coming before the Commission'.¹³⁷

As with other claims of this nature, Commissioner Bell did not make any award or recommendation on the case. This occurred despite that fact that, under section 54 of the Land Claims Settlements Act 1856, Commissioner Bell had a particular duty in relation to children of dual descent: to make a full inquiry, to report evidence taken to the Governor and to report his opinion as to an appropriate outcome. Furthermore, section 13 of the Land Claims Settlement Extension Act 1858, enabled the commissioner to make provision in cases where land that had been set aside for dual descent children, had been alienated. This, Bell failed to do.

By 1869, Halbert was dead and Williams was required to take up the case himself. He reapplied to have the claim heard by the Poverty Bay Commission, his claim was heard 12 July 1869. He stated to the commission that the land claims commissioner, Alfred Domett, had informed him that if opposition to his claim was withdrawn, there would be no difficulty in passing a grant. Wi Pere stated immediately afterwards that he withdrew his opposition.¹³⁸ The record does not explain why, though we suspect it was linked to the reinterment of the settlers killed at Matawhero, which halted the hearing on the fourth day. In light of Pere's statement, Judges Rogan and Monro notified the land claims commissioner that opposition had been withdrawn.¹³⁹ Domett did not respond immediately, but sought assurances that all those who had formerly opposed Williams' claim had acquiesced.¹⁴⁰ By 1871, Domett believed that criterion to have been fulfilled, even though he 'concluded that the land had indeed been intended for Wi Pere's benefit'.¹⁴¹ Domett's conclusion placed Halbert in the position of trustee on behalf of his son.

In a final twist, despite the fact that Williams had been unable to prove his claim to the satisfaction of either the land claims commission or the Poverty Bay Commission, he was then awarded a Crown grant for what was the largest single settler claim (482 acres) The irony is that Williams had, 30 years previously, tried to prevent just such dealings with his 'deed of trust'.¹⁴² This somewhat surprising decision in Williams' favour, relied on a number of

137. Document F2, p 49

138. Ibid, p 54

139. Poverty Bay Commission minute book, 12 July 1869, ATL, MS micro coll 06-022 (A10 (a), vol 4, p 2006

140. Alfred Domett to Court of Land Claims, 29 March 1870, MA62/4 (RDB, vol 129, p 49, 595. In March 1870, he was still insisting on reassurance that Riria Te Mauaranui had withdrawn her opposition to Williams' claim.

141. Document A10, p 378. Domett wrote: 'It having been shown to my satisfaction that the land at Pouparae, originally set apart or sold by the Native owners to the original claimant Thomas Halbert for the maintenance of Wiremu Pere – son of the said Halbert, was sold by the said Halbert to the Bishop of Waiapu and Messrs Rogan and Monro, Judges of the Native Land Court and Commissioners appointed by Order in Council, dated 10 February 1869 to acquire into claims affecting certain lands ceded to Government by the Aitangamahaki and Rongowhakaata Tribes, which land included Pouparae, having reported that the opposition raised by Wiremu Pere to the claim of the said Bishop had been withdrawn by him – it is hereby decided that a grant of the said land at Pouparae containing 482 acres be issued in form to the said Reverend William Williams Bishop of Waiapu'. Decision by Land Claims Commissioner, 6 April 1871, OLC1/211, Archives New Zealand (Wai 814, paper 1.15, doc 7.11)

142. Document A23, p 241; see ch 3

factors: McLean's intercession on Williams' behalf, Wi Pere's withdrawal of his opposition, and Halbert's ability, as trustee, to sell the land which the commission now recognised as having being entrusted to him on behalf of his son.

7.5.2 Tribunal analysis and findings

The Pouparae issue was investigated three times from 1859 to 1871:

- ▶ first, by the Bell commission, which made no finding;
- ▶ secondly, by the Poverty Bay Commission, which also made no finding but handed the matter on to the land claims commission
- ▶ thirdly, by the land claims commission, which found that the land had indeed been given to Halbert for the maintenance of his son Wi Pere, who was now considered to have withdrawn his objection to the transfer.

If Halbert was either kaitiaki (in Maori customary terms) of Wi Pere's lands, or trustee (in English common law terms) of those lands, did he have the right to on-sell to Williams? In our view, he did not have such a right in either case. If he no longer wished to retain the land on behalf of his son, Maori custom would have required him to return it to the donor.¹⁴³ Nor is it surprising that the English law as to the power of trustees does not accept a power of sale: 'A power of sale vests in the trustee only under an express or implied authority. This is because the trustee's primary duty is that of preserving the trust property in specie for the beneficiary's benefit.'¹⁴⁴

We accordingly differ from the conclusion of Commissioner Domett in 1871. Halbert was not empowered to transfer Pouparae to William Williams, whether he was acting as trustee or kaitiaki. It follows that Wi Pere was (subject to the issue of the withdrawal of his opposition, which we deal with below) entitled to be awarded the land.

As we indicated, Pere withdrew his opposition to Williams' claim on 12 July 1869. We have suggested a possible reason for that withdrawal, though there is no direct evidence on the point. It is possible also that Wi Pere sought to strengthen his relationship with William Williams following Waerenga a Hika and Matawhero by making this gesture of generosity. Alternatively, Wi Pere may have made his decision because he did not want to dissipate his energy by fighting on more than one front. Te Muhunga had, after all, considerably more significance for him. It is also possible that he retracted his opposition to Pouparae as he considered Williams's good opinion useful and did not wish to be regarded by the Bishop, as continuously dissenting. Whatever the reason, Pere withdrew his claim and appears to have confirmed that withdrawal following the Domett inquiry in 1871.

Although we have found that Wi Pere was the beneficial owner of Pouparae as a matter of

143. See generally the Muriwhenua land claim.

144. Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand*, 2nd ed (Law Book Company Information Services, 2000), p 655

Maori custom and English law, and although we have found that Halbert had no power to alienate Pere's rights in the block, we are inclined to the view that Pere's withdrawal of his opposition to Williams' claim ought to be respected. Pere has throughout this inquiry struck us as a man who acted deliberately and carefully at all times. He showed time and time again his tenacity in pursuing remedies for wrongs committed against him or his iwi. In this case, the withdrawal of his protest appears to have been final. This is to be contrasted with his protests about the excess acreage taken at Te Muhunga and indeed about the whole of the Patutahi issue. We consider therefore that Pere's decision ought to be respected and we find accordingly that the Treaty has not been breached in respect of this claim.

7.6 TRANSFORMING CUSTOMARY TITLE

The commission's third task was to transform the titles that had been ceded to the Crown into a new Crown-derived form of title.¹⁴⁵ The Crown-derived titles were issued, as would be expected, as Crown grants. The question was what form the Crown grants would take. The land interests of many Turanga Maori now depended upon the application of tenurial presumptions of the English common law, largely impenetrable to the English, let alone to Turanga Maori. We assess the problems created by the introduction of this common law system below. The parties identified two key issues: first, whether the Crown ensured there were sufficient protections both to safeguard Maori in dealing in their lands and to maintain sufficient lands for their foreseeable needs; and, secondly, whether the form of title received was prejudicial to Turanga Maori.

Before going further it is necessary to address some basic principles of English land law. In the nineteenth century, there were two forms a Crown grant could take. Title could be issued to grantees as tenants in common. By this form of title, land was awarded to all those deemed to be owners (or grantees). Their individual interests were undivided (that is not marked out on the ground, or subdivided in any way). Interests could be of variable value and proportion. They could also be inherited by the heirs of each of the individual grantees. Alternatively, title could be issued to grantees as joint tenants. By this form of title, all interests were deemed to be equal. Individual interests could be alienated during the lifetime of individual grantees, but they could not be inherited by the successors of those grantees. Instead, on death, the individual undivided interests of the deceased joint tenant reverted to the pool of surviving joint tenants.

It was in 1869, and remains today, a presumption of the English common law that, unless otherwise expressly provided for or unless clear circumstances dictated otherwise, all Crown grants to multiple owners would take the form of joint tenancies.

145. Note that once land had been ceded to the Crown, and a proclamation issued, the native title was extinguished.

Since there was no express provision in the deed of cession or any associated legislation, and since the Poverty Bay Commission had not specifically adjudicated on the point, the Turanga Crown grants were all deemed to be issued as joint tenancies; that is as mandatory equal shares that could not be inherited.

At its 1869 hearing, the commission adjudicated on 101,000 acres. On 3 September 1869, Monro forwarded the commission's awards to the Native Minister, and drew his attention to a number of matters in relation to the preparation of Crown grants. They included recommendations that restrictions should not be placed on the 'free power of alienation by sale or mortgage', that fees 'should be charged on the same scale as on grants issued under the authority of the Native Land Court', and that care should be taken to lay out roads between blocks.¹⁴⁶ There was no reference to the form the grant should take.

The first Crown grants were issued in November 1870. Some months later, the Justice Minister, Henry Sewell, raised a concern about the large number of names (93) on one particular grant, and the effect of this on potential sales and leases. The Attorney-General confirmed that the Governor had authority under the Poverty Bay Grants Act 1869 to issue the grant, but noted that the commissioner's award did not specify whether their interests were 'equal or otherwise'.¹⁴⁷

Though the commissioners do not appear to have been consulted at this time about the nature of their awards, Judge Rogan explained on a later occasion, their reasons for including so many names. They had no power, he stated, to exclude or to reduce the number when the chiefs handed in the lists. Nor would it have been wise, in his view, to have done so, given the 'difficult' state of the land in question, and the fact that Maori were 'very unsettled': 'If the tribal title were ignored it is probable the Court would have come to grief as all others had previously.'¹⁴⁸ The commissioners were also aware of the dissatisfaction in Hawke's Bay arising from the 10-owner awards.¹⁴⁹

Despite official concern as to the number of owners, the grants were issued in accordance with the awards. Only when Turanga Maori received the grants, did they learn that the titles were issued by default to them as joint tenants and what the implications of that were.

Maori complaints led to government acknowledgement of the difficulty. Indeed the Crown was already aware of widespread Maori concern; the same problem had arisen under the nationally applicable Native Lands Act 1865. The Fox Ministry prepared legislation to convert titles held by joint tenants into tenancies in common. It came into force on 3 September 1869. Inexplicably, the Bill applied to grants under the Native Lands Acts but did not apply to the Poverty Bay Commission awards.

146. Document F8, pp10–11

147. Prendergast to Sewell, 13 May 1871, MA62/8, Archives NZ (doc F8, pp12–13)

148. Rogan to Native Minister, 21 June 1872 (doc F8, p13)

149. We will discuss the 10-owner awards in detail in the next chapter. Suffice to say here, the 1865 Native Land Act provided for titles to land to contain no more than 10 names. The passing of the Native Lands Act 1873 was a direct result of the consternation produced by the effects of the 1865 Act.

Despite protest in 1872, no immediate remedy was provided. But the matter was highlighted during debates on the Native Lands Bill 1873, and the government prepared to pass legislation. At the outset of the second sitting of the Poverty Bay Commission, the commissioners assured Turanga Maori that all future grants would be held as tenancies in common.

The Native Grantees Act was passed on 2 October 1873 and came into force on 1 January 1874. It deemed all grantees listed under any statute other than the Native Lands Acts to be tenants in common and not joint tenants. But where joint tenants had sold, leased or mortgaged their interests prior the Act coming into force, such interests retained their former status. Where an owner died, the position was not straightforward. If an owner died after 1 October 1873, his or her interest did not pass to the remaining joint tenants. It was held by the deceased's successors as tenants in common. But where an owner died before the Act came into force, his or her interest passed to the surviving joint tenants.

It will be recalled that we raised a number of key issues at the beginning of this chapter. Two relate specifically to this section. First, was the form of title issued to 'loyal' Turanga Maori, in respect of the blocks awarded to them, prejudicial to their interests? And, secondly, did the Crown provide appropriate safeguards for aggrieved applicants? Did it provide a means of ensuring that applicants retained sufficient lands to meet their foreseeable needs? We now examine the claimant and Crown arguments.

7.6.1 The claimants' case

Claimant counsel argued, first, that the Poverty Bay Commission failed to provide adequate procedural safeguards for Turanga Maori and, secondly, that the issue of Crown grants to Turanga Maori as joint tenancies was prejudicial.

(1) *Safeguards*

Counsel submitted that the Poverty Bay Commission failed to provide adequate procedural safeguards. There was, for example, no right of appeal or rehearing. That some Maori sought such safeguards, is clear in the evidence relating to the Kohangakarearea block. In July 1869, Rapata Whakapuhia of Ngati Kaipoho presented his hapu's claim. It was disputed by Henare Turangi, who sought to be included. The commission adjourned to allow surveyors to check the cultivations and boundaries referred to in the evidence. They found in favour of Rapata Whakapuhia. Henare Turangi sought to introduce new evidence without success. When his agent applied for a rehearing, he was told the commissioners thought it unlikely that the Government would grant a rehearing, 'even if any provision were made for such proceedings'.¹⁵⁰

150. Document A23, p 235

Mr Stirling cited another instance where an ‘appeal’ was discussed, in the Karaua block of Ngati Kaipoho. In this case, not only did the commissioners recommend against any ‘appeal’ but they warned that, should the claimants lose, they would incur heavy penalties.¹⁵¹

(2) *Joint tenancies*

The Poverty Bay Commission issued titles to Turanga Maori in the form of joint tenancies. This, claimant counsel argued, had three consequences, all of which were prejudicial to Maori. First, the titles were deemed to be made up of interests of equal size. It was therefore not possible to differentiate the proportionate interests of right-holders within the hapu in accordance with tikanga. This meant that owners such as chiefs with proportionately larger interests by tikanga had their entitlements reduced, while those with smaller interests had theirs upgraded. Secondly, the interests could not be inherited. Upon the death of a grantee, the grantee’s interest merged with those of the remaining surviving grantees. Thus, this form of title encouraged owners to sell their interests before death. And, thirdly, as the interests were individualised and freely alienable, that individual could sell them without reference to the rest of the community. There were no mechanisms in place to prevent piecemeal purchasing to their own detriment and that of their communities.

The result was explained to Parliament by Sheehan in 1873:

It sometimes happened that there were between 50 and 80 grantees named in one grant; and it was unnecessary to inform the House that it did not by any means follow that all the grantees named in a particular grant possessed an equal interest in the land. The result has been that some of those who were certainly owners of the land, but whose interest in it was but very little, sold out almost immediately after the issue of the Crown grant, at whatever price they could obtain.¹⁵²

The claimants argued that the resulting flurry of land sales was therefore unsurprising.¹⁵³ By 1873, for example, virtually all Ngai Tamanuhiri land awarded by the commission had been sold or leased; as had 13 of the 16 blocks awarded to Te Aitanga a Mahaki.

Counsel argued that, as well as being disadvantaged by the form of title that the awards were made in, Turanga Maori were not helped by subsequent legislation which purported to tackle the problem. The Native Grantees Act 1873 was designed to bring Turanga into line with the rest of New Zealand. It converted joint tenancy title into tenancies in common. However, it specifically did not apply to land that had already been leased, sold or mortgaged prior to that date. Nor did it allow the ‘interests of a deceased to pass to their estate if they died before the passage of the amending legislation’.¹⁵⁴ Given that much of the granted land in Turanga was in one of these categories, the claimants argued that the 1873 Act solved nothing.

151. Document A23, p 235

152. NZPD, 5 September 1872, p 934 (doc H2, p 75N)

153. Document H2, p 73

154. Ibid, p 74

7.6.2 The Crown's case

Crown counsel presented two arguments in response. First, that the Crown did provide adequate protection to Turanga Maori through the commission's procedures. Counsel argued that the commission did follow due process and that it gave effect to the claimants' wishes. Secondly, counsel argued that, while joint tenancy titles did prejudice Turanga Maori to an extent, the claimants' case has been overstated.

(1) *Safeguards*

Crown counsel argued first that the commissioners had very limited powers when it came to placing alienation restrictions on land, following a hearing. They could, for example, recommend that restrictions be imposed, but it was the Governor himself who made the final decision as whether to implement such a recommendation. If the recommendation was accepted, a restriction could be imposed on the title that was awarded to the claimants and would affect how they could deal with the land. If no recommendation was made or accepted, the owners could deal in their land as Crown grantees.¹⁵⁵ The Crown argued that in fact Turanga Maori did not usually seek any restrictions on alienation. On the contrary, restrictions were only sought in a small minority of cases.

Crown counsel noted that, in the 1870 Native Land Court hearing, requests for restrictions were made in the following blocks: Te Hawera, Te Papa, Te Rae o Tokorau, Te Poho, Paiakawai, Kahukuratara, Taumako, Puketapu, Oweta, Ruahinetu, and Manutuke. The court recommended that the restrictions be imposed. Restrictions were imposed on the following blocks: Te Hawera, Te Poho, Puketapu, and Ruahinetu. Thus, the evidence showed that restrictions were imposed in at least some cases.

Secondly, the Crown rejected claimant criticisms regarding its failure to provide an effective process for appeal or rehearing. Crown counsel argued that the Poverty Bay Commission was a recommendatory body, rather than a court. For this reason, it did not need a formal appeal structure. If Maori were dissatisfied with the outcome of a hearing, they could request the Government to instruct the commission to hold a rehearing into any matter. They could also request that the Government reject the commission's recommendations. In addition to the above, the Crown argued that Maori could petition Parliament. The Crown submitted that in any event there was no great evidence of demand. On only two occasions did Maori indicate that they wanted to appeal the award recommended by the commission.

(2) *Joint tenancies*

Crown counsel submitted, therefore, that if other considerations were rejected, the critical issue for the Tribunal was whether Turanga Maori were disadvantaged by the fact that land was awarded in joint tenancy titles, rather than as tenancies in common.

155. Document H14(9), p14

The Crown conceded that:

there was some actual prejudice arising from Poverty Bay Commission grants being awarded on the basis of joint tenancy. This was a result of a window of potential detriment when land under joint tenancy was leased or mortgaged, or when tenants died between 1869 and 1873.¹⁵⁶

The Crown argued, however, that the degree of prejudice had been overstated.

The Crown refuted the claim that ownership lists were stacked with non-owners whose rights were inflated under joint tenancy rules. Crown historian Robert Hayes argued that the number of incidents where non-owners were included in joint tenancy awards was low. He said that 80 per cent of the blocks had 20 or fewer owners, indicating that the swelling of numbers did not occur as frequently as claimants suggested.¹⁵⁷

Furthermore, Hayes argued that, while Turanga Maori did not learn that the land would be awarded in equal shares until 1870, the period of significant selling occurred earlier, immediately following the hearing of 1869. At this time, Turanga Maori could not have known the particulars of the awards they would be given. Thus, ‘the two key elements of joint tenancy, namely inability to bequeath and deemed equal interests, could not have been a factor in Maori selling land prior to mid-1872 ie that they simply did not know about it’.¹⁵⁸ Crown counsel therefore argued that it was unlikely that joint tenancy awards per se encouraged owners ‘in any material or significant way, to sell’.¹⁵⁹ While counsel agreed that examples of individual owners alienating to avoid the inability to bequeath land cannot be discounted, it was submitted that where this occurred, ‘it seems likely to have been done in a way that ownership was retained (where that was desired) within the whanau community’.¹⁶⁰ They cited Wi Pere’s evidence to the House of Representatives in 1885, as an indication as to why joint tenants may have leased or sold: ‘One man may erect a fence, and another man may go and place his sheep in the portion which the other has fenced. Owing to their not being able to agree, frequent disputes arise, resulting in those people becoming disheartened and selling their shares.’¹⁶¹

7.6.3 Tribunal analysis and findings

It seems to us that the issues raised by the commission’s function as a transformer of title can be dealt with briefly and by reference to first principles. We address them in order below.

156. Document H14(11), p3

157. Transcript 4.15, p47

158. Document H14(11), p4

159. Ibid, p9

160. Ibid

161. Ibid

(1) *Transparency of process*

We have dealt extensively with the question of the way in which ‘rebels’ were excluded from ownership lists in the previous section and need not revisit our reasoning here. The Crown’s argument seemed initially attractive – the commission was simply giving effect to Maori decisions about who should be on the lists. Seen in this way, it could be said that the commission was giving effect to the tino rangatiratanga of the Turanga Maori communities. But that was not what was happening. The commission was in fact facilitating the wholesale exclusion of some Maori from titles by other Maori who stood to gain more land from that exclusion. This was achieved in large part outside the courtroom without hearings, with a minimum of fuss and with no transparency at all. Such a system was inherently unfair. Literally hundreds of Maori lost their lands by this means without any review by an independent body. In addition as we have said, without an independent inquiry by the commission, mistakes could have been and undoubtedly were made. We agree that claimants were rightly concerned about the possibility that owners were left off the lists because they had left the district, whether voluntarily or otherwise, after Waerenga a Hika or Matawhero. There is no way of knowing whether rightful claimants were not included on the lists of owners simply because they had not made it to the hearing on the day. It seems to us not only likely but inevitable that this happened. And then there is the question of the children of those killed. How can we know whether they were given an opportunity to be heard about the rights they should have inherited?

It is not possible to precisely quantify the level of loss which must have resulted from this purely reactive system of inquiry, but, in our view, it was clearly substantial. The commission ought to have been satisfied in each case of exclusion that the step was justified. In most cases, the commission probably did not even know the exclusion had occurred at all.

(2) *Protection mechanisms*

It may have mitigated the Crown’s failure if a basic system of back up checks had been provided such as an adequate system for rehearings or appeals by those who had been excluded. The lack of such a facility was in our view a failure of active protection. The discouragement of those who indicated a wish to seek rehearing is hardly reassuring. We do not agree that, because the commission was not a court strictly so called, none of the usual procedural safeguards were necessary. A quick and expeditious rehearing procedure in the event that relevant evidence had not been adduced or in the event of some other error in process was a basic requirement in a commission whose procedures mirrored those of the Native Land Court and where the practical effect of the commission’s decisions was the same as the court’s.

Did the commission (or the court acting as the commission) lack proper systems for the institution of other protections on titles? The Crown rightly pointed to a number of blocks, which had alienation restrictions imposed on them. Not all applications for restrictions on alienation, however, were successful. As we later say in terms of the Native Land Court,

Poverty Bay Commission titles should have contained alienation restrictions unless actively opposed by the grantees. This was not the case.

The Poverty Bay Commission and Native Land Court dealt with the best and most fertile lands in Turanga. The alienation of interests to private speculators soon followed the awarding of interests. GE Read, for example, had extensive land dealings. By 1876, he had leased or purchased interests in 29 blocks, many near Matawhero or southwards along the Awapuni Lagoon to Manutuke.¹⁶² His purchases included Te Upoko o Te Ika and Te Koru, Wairau (1871), Matawhero 7, Rahanui, and Tahuniorangi (1872). He also purchased shares in the following blocks, frequently following a leasing arrangement: Tara a Paea (1869), Pokiongawaka (1869), Waiari (1870–73), Apeka (1871), Te Kati (1872), Taumata a Te Rangi (1870), and Te Pakake o Whirikoko (1872).¹⁶³ Te Ahipipi was mortgaged to him in 1869, and later purchased.

Read also bought interests in the large Whataupoko block, a block in which a number of settlers purchased or leased shares. Barker and McDonald, for example, owned 14,000 acres of the 19,200-acre block in freehold by 1875, and a further 2000 acres in leasehold. Similarly, James Woodbine Johnson leased most of the lands awarded to Ngai Tamanuhiri by the Poverty Bay Commission, and then (with his brother and Charles Westrup) he began to purchase interests in those blocks – Maraetaha, Pakowhai, Te Kuri, and Tangotete.

The Poverty Bay Commission awards, therefore, made a substantial impact on Turanga Maori. Ngai Tamanuhiri were awarded some 15,000 acres of their land in 1869. By the time the Native Lands Act 1873 came into force, all this had been sold, leased, or mortgaged.

(3) *Joint tenancies*

What of the form of title? Clearly, the joint tenancy awards were a mistake on the part of the Crown. The Native Lands Act 1869 which corrected the same error with respect to Native Land Court awards confirms this.

The form of title caused considerable anxiety at the time, for two reasons. First, it penalised those whose customary rights entitled them to substantial recognition in the title issued. Secondly, it meant they could not bequeath shares to their descendants by will. As Riperata Kahutia put it:

[Joint tenancy] is so obviously unjust that I cannot help exclaiming on the injury done me; in many cases I do not possess one quarter the land which was mine, or indeed is mine; and worse than this, what is to become of my children at my death since I find they cannot inherit my property nor have I the power to leave to them by will.¹⁶⁴

162. Daly, p135. Daly makes the point that most of his purchases 'consisted of title that was insecure or incomplete'.

163. Ibid, p136

164. Riperata Kahutia to Judges Rogan and Monro, 21 December 1872, Poverty Bay inwards correspondence, MA62/7, Archives NZ (doc F8, pp17–18)

Hayes pointed out that when Attorney-General Prendergast considered the issues of joint tenant grants in 1873, he noted that joint tenants could in fact end the joint tenancy by deed. They could not bequeath their interests to their children, but each could convey their equal share by deed to their children; or to trustees ‘upon trust for him or her self and children’. If however, the owner died without disposing of the land, the share passed to the survivors (his or her co-joint tenants).¹⁶⁵ Hayes noted that Riperata Kahutia and ‘other Turanga Maori’ became aware that they could sever joint tenancies. They were also aware they could create trusts for themselves and their children. He gave the example of Honi Niwa, Hone Meihana, and Wi Patene conveying their respective joint interests in the Whataupoko block in 1871 to Riperata Kahutia upon trust with the proviso that if any of them died, then Kahutia was to hold his interests for his children.¹⁶⁶

All of that of course was true, but it was no answer. The Crown should have fixed the problem by legislation in 1869. It was not for Maori to expend substantial sums on the creation of unnecessary legal fictions to displace an English law presumption that never should have been applied in the first place.

The fact that the Crown did not move swiftly to correct its mistake with respect to the Poverty Bay Commission can only be attributed to an incompetent administration not sufficiently concerned about the interests of Turanga Maori to fix the problem. This was clearly a failure of active protection.

We accept, however, that the level of difficulty created by the form of the grants, was possibly overstated. It is true that those Maori with artificially inflated rights as joint tenants, could not have adopted a strategy of quick sale in as many cases as the claimants suggested, if they did not actually find out about the nature of the award until after the bulk of the sales had been completed. But that does not explain those interest holders who may have received their interests as a complete windfall. That is if, as the claimants argued, ownership lists were stacked with people who had no rights, then those individuals would have had every incentive to sell quickly, no matter what the form of their grant.

Were the lists stacked this way? The Crown argued that there was little evidence that ownership lists were stacked as a land retention technique. Mr Hayes presented persuasive evidence that the ownership lists were in fact smaller on average than would be expected, not larger. Eighty per cent of the blocks that went through the Poverty Bay Commission in 1869 had 20 or fewer owners.¹⁶⁷

Having reviewed the evidence, there are three things we can say with certainty. We know that ‘rebels’ were being excluded for a variety of reasons. We have already discussed this. We know that some Turanga Maori complained of the impact the stacking had had on their land

165. Prendergast to Cooper, 12 March 1873, Poverty Bay inwards correspondence, MA62/7, Archives NZ (doc F8, pp22–23)

166. Document F8, pp23–24

167. Document F28(a), p1

holdings. And we know that Donald McLean was aware of the problem. He wrote: 'I am sorry the natives have suffered so much by the insertion in grants of persons names who had no claims and who are now dealing . . . however much I feel for them [Turanga Maori] in this matter, I cannot alter the law'.¹⁶⁸ Furthermore, we have some insight into why the stacking of ownership lists might have seemed a good idea to Turanga Maori. In a report to the Secretary of Crown Lands, G Randal Johnson wrote:

The true owners of the lands themselves did not oppose, but even in some cases supported, the unfounded claims of these men from a fear (caused I am told, by unauthorized statements) that unless there were many loyal claimants for the land, the Government would retain it all.¹⁶⁹

In other words, at least some Maori feared that if the ownership lists contained fewer names, the Government would see the reduced list as evidence that Turanga Maori needed less land and retain it all. The continued uncertainty as to exactly what the Government take would be, would have fuelled this fear

How then do we account for the reduced lists? Claimants were not adding non owners to the ownership lists, but they may have been replacing 'rebel' names with at least some 'loyal' non-owners in order to ensure that lists did not appear too thin. According to officials at least, Maori feared that short ownership lists would encourage the Crown to take more land. On this view of matters, the argument for the claimants and the evidence of Mr Hayes are reconcilable. We prefer this view.

Whether or not the ownership lists were replenished in this way, however, it is clear that some detriment occurred to Maori as a result of the time taken in fixing the botch up with regard to joint tenancy, though it is impossible now to precisely quantify the prejudice. It is sufficient to note here that all parties accepted that prejudice resulted from the joint tenancy awards.

7.7 1873: THE END OF THE POVERTY BAY COMMISSION

The 1873 hearing of the Poverty Bay Commission, as we have noted above, was characterised by Maori protest at its reappearance. We have noted also the dissatisfaction of Turanga Maori with the Crown's handling of the 'returned lands' which led to this protest. In these circumstances, the impact in Turanga of the Hawke's Bay anti – land court resistance movement, the 'repudiation movement' as settlers called it, was substantial. The Hawke's Bay Native Land Alienation Commission had held lengthy hearings in Napier earlier in the year, and Ngati

¹⁶⁸. Marginal note on letter from 'the whole tribe of Ngaitekete to McLean, 30 November 1872 (RDB, vol129, p49,825)

¹⁶⁹. Randal Johnson to Secretary for Crown Lands, 9 September 1873 (RDB, vol129, p49,848)

Kahungunu had brought many complaints before it. Henare Matua, leader of the Hawke's Bay opposition to the impact of the land court, arrived in Turanga in July. Locke wrote to McLean: 'The people (Maoris) here appear to have been quite carried away for a time by Henare Matua and those with him'.¹⁷⁰ And Wyllie wrote to McLean, that there had never before been such excitement in Turanga. Keita Wyllie, who was critical of Matua and warned that his ideas might bring more difficulties for Turanga Maori, clashed with him both in print and on the marae.¹⁷¹ Many Maori had gathered to debate land matters, and eventually the tension would spill into the commission's hearings.

The final hearing of the Poverty Bay Commission was notable for the number of sessions and adjournments that occurred. It was a shambles and got off to a false start almost immediately. Locke, the Crown agent, did not arrive. After four days, the hearing began regardless. A large number of Maori had gathered for the hearing and Rogan feared that 'a great outcry will be the consequence of the Crown agent's apparent contempt of the natives and the court'.¹⁷² Despite Rogan's fears, Turanga Maori did not leave the town in disgust at Locke's non-appearance but neither did they come into the courtroom. Rather, they preferred to 'hold any discussion out in the open'.¹⁷³ The court adjourned for two days, reconvening on 11 August.

For the next three days, Rogan opened the commission to an empty courtroom.

On the morning of 14 August, with Locke back in Turanga, the scene changed. Up to 300 people crowded into the courtroom. In his opening address, Judge Monro referred to the adjournment of the 1869 hearing, due in his opinion to the dissatisfaction of Turanga Maori, and assured those gathered that titles would now be issued as tenancies in common. Maori could, he said, surrender their old grants and get new ones as tenancies in common. He also stressed that the ceded lands could not go before the Native Land Court and that 'there was only one way of getting them back, and that was by applying to the Commissioners, as the lands were in the hands of the Government'.¹⁷⁴

Despite Monro's reassurances, day one of the next session did not go well. It had to be adjourned during the morning when Henare Matua challenged the authority of the commission, claiming that the Turanga Maori had placed the land in his hands and that he would take their grievances to Parliament. As Mr Stirling noted, the adjournment did not help. When the commission reconvened in the afternoon, Paora Te Apatu stated that the confiscated lands should be returned to Turanga Maori but that, rather than taking them through the commission, they preferred to wait until a fairer law had been drafted. Wi Pere also spoke. Like Henare Matua, he argued that Turanga Maori should take their complaints to their members of Parliament and that the commission should adjourn till Parliament had met. The

170. Locke to McLean, August 1873, McLean papers, MS papers 0032–0394 (doc A17, p162)

171. Document A23, pp 262–263

172. Rogan to Ormond, 5 August 1873, MA62/6, Archives NZ (doc A23, p260)

173. Document A23, p 261

174. *Poverty Bay Herald*, 16 August 1873 (doc A23, p264)

grievances, according to Pere, were not only the joint tenancy issue but also the whole question of the retained lands. Although the commissioners stated that the latter had nothing to do with the Poverty Bay Commission, the fact that Turanga Maori now knew that the boundaries of these lands had been 'adjusted and extended well beyond what had earlier been agreed to' added to the sense of injustice.¹⁷⁵

Things did not improve the next day. Henare Matua again claimed to represent all the owners of the blocks that were before the commission, and stated that they 'were not desirous or willing' for their claims to be heard.¹⁷⁶ While he said he did not want a row in court, all the elements for disruption were now present. The final straw was the announcement of Kate Wyllie's Okirau claim, which had been adjourned at the 1870 hearing. The *Poverty Bay Herald* reported the fracas that ensued:

Mr Commissioner Munro suggested that only those who were claimants in each case should remain in Court, and the Commissioners were advancing in a direction with reference as to who the other grantees were, when on a preconcerted signal from the crowd, the natives rose *en masse* and amidst cries of *korero parau* [false evidence] and *kokiri kokiri*, effectually put an end to all hope of further business. Captain Richardson and his small force were active in their endeavours to eject the more prominent among the rioters, and got a little rough usage. In the scuffle Sergeant Shirley's head came in contact with a square of glass, the sound of which breaking, added to the tumult outside, and give rise to a suspicion that the Maoris really intended to carry out their threat, pretty freely expressed, of attacking the Courthouse and despoiling the maps and property of the Commissioners.¹⁷⁷

Once again the hearing was adjourned, this time for a week. Rogan privately admitted that the hearing was 'an ignominious defeat'.¹⁷⁸ The settlers were also dismayed. At a public meeting, they resolved to do whatever was necessary to uphold the dignity of the commission and ensure that the hearings could proceed. Henare Matua was not impressed. Before he left for Wellington, he nailed a notice to the courthouse door stating that the commission had caused the problem by ignoring the statements made by the 'chiefs and the tribes and sub tribes'.¹⁷⁹ Donald McLean was not impressed either, and he recommended that the commission hear a few 'unimportant' cases. The commission, he thought, could then adjourn in dignity.¹⁸⁰

The next session opened on 26 August. The courtroom was a bit quieter – Henare Matua had left Turanga, and Wi Pere had left for Wellington, to lay the complaints of Turanga Maori before Parliament. Despite this, the objections continued. Rongowhakaata counterclaimants objected to Te Aitanga a Mahaki claimants. Te Aitanga a Mahaki objected over the inclusion

175. Document A23, p265

176. Poverty Bay Commission minute book, 15 August 1873, MA62/4, Archives NZ (doc A23, p265)

177. *Poverty Bay Herald*, 16 August 1873 (doc A3, p107)

178. Rogan to McLean, 21 August 1873, MS papers 0032–88 (doc A23, p267)

179. *Poverty Bay Herald*, 23 August 1873 (doc A23, p268)

180. Document A23, p268

of ‘Hauhau’ in Te Aitanga a Mahaki lists of owners. Proceedings became so difficult that the commissioners refused to hear any cases which were disputed, or where claimants were absent. On 9 September 1873, the commission was adjourned for a month.

The commission resumed its hearing on 12 November 1873. It was immediately adjourned to 17 November, as neither the commissioners nor Locke were present. Wi Pere had returned from Wellington just in time for the hearing. According to the *Poverty Bay Herald*, he “set to work to sow the seed of discord among his people”, haranguing them on the subject of “determined opposition to the Land Court” as it “had been and would continue to be, the means of alienating their lands”.¹⁸¹

On the first day of the second session, claimants interested in having their cases heard were asked to step forward. This resulted in a number of objections to particular blocks being investigated. A second invitation was issued and, to the commissioners’ chagrin, again no claimants appeared.

The next morning, Locke, who had just arrived, sought another adjournment, so he could ‘korero with some of the principal people’.¹⁸² Williams recorded in his journal:

He says the Govt wish to have the commission brought to an end & therefore he means to propose that they shd get the land passed through in tribal blocks, leaving the title to be fixed afterwards by the NL Court. I am afraid the people will look with suspicion on the proposal simply because it has emanated from the Govt.¹⁸³

The commission was no longer capable of transacting its business. When the session opened the next day, Wednesday 19 November, the commissioners tried to get ‘one block before the commission’.¹⁸⁴ When Wi Haronga, the applicant for the Rangatira block was called, Wi Pere spoke instead. Speaking on behalf of all three tribes, he proposed that the remaining lands be returned to 12 people, who would act as trustees ‘for the benefit of the three tribes for Te Ai Tanga a Mahaki, Ngaitahupo and Rongowhakaata’.¹⁸⁵ There appeared to be no dissent by Maori in the courtroom. Not only would his proposal have allowed for Turanga-wide corporate administration of the Maori land asset, but it would have avoided the time, resources, and divisiveness of block-by-block inquiry and adjudication by the commission and, later, the Native Land Court. It is obvious that the commission could have recommended such a course to the Government if it so chose. It did not. The trust mechanism was not taken up at any level.

Crown agent Locke proposed instead that the land ‘should be assigned to them in tribal blocks to be dealt with afterwards for subdivision by the ordinary operation of the NL

181. *Poverty Bay Herald*, 15 November 1873 (doc A10, p 448)

182. WL Williams, journal, 18 November 1873, ATL (doc A10, p 449)

183. Ibid

184. Poverty Bay Commission minute book, 19 November 1873, MA62/4, Archives NZ (RDB, vol129, p 49,570)

185. Ibid (doc A10, p 450)

Court'.¹⁸⁶ Over the next few days, the commission tried, unsuccessfully, to deal with the Awapuni block.¹⁸⁷ Finally, on the morning of 22 November, Locke stepped forward and announced that he was there 'at the express wish of tribes' who agreed that the land be returned in four blocks.¹⁸⁸ The estimated areas to be awarded to the tribes were: 400,000 acres to Te Aitanga a Mahaki, 51,600 acres to Ngaitahupo (Ngai Tamanuhiri), 5000 acres to Rongowhakaata, and 185,000 acres to sections of Rongowhakaata and Ngati Kahungunu.¹⁸⁹ We return to this matter later.

In the end, neither proposal was implemented. Instead, the Native Land Court stepped in to take over the work of the commission. It simply investigated blocks, hapu by hapu, in the orthodox way of the court, and issued individualised Native Land Court titles to the remaining one million acres of ceded lands. The opportunity to adopt a tribal approach to the management of the remaining lands was lost and never regained. We deal with the work of the Native Land Court next.

7.8 THE SIGNIFICANCE OF THE WORK OF THE COMMISSION

At the outset, we identified the three key roles of the Poverty Bay Commission. First, it was the Crown's primary instrument for punishing the 'rebels' involved in Waerenga a Hika in the strike on Matawhero and in military action against Crown forces; secondly, it was the means by which the old problem of the illegal settler land claims could finally be put to bed; and, thirdly – and most importantly of all – it was the means by which an entirely new system of land titles was introduced, based in and affirming of the Crown's absolute authority in Turanga. It was therefore also the means by which the defeat of Turanga Maori at Waerenga a Hika and of the Whakarau at Ngatapa were given practical meaning in economic and political and legal terms.

We have concluded that the commission should not have effected the confiscation of the lands of 'rebels'. In chapter 3, we found that the Pai Marire forces in Waerenga a Hika were not in rebellion. We also found in chapter 5 that the Whakarau, though technically in rebellion, had been so provoked by the Crown's own actions that confiscation was a wholly inappropriate punishment. In this chapter, we have found that the commission did not have the power according to law to usurp the role of the ordinary courts in punishing 'rebels' or to confiscate their land. What is more we have found that the legal process adopted by the commission to confiscate rebel land was inherently unfair. Few exclusions from title were tested before

186. WL Williams, journal, 19 November 1873, ATL (doc A10(a), vol 2, p780–781)

187. Poverty Bay Commission minute book, 21 November 1873, MA62/4, Archives NZ (RDB, vol129, p49,577). The commission finally announced that they could not reach a decision as 'all the natives in the Bay had a claim'.

188. Poverty Bay Commission minute book, 22 November 1873, MA62/4, Archives NZ (RDB, vol129, p49,578)

189. Ibid (pp49,579–49,580)

the commission. Those that were tested were dealt with in a peremptory and inconsistent manner.

In the vast majority of cases, the commission simply accepted lists prepared outside the court which excluded many owners without any inquiry at all. Thus, the commission operated a system whereby the beneficiaries of the exclusions became the primary excluders. Those involved in action against Crown forces had their lands confiscated in this manner. So did those who were mere prisoners of Te Kooti at Ngatapa. The Crown failed accordingly to provide an independent forum which operated pursuant to clear and consistently applied rules and which was required to turn its judicial mind to each act of confiscation against each rebel. In doing so, the commission, and therefore the Crown which created it, breached fundamental requirements of due process.

We have also concluded that it is likely Maori did not in fact request the Crown to investigate settler land claims even though the deed of cession stated that they did. In our view, they were pressured into accepting a clause which falsely recorded that they had requested the reinvestigation of settler claims. We think it likely that this was done in order to overcome fears that the commission did not have jurisdiction to deal with these matters. Nor is it surprising in the circumstances that some Maori were now willing to appear in the commission hearings to uphold settler transactions. As a result, Turanga Maori lost an amount of land which, though small, was nevertheless of considerable value. The ratification of settler titles reflected a dramatic shift in the position.

Finally, we have found that the transformation of title effected by the commission produced a form of tenure that made retention of the old relationships with the land impossible while at the same time preventing owners from taking any advantage of the new mercantile economy except by the alienation of the land. In this, the Poverty Bay Commission was the harbinger of its successor the Native Land Court.

We have found that this transformation of title was effected in breach of the principles of the Treaty. Here, it is sufficient to say that Turanga Maori wanted their lands returned on a tribal basis and their rangatiratanga secured by mechanisms which the new law of the Queen would provide. Wi Pere therefore requested that the commission grant the lands to a single tribal trust. The failure of the commission and ultimately the Crown to take up this request and implement it was a critical missed opportunity. We will turn to this matter in more detail in the next section of our report.

Thus, the importance of the Poverty Bay Commission's work cannot be overstated. When it arrived in Turanga in the form of commissioners Rogan and Monro, it was the first example to Turanga Maori of the operation of the civil machinery of empire after the departure of the military. Unlike Magistrate Wardell in the 1850s, the commission now had a mandate to impose its will. Turanga Maori showed their submission to that will by prior exclusion from ownership lists of most individuals they suspected would be treated by the commission or the Crown as 'rebels', by accepting the reinvestigation of illegal settler transactions, and

by seeking Crown-derived titles for lands that they already owned. The commission was the first non-military evidence that the relationship between Turanga Maori and the Crown had changed from a horizontal relationship between related but largely autonomous polities, into a vertical relationship between a single sovereign and its individual subjects. Of course, not all was plain sailing. The shambles of 1873 showed that there was still a sting in the tail of Turanga resistance, but Turanga independence came to be expressed only in moments of extreme provocation and then within tightly circumscribed parameters.

We turn now to consider how Maori tried to make the best of this new vertical relationship with the Crown in working with the structure and operations of the Native Land Court.