

TURANGA TANGATA

TURANGA WHENUA

TURANGA TANGATA
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THE REPORT ON THE
TURANGANUI A KIWA CLAIMS

VOLUME II

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
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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.

Dated at Wellington this 8th day of October 20 04



J V Williams, presiding officer



M C Bazley, member



J W Milroy, member



A Parsonson, member



CHAPTER 8

THE NATIVE LAND COURT AND THE NEW NATIVE TITLE

Friends, Mr Speaker, we entreat you . . . To leave our land peaceably in our own possession. We wish these laws to have no effect upon our lands.

—Petition of Henare Matua and 29 others

8.1 INTRODUCTION

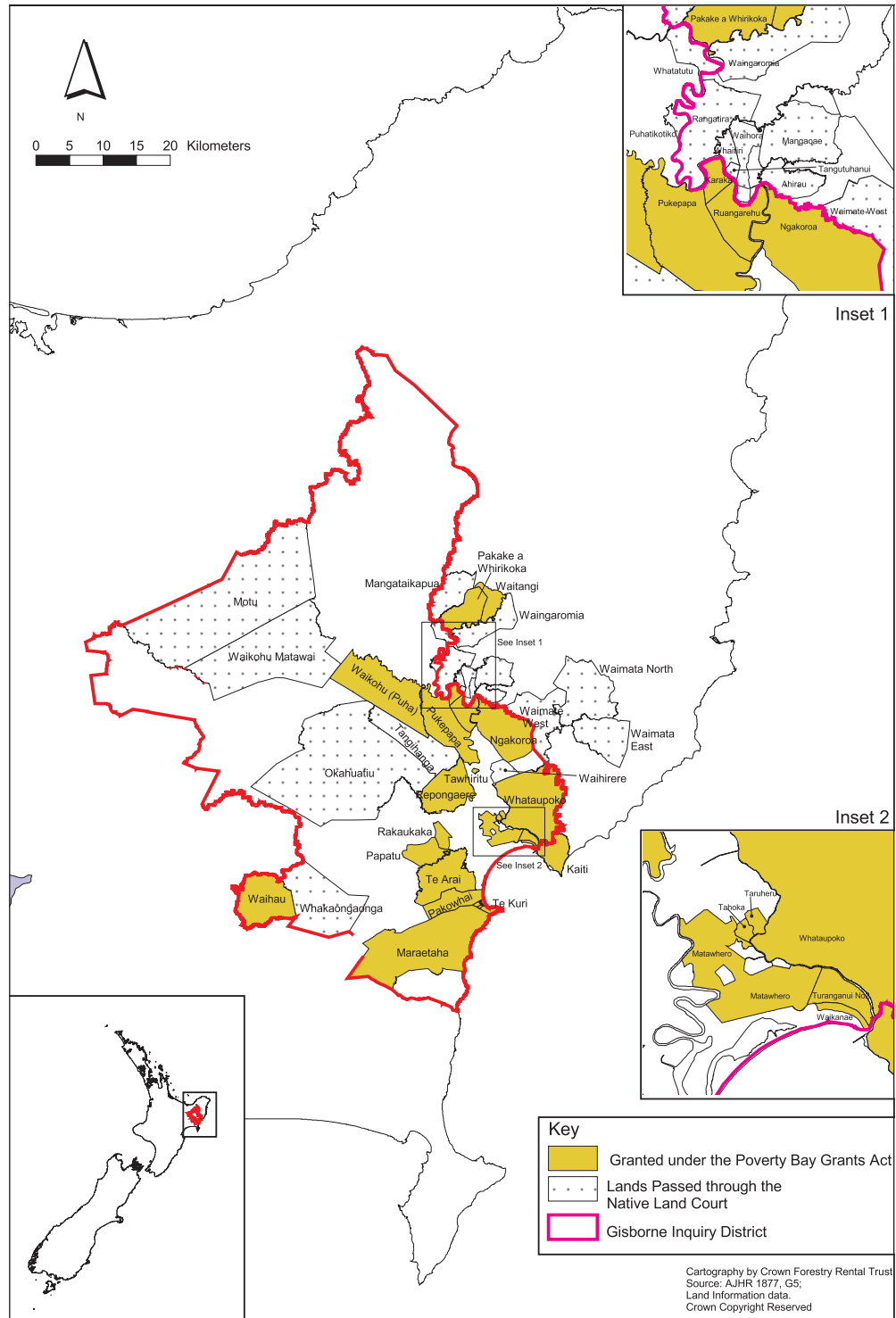
8.1.1 The Native Land Court arrives

The Native Land Court began to investigate the title to Turanga lands under the Native Lands Act 1873.¹ This followed five years of the Poverty Bay Commission and considerable confusion over whether the land court had any jurisdiction at all in Turanga. The court, and the legislation that governed it, was designed to transform Maori customary tenure so that Maori ultimately held Crown derived titles. The transformation of tenure in Turanga was achieved with surprising speed. It enabled alienation of Maori land in Turanga on a completely unprecedented scale.

The court had of course arrived at the end of a lengthy power struggle between Turanga Maori and the Crown. Prior to 1865, the Crown had largely left Turanga to its own devices. Turanga Maori managed their own affairs as they always had, while accommodating (indeed welcoming) the arrival of a small but hardy band of settlers. Turanga Maori clearly did not regard themselves as resident in an annexed district. They did not see themselves as part of a new Pakeha-dominated order. On the other hand, they did not align themselves with Maori nationalist or separatist movements either. For them, as we have noted, the refrain was ‘neither King nor Queen’. They valued both their autonomy and their neutrality.

All of that changed, as we have seen, with the events at Waerenga a Hika and Matawhero. In the months that followed, Turanga Maori were required to accept the superior authority of the Crown. The clearest symbol of that acceptance was the deed of cession of 1868, which purported to extinguish native title across the entire district. Land was confiscated by agreement (or at least the appearance thereof). Turanga Maori were divided between ‘loyal’ and

1. The Native Land Court sat briefly at the end of 1873 and again in 1874, but the substantive cases it heard in these sittings concerned lands outside the present inquiry area.



Map 21: Blocks awarded Crown grants by the Poverty Bay Commission
and land that passed through the Native Land Court

‘rebel’. The latter lost their lands. In the confusion that followed the arrival of the Poverty Bay Commission (the implementation mechanism of the deed of cession), ‘loyal’ Maori lost their lands too: first, in the lands kept by the Crown out of the cession, secondly through poor procedure in the commission and thirdly through a mistaken application of English common law presumptions as to the form title would take.

Once the Poverty Bay Commission had investigated and awarded the valuable Poverty Bay flats, the Native Land Court moved in to transform land tenure in the remaining one million acres of the district ceded in 1868 – that is, to normalise Crown–Maori relationships on the basis of the Crown’s newly acquired ascendancy.

In the 20 years that followed, the pace with which Maori land tenure was transformed and Maori land sold is little short of staggering.

In this chapter, we address the national tenurial transformation of which the land court was a key part, and the local implementation of that change in Turanga. We begin with a brief description of the Native Lands Act 1873 under which the court in Turanga operated, the key shifts in policy contained within it when compared with earlier Native Land Acts, and the court’s processes. We then turn to the impact of the court in Turanga. Following this general descriptive introduction, we split the chapter into four sections, each addressing one of the four primary issues in this area as we see them. They are as follows:

- (a) *The Native Land Court as a title adjudicator.* This section assesses whether there was a need for a court as an external adjudicator of customary entitlements to land. Most importantly, we consider whether Maori actually wanted the court.
- (b) *Individualisation of Maori land tenure.* In this section, we consider whether the new system of tenure individualised Maori title and, if it did, whether Maori wanted it.
- (c) *The system of Maori land transfer.* In this section, we assess the new system of Maori land utilisation and transfer. Did it assist Maori owners to extract fair value from their land asset by providing them with a usable title arrived at through a simple and efficient process? Did it protect Maori owners from engaging in transactions which were flawed or likely to leave them landless?
- (d) *The effect of the court, the new tenure and the system of transfer on the pace and volume of alienation.* In this section, we ask the most important question of all. Did the entire legislative and administrative apparatus governing Maori land cause Maori to sell more land at a faster rate than they wanted to?

It will be seen from the foregoing that our approach to the issues arising from the Native Land Court is significantly different to our approach in other chapters in this report. This is partly driven by subject matter. The story of the Native Land Court does not lend itself well to an orthodox narrative–argument–analysis structure. It is also in part due to our desire to approach the issues thrown up by the Native Land Court from a fresh perspective in the hope that, by doing so, we might finally resolve one of the enduring subjects of debate between Crown and claimants in Treaty jurisprudence and historiography.

It is not the purpose of this analysis to assess individual transactions under the land court system for Treaty consistency. There will undoubtedly be land sales that were fully consensual – that is the sellers all individually agreed the price, understood the effect of sale, received the proceeds and were satisfied with the outcome. There will be others in which some or all of the owners either did not wish to sell, or did not agree the price, yet were forced by circumstance or tricked by purchasers into joining the transfer. We saw evidence of both consensual and non-consensual sales in Turanga. We are however, far more interested in the system than individual transactions. Our focus is on whether the structures and processes for the administration and alienation of Maori land under the Native Lands Acts were consistent with Treaty principles. The questions we have posed reflect that focus.

8.1.2 Native Lands Act 1873

The Native Land Court commenced hearings in Turanga in 1875, under the Native Lands Act 1873. This was not the first legislation to govern the transfer of title of Maori land. Rather, it followed the Native Lands Acts of 1862, 1865, and 1867. It is unnecessary to address the three earlier Acts now. Instead, we discuss them when we explore the reasons for various changes introduced under the 1873 Act. It is sufficient to record that the Native Lands Act 1873 affirmed the underlying premises of the earlier native land legislation: Maori land would remain open to private purchasers, title would continue to be investigated by an independent court operating in accordance with English judicial norms; that title would be ultimately transformed into an English form of tenure; and the preoccupation of the law would remain the supervision of the process of transfer from Maori into Crown and settler hands. Within these accepted parameters, a number of significant reforms were introduced in the Act. They were as follows:

- ▶ A new system of district officers would be introduced.
- ▶ The court would now have a supervisory function to supplement that of trust commissioners established under the Native Lands Frauds Prevention Act 1870.
- ▶ The 10-owner rule would be finally abolished.
- ▶ Customary land (that is titles which had not yet been transformed into Crown derived tenure) would now be alienable directly to settlers but subject to important conditions.

We address each of these reforms now.

(1) District officers

Both Maori and Pakeha complained that the introduction of an English style judicial system, in which neither the judge nor the Maori assessors who sat with him had detailed local knowledge, had led to a number of unsafe awards by the courts. These had in turn caused conflict among competing Maori communities and the expenditure by them of large sums in the relitigation of the matters at issue. In response, the new Act provided for the appointment of

district officers to assist the court. They would gain local knowledge of whanau and hapu interests throughout the district, record that knowledge in a kind of district-wide *Domesday Book*, and appear before the court in every application for investigation into title to ensure that the court had the assistance of an independent viewpoint on matters of customary right from an official with detailed local knowledge (ss 21–32).

By the terms of section 24, it would also be the task of the district officers to ensure that Maori in their respective districts retained sufficient land, in the form of reserves. The measure of sufficiency was to be 50 acres per head for each man, woman, and child. This standard was the first clear statutory stake in the ground by the colonial Legislature, in response to growing disquiet over Maori landlessness.

If the starting point was an English style judicial panel, then the theory of the district officers was sound. As is so often the case, the theory translated poorly into implementation. A few district officers were appointed as part-time officials covering impossibly wide districts. No progress appears to have been made on the district books and by the time of the native land laws inquiry into the operation of the court 18 years later, it was wrongly believed that no district officers had even been appointed.² The 50-acre per head standard was inconsistently applied, if at all, for the same reason. Samuel Locke was appointed in 1874 as district officer for the area from Hawke's Bay to East Cape and inland to Taupo. His position was part-time. At the same time he held the position of native officer and, it appears, he had a role as well in vetting applications for survey. In 1875, he complained that his district was too large and required too much travelling.³ In 1876 he, ironically given his protective function as district officer, replaced Wilson as Crown purchase officer for the East Coast. He resigned both roles in 1877 to enter politics. He does not appear to have been replaced in the capacity of district officer. The records that remain of his brief tenure indicated that Locke did succeed in creating some reserves. For example, on his retirement he reported having established 25 reserves encompassing 39,223 acres in Cook County – around 12 per cent of the land that had gone through the court up until that time – but it cannot be said that his work had a significant or lasting effect on the estate of Maori land holdings as the reserves were not made inalienable in perpetuity. Thus, a significant plank of the 1873 reforms never really got off the ground either nationally or in Gisborne.

(2) Supervisory functions of the court

Concerns had also been expressed about the trust commissioners appointed under the Native Lands Frauds Prevention Act 1870. Their task was to supervise the validity and fairness of transactions between Maori and settlers. Many complained that the trust commissioners failed adequately to carry out their statutory tasks. Under the new Act, the Native Land

2. Report of the Commission appointed to inquire into the subject of the Native Land Laws, AJHR, G-1, 1891, p x (Dr Grant Phillipson, app 2, in Dean Cowie, *Hawke's Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1996, p 220, app 2)

3. Document A17, p 140

Court was directed to undertake its own supplementary inquiry into the fairness and probity of alienations whether by sale or lease (ss7, 59). In addition to inquiries by trust commissioners, Native Land Court judges were now also required to satisfy themselves that the agreed consideration in respect of the purchase of land was equitable, had been properly received in the case of absolute sales and that all owners had signed the transfer. The court had also to ensure that any translation was undertaken by a properly licensed interpreter and that it had been independently certified by a Judge or resident magistrate and at least one other adult male (s85).

As to the massive problem experienced in Hawke's Bay with respect to debt driven sales, the Legislature moved cautiously in two areas.⁴ First, unsubdivided tribal land would no longer be available to meet the debts of individual owners of undivided interests. The debtors' interests would now be required to be partitioned out first and only those partitioned interests would be available. Secondly, the private system of surveys in which costs had been artificially inflated was abolished and control of the system centralised within a new Government surveyors' office. It was hoped that this would reduce the costs to Maori of obtaining title in the court and the sale of lands in order to meet those costs.

(3) *The 10-owner rule*

The most significant reform in 1873 was the final abolition of the infamous 10-owner rule. By the 1865 Act, title could only be vested in 10 individuals.⁵ Although it appears that the 10-owner rule had been designed to break down tribal titles into much smaller whanau lots – to divide up the long hapu lists into 10-owner portions as it were – that was not its effect. Instead, with the knowledge and acquiescence of the court, chiefs were awarded title in their own names as political representatives of their people. The people were left off the titles entirely. Chief Judge Fenton decided, however, that political representivity did not translate into legal obligations owed to the wider land owning community. The representative titles of rangatira would be absolute and freely alienable. McLean who was the architect of the 1873 Act considered that the chiefs should now be circumvented. The new Act required instead that all members of the land-owning hapu be recorded on a memorial accompanying the court's declaration as to the hapu entitled by Maori custom to the land (s47). The Act therefore created an intermediate form of title, halfway between pure uninterrupted customary title and freehold title held by Crown grant. Awards under section 47 of the Act did not transform customary title into the new, anglicised and unrestricted form of tenure called native freehold title. By the policy of the Act, that would come later when the tribal estate was gradually subdivided into lots of 10 owners or less. Thus, this intermediate tenure was intended to

4. Hawke's Bay was one of the early sites of Native Land Court sittings under the Native Lands Act 1865, and it was here that widespread problems arose following the provision for direct settler purchase of Maori land.

5. See section 23 of the Native Lands Act 1865. The Act provided for tribal title. 'The Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons, or of the tribe who according to Native custom own or are interested in the land'. However, we note that this form of title was almost never used.

be transitional only. Awards in favour of hapu or hapu clusters were effectively membership lists of those land owning hapu at the time of the award. Notwithstanding the award, the land technically remained Maori customary land. What had changed was that the court's award created a new certainty for potential purchasers as to who the undivided right holders were. Although customary title remained, it had now crystallised into a precise list of right-holders. Those right-holders now held individual shares in the land. This intermediate title became the primary form of Maori land tenure both nationally and in Turanga for the next 20 years.

(4) *Alienation*

It was in the crucial area of alienation of land that the 1873 Act introduced a significant departure from prior colonial law and practice. Subject to certain important conditions, the Act made Maori customary land fully alienable to private purchasers before title had been vested in freehold in 10 or fewer owners and anglicised. In a sense this reform can be seen as a significant loosening up of constraints on the sale of Maori land. On the other hand, the conditions which had to be met in order for alienations to proceed were intended to represent important safeguards. The most important condition was that all owners had to agree to the alienation (ss 59, 62). This requirement was designed to avoid the problem that had occurred under the 1865 Act in Hawke's Bay. Chiefs, whether forced by debt or acting by free choice, would no longer be able to act as absolute owners and sell without community consent. A smaller sub group of sellers could in fact validly alienate their interests but only by partitioning them out and creating a new title, and then, only if the majority of owners in the original block consented to the partition.

By the terms of section 87, any other form of transfer prior to the land being vested by the Native Land Court as native freehold land, was to be treated as absolutely void.⁶ The view expressed by the Supreme Court on several occasions was that only a transfer agreed to in the land court by all, either as owners of the original block or as owners of a newly partitioned block created for the purpose of sale, could validly transfer title. The thinking underlying the policy was set out by Chief Justice Prendergast in the Supreme Court decision in *Poaka v Ward*.⁷ The principles are laid out at some length in the decision but they are stated comprehensively and are worth setting out in full:

In general terms it may be stated that 'The Native Lands Act, 1873' provided that land the subject of title by memorial of ownership should, so long as the land was held by that title, be effectively and completely transferable only in Court – that is, that until the certificate and declaration of the Judge had been indorsed on the records of the Court the purchaser did not hold as 'freehold;' and by that Act, in order that the Judge should be able to make that certificate and declaration, he had to be judicially satisfied of the assent of all the collective

6. That is, the transfer of such land was neither legal nor illegal. It was simply void.

7. *Poaka and others v Ward and Smith* (1889–90) 8 NZLR 338, 338 (CA)

owners. Provision was, however, made for the case of *dissentients* who were in a minority, by cutting off a share for dissentients and a share for those who assented; *and so long as the Native had only a memorial of ownership all transfers except in this manner – that is, in Court – were void.* . . . The good sense of the system is manifest: the essence of it was that, until a Native knew what his individual share was, he should have special safeguards when dealing with his land; and, moreover, it was recognised that, until a particular Native had his portion of land allotted to him, the other Natives included with him in the same memorial were interested in the question of his parting with his rights. When a memorial of ownership of a large block of land has been issued to a large number of Natives, as is often the case, and no subdivision taken place, but little has been done towards the real ascertainment of the title of the persons composing the number. The quantum of the interest of each has not been ascertained; the locality where within the block the interest of each shall be has yet to be determined. All that really has been done is that the successful body of Natives is entitled as against all others. It must often be a matter of great moment where in a block the interest of each is to be located. Under such a state of things there is much reason for the restriction upon, or limited prohibition against, alienation to be found in the Act of 1873. It is manifestly undesirable that new interests should be created – new and perhaps powerful European owners introduced as competitors with non-sellers in the location of their respective interests. While the land was held under memorial of ownership there was the restriction upon alienation provided for in sections 48 and 49 of the Act of 1873, and the other sections of that Act, providing as to the mode of transfer of land so held – that is, in Court. [Emphasis added.]⁸

In summary, the judgment in *Poaka v Ward* provided that:

- ▶ The Native Land Court system provided a number of safeguards for Maori, which ensured that all Maori listed on a memorial of ownership had a say in what happened to any single interest.⁹
- ▶ The memorial of ownership simply listed all those who had an interest in a specific block. It did not allocate amounts of land per interest or locate any interest on the ground.
- ▶ It was therefore important that no new interests be created and that Maori non-sellers did not have to compete with Europeans who had purchased interests, when it came to locating each interest on the ground.
- ▶ The effect of section 87 was that only transfers agreed by owners signifying their consent in court could be recognised as valid. All other transactions, and particularly all earlier transactions, were void.

8. Ibid, p348

9. These included the fact that land could only be transferred to a freehold title in the Native Land Court, and dissentients could have their interests partitioned out.

We heard a great deal of argument about whether the combined requirements that all owners of a block must agree to sale and that this must be done in court, not before, ensured that Maori communities were not unfairly drawn into the sale of hapu lands they did not really wish to sell. We will deal with these issues at length below.

8.1.3 The Native Land Court process

Having introduced the key policy planks of the 1873 Act, it is appropriate now to consider the process by which the Native Land Court inquired into customary rights and awarded titles under it.

The entire process commenced with surveys. No investigation of title could proceed unless plans had been lodged with the court (s 33). This was an important practical and symbolic step. The physical task of walking the boundaries of a Native Land Court block and the cutting of a survey line four feet wide in accordance with the survey regulations signalled in a very practical way the arrival of the court system into a district.¹⁰ Maori were required by regulations to agree a rate for the cost of survey with the inspector of surveys and the mode of payment – that is, whether money or land. If payment was to be in money then the time within which such payment was required would be set out. The court could award an area of the surveyed block to the Crown on application of the inspector of surveys in order to cover the cost of survey and other fees payable under the Act (s 73).

As we shall see, the cost of survey in the Native Land Court process was a significant issue of controversy throughout the country. The claimants argued before us that the cost of survey was also significant in Turanga. We will address this issue below.

Once survey had been completed, the matter could go to the land court for investigation. Any individual could apply to the court to have his or her interest in a block investigated.¹¹ There were however a number of steps to be taken before the claim could actually be heard. The boundaries had to be specified in the application, the names of other hapu or individuals interested in the land had to be provided and they were required to be notified of the application by the applicant. Notices were also required to be published in the *Kahiti* and the *Gazette* for the relevant district.

Once these preliminary requirements had been complied with, the application could proceed to hearing. Unlike the Poverty Bay Commission, the Native Land Court did not utilise Crown agents to assist in the investigation of title. District officers would have served a similar role but, as we have said, the district officer system never really took off. Most claims to title were led by a Maori spokesperson – generally called a conductor (s 44). These were usually leading rangatira of the hapu. In other cases, legal counsel or some other European technical

10. See 'Approving General Rules of Native Land Court, *New Zealand Government Gazette*, 1880, vol 2, p1705

11. However, section 34 states that, 'when the land is claimed by more than two claimants, [it will] be signed by at least three of the claimants'.

expert, such as surveyors, conducted proceedings on behalf of their clients.¹² Evidence was given under oath if the witness was Christian, and opposing counsel or conductors had the right to cross-examine in the usual way of English courts. Most witnesses, when they appeared in court, identified the hapu under which they claimed their right and most ownership awards were made on the basis of hapu membership. Like the Poverty Bay Commission, the court was empowered to recognise voluntary arrangements reached outside the courtroom amongst claimants and counter-claimants (s 46). As with the commission, this aspect of the court's jurisdiction was utilised extensively in Turanga.

The court comprised a judge and one or more assessors, 'when required by the presiding judge.' Section 15 also provided however that 'his or their concurrence shall not be necessary to the validity of any judgment or order.' This rather startling provision was repealed in 1874. Only a minority of judges were legally trained. Most were either former military officers or former officials. The judges in Turanga for the first four years of the court's operation were Rogan and Monro, both of whom, it will be remembered, had sat as commissioners. Judge Rogan was a former resident magistrate and had been the judge in charge of the Kaipara Court which operated under the 1862 Act. He was qualified as a surveyor.¹³ Judge Monro was described by Chief Judge Fenton as the most able of his bench.¹⁴ Monro joined the Native Department as an interpreter and translator in 1857. In 1864, he worked as a clerk in the court, and within two years had been appointed to a judgeship first in the Compensation Court, and then in the Native Land Court.

Assessors were generally rangatira of standing within their own communities who were seen as friendly to Government policies. Rangatira sat as assessors outside their own districts. Two notable examples were Te Wheoro of Waikato and Hikairo of Te Arawa. Te Wheoro resigned prior to the 1873 Act complaining that assessors were little more than window dressing.¹⁵ In Turanga, the assessors included: Tuta Tamati, Erutara Rangihere, Wiremu Pokiha, Paraki Te Waru, Wi Pewhairangi, Pirimi Mataiawhea, and Renata Poata Uruamo.

Once the investigation was completed, the court would declare the owners of the block in accordance with native custom and list the individuals in a memorial of ownership provided on form 1 in the schedule to the Act. The owners were to be listed 'according to their hapus and tribes' (see app 11). By the terms of section 47, a survey plan had to be annexed to the memorial of ownership. Section 48 required that all such memorials were to bear a condition prohibiting sale and restricting lease terms to 21 years or less, without renewal.

12. Although section 44 stated that the investigation of title would happen 'without the intervention of any counsel or other agent', it seems that lawyers were intimately involved. By the Native Lands Amendment Act 1877, legal counsel's right of audience before the court was affirmed.

13. Richard Boast, Andrew Erueti, Doug McPhail, and Norman F Smith, *Maori Land Law* (Wellington: LexisNexis, 2004), p83

14. Ibid, p84; Wai 64 ROI, doc G5, p9

15. Document A75, p30

8.1.4 The Native Land Court and land alienation in Turanga

The operation of the court in Turanga after 1873 followed a now familiar national pattern. The figures we were given by various parties in the inquiry are broadly indicative of that pattern. Of the 690,000 acres in the inquiry district, 210,500 – nearly a third – had passed through the court within three years of the enactment of the 1873 Act. Another 230,100 acres had been through the court by 1883.¹⁶ Whether sale was the inevitable consequence of award by the land court is more difficult to track. This is because the individualisation of interests under the 1873 Act made acquisition of whole blocks a slower and more painstaking process. Thus, a snapshot at any given time of the state of Maori ownership of whole titles does not give an accurate picture. It does not convey, in addition to completed sales, the level of half completed transactions represented by the gradual buy up of individual interests. These are far more difficult to trace and record. These matters were also greatly affected by the establishment in 1892 of the Validation Court – a court to clean up the residue of uncompleted or technically invalid purchases commenced under the 1873 Act and not completed by the date of its repeal in 1886. We will address issues in relation to the Validation Court at length below. For now however, it is sufficient to indicate that the figures we use for alienations is probably, for the reasons we outline above, an under representation. Thus, as far as they go, the statistics indicate that the Crown purchased approximately 30.2 per cent of the land in the inquiry district.¹⁷ According to Katherine Rose, who gave evidence for Te Aitanga a Mahaki, private purchasers had acquired nearly half of that iwi's rohe by 1912.¹⁸ Ngai Tamanuhiri claim that 62 per cent of their rohe was bought by private purchasers.¹⁹ Rongowhakaata lost approximately 46 per cent of their core lands between 1873 and 1900.²⁰ In short, in the period between the 1873 rework of the Native Lands Act led by McLean and the 1909 reform led by Sir John Salmond, about three quarters of the Turanga Maori land base had been transferred out of Maori ownership. One of those three quarters had gone to the Crown, the other two to private purchasers.

8.1.5 Our approach to the issues

This outcome in Turanga is little different to districts elsewhere in the North Island. In most areas, by the turn of the century, Maori retained only a residue of their former estates. With few exceptions, that residue was insufficient to maintain land-owning hapu at a reasonable level of wellbeing. The essential question here therefore, as elsewhere, is whether Maori made a rational choice to use alienation of their lands as the primary means by which they engaged with the new economy, or alternatively, whether the new title system created by the Crown

16. Document F4, p5

17. Document H14(15), p5

18. Document H1, p79. The figures for the alienation of Te Aitanga a Mahaki lands by private purchasers are: 208,655 acres by 1890; a further 48,293 acres by 1900, and 25,000 acres by 1912.

19. Document E8, pp9–10

20. Document D9, para 87

effectively denied Maori the choice of retaining, developing and occupying their lands. If the former, then the obligation on the Crown in accordance with Treaty principle can be no higher than that articulated by Lord Normanby in his instructions to Governor Hobson in 1839:

Nor is this all: they [Maori] must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence.²¹

In modern language, this particular instruction gives rise to the principle of active protection – the obligation on the Crown to intervene to prevent Maori from alienating land at such a rate or to such an extent that it would be destructive of their own interests.

If on the other hand, the system was designed by the Crown to deny Maori effective choice (or if that was its effect), then the obligation of the Crown is altogether different – for this would go to the heart of the Treaty guarantees of *tino rangatiratanga* in the Maori text and exclusive and undisturbed possession in the English text. Such a system would effectively provide for the acquisition of Maori land without concern for the properly articulated consent of Maori in each particular transaction in accordance with their own decision-making processes. Viewed from this perspective, sale would have been inevitable because the system offered no rational alternatives. If this were the case, then such a system would amount to a grievous breach of Treaty principle. It would in reality have been a system of *raupatu* by stealth – but *raupatu* on a much larger scale than that effected under openly confiscatory laws and policies.

In order to properly address this underlying question, we have posed several more narrowly defined questions. They are as follows:

- (a) Did Maori accept, in the circumstances of the new economy, the need for an external adjudicator of customary entitlement in the form of the Native Land Court? This question addresses the issue of whether the land court usurped traditional community decision making.
- (b) Was the new system of native land tenure designed to individualise community ownership? If so did Maori in Turanga and nationally actively seek this transformation? This question addresses the nature of the new titles system and whether Maori wanted it.
- (c) Was the Native Land Court system simple and certain? This question addresses the quality of the processes for title transformation and transfer, laid down in the Native Land Court regime.

21. Marquis of Normanby to Captain Hobson RN, 14 August 1839, BPP, vol3, p87

- (d) Did the new title system result in Maori alienating more land in Turanga than would have been the case had community title and management been recognised from the outset in native land legislation? If that was the effect, did the Crown intend it?

We analyse each of these questions in separate sections below.

8.2 THE NATIVE LAND COURT AS ADJUDICATOR

8.2.1 Introduction

Did Maori accept, in the circumstances of the new economy, the need for an external adjudicator of customary entitlement in the form of the Native Land Court?

The Native Land Court introduced fundamental changes to the traditional Maori land tenure system and to basic social control structures. During this chapter we will isolate the elements of these changes and assess each against Treaty principles. The first element was perhaps the most fundamental. It was the necessary pre-condition to the other elements introduced in the transformation. The Native Land Court removed from the Maori communities (where that power had resided) the power to control the nature and distribution of land rights both within and between those communities. Professor Brian Murton of the University of Hawai'i, an expert witness for Ngai Tamanuhiri and Te Aitanga a Mahaki, argued that control of such decision making is fundamental to the well-being of any society:

Every society has a structure of rights that characterize the relationship of primary decision units (individuals, households, families) to one another and to objects of value. Each set or bundle of entitlements entails a socially recognised structure of institutional arrangements that both constrain and liberate decision units and their behaviour with respect to other decision units. If the entitlement bundle of a decision unit is reduced it can begin a descent into poverty, unless adequate alternatives can be established. *But if decision units are excluded from decision-making processes with regard to entitlement distribution and enforcement, they can no longer protect and promote their rights. This is at the heart of empowerment approaches to impoverishment: poverty can be defined as a lack of power.* [Emphasis added.]²²

Viewed from this perspective, it can be seen how important the introduction of the land court as a new decision maker in all matters of land rights allocation for Maori communities and leaders, could potentially be. Did Maori seek to transfer this power to an independent arbiter? Did the circumstances of the new colonial economy make transfer necessary in any event?

It is to be remembered that the Native Land Court proper did not commence its work in Turanga until 1875 – a full 13 years after it was so tentatively established in 1862. Of course, the

22. Document A35, p8

Poverty Bay Commission had sat there in 1869 and 1873 and the land court had sat for a brief period as a kind of substitute commission in 1870. Turanga Maori had therefore had considerable experience of judicial style forums before the arrival of the Native Land Court. That experience as we have seen, was far from positive. All land in Turanga, except for the 102,200 acres awarded by the Poverty Bay Commission before its demise and the 60,000 acres in the Patutahi take, was processed by the land court after the enactment of the Native Lands Act 1873. Thus, the court was fully entrenched in Crown policy by the time it arrived in Turanga and Maori responses to it in Turanga were constrained by that reality. We must therefore commence with an assessment of Maori attitudes at the national level prior to the expansion of the court into a fully functioning national forum in 1865. We do this in order to determine whether the court was established in response to a need being expressed in the Maori world at the time or whether it had been designed to meet settler ends. We then consider whether nationally Maori attitudes had changed by 1873 when the next big reform occurred, or by the time of the 1891 inquiry into the native land legislation. We will finally focus more particularly on the evidence of Turanga Maori attitudes to, and participation in, the workings of the court in that district throughout the period.

First, however, we summarise the arguments of the parties.

8.2.2 Claimant and Crown argument

Claimants argued that the Native Land Court was an unwanted imposition made without consultation let alone Maori consent. They argued that Maori, both nationally and in Turanga, had expressed in the strongest terms their wish to control title allocation and subdivision even though they accepted that titles needed to be more precisely delineated in the new economy than had been necessary in pre-colonial times. Maori argued throughout the second half of the nineteenth century for replacement of the land court with their own runanga to decide land allocation matters. The claimants before us argued that the colonial parliament refused to sanction any approach which might vest power back in the communities from which it had been taken. To do so would have slowed, or even halted the flow of land to Crown and settler hands. This, they argued, the settlers would never allow.

The Crown argued that Maori society was in a process of transition in the 1860s and 1870s – and particularly so in Turanga. The process of colonisation had introduced new ideas into Maori society, including most particularly, concepts of individual rights and freedoms. The mana of the chiefs had diminished and the will of the whole community was not the unquestionable imperative upon individuals that it had been before 1840. Individual Maori now saw another more powerful source of authority – the settler state. They no longer looked entirely to their own communities and leaders as sources of law and authority. The Crown argued that Maori recognised the need to transform traditional tenure in order to engage with the new economy and that this could not be achieved without help from an external adjudicator.

Further, the Crown argued, attempts were made, both nationally and in Turanga, to substitute tribal runanga for the Native Land Court – but all attempts failed for lack of sufficient support within the Maori communities themselves. Thus, the division in attitudes to the Native Land Court was not between Maori and settlers, but between more conservative Maori wishing to retain traditional approaches to these matters, and those who saw greater benefits in the new system introduced by settlers. The court, it was argued, was part of a process of change in Maori society but not its cause.²³

We turn now to consider these arguments.

8.2.3 Did Maori want the court prior to 1865?

(1) *Development of the Crown's policy on the Native Land Court*

The Crown's interest in creating a court to investigate and transform native title sprang from its disastrous experience in Waitara.

The war in Taranaki began over the Crown's attempt to purchase the Waitara block, and the determination of Wiremu Kingi Te Rangitaake, on behalf of his community, to prevent it from doing so. At the heart of the conflict were two opposed positions: the Crown's attempt to complete a purchase of land offered by a small group of Maori sellers who were not representative of the larger community's wishes; and the assertion of the Crown's right to do so, in defiance of the wishes of the leadership of that community. From 1859, the Crown decided to assert its right as purchaser, force a survey and require those who dissented from the sale of the block to point out their 'pieces of land' within it, as individuals.²⁴ This, Wiremu Kingi and his people refused to do. In their view the Crown could not have secured any such right over the land until the community itself, by its own decision making procedures, agreed to sell. War broke out as a result.

In order to avoid a repeat of that conflict, the new court's role would be twofold. First, it would relieve the Crown of the potentially dangerous task of picking winners when it purchased land. The court would decide who the traditional landowners were. Secondly, it would render more certain the rights of the right-holders so as to enable commerce with settlers. This was the proposal put by Donald McLean, the Native Secretary, and Governor Gore Browne to the chiefs gathered at the Crown's very first national consultation hui held at Kohimarama in 1860. The Governor proposed that: 'When disputes arise between different Tribes in reference to land, they might be referred to a committee of disinterested and influential Chiefs, selected at a Conference similar to the one now held at Kohimarama.'²⁵ Rather than go

23. Document H14(12) p22

24. McLean to Waitara Natives, 18 March 1859, AJHR, 1860, E-3A, p12

25. Thomas Gore Browne 'Message No 2', Wednesday [sic] 18 July 1860, Minutes of Proceedings of the Kohimarama Conference of Native Chiefs, July–August 1860 (doc A74, p127)

to war over disputed territory, said Gore Browne, they should 'go at once to the proper Court, and, if he is right, the Judge will give him possession, and the Law will protect him in it'.²⁶

(2) *Maori reaction*

According to Professor Alan Ward:

There were in fact two main reactions by Maori to proposals for tenure change:

A. Considerable interest in greater definition and clarification of rights (a) for the prevention of disputes (b) to assist their own economic enterprises, including the leasing of land.

B. Growing opposition to the sale of land.

Both responses ran concurrently.²⁷

At least some of those who participated at Kohimarama or corresponded with the Governor after the hui, expressed an interest in some sort of independent adjudicator. Mohi Kupe of Tapuika, for example, placed his entire faith in the new system introduced by the Crown:

Should any one interfere with me in the possession of my piece of land, I will refer the matter to the magistrates. It is my wish to do the same with regard to everything belonging to me; and whether the parties concerned be Maori or Pakeha, let all matters be submitted to a regular tribunal.²⁸

Tamihana Te Rauparaha of Ngati Toa preferred a hybrid. He suggested that both title investigations and sales should be conducted by a joint panel comprising a 'Pakeha gentleman' and a Maori chief assisting.²⁹ Epiha Karoro of Ngati Awa suggested control of land allocation by local Maori committees:

I have another word to say to you, O Governor! let persons be appointed in each tribe to superintend the sub-divisions of land, so that when there is a dispute they may take steps to get it amicably arranged. Those persons appointed by you would investigate the title; as, for instance, if it were a question requiring that the line of descent from some ancestor should be traced, and it were found that both parties were entitled (had claims) to the land in question, it would then be right to divide that land.³⁰

According to Crown historian Donald Loveridge, McLean and Gore Browne came away from Kohimarama satisfied that Maori supported the establishment of a Crown-operated tribunal. We rather doubt that McLean and Gore Browne did feel confident about this, or if they did, we saw little evidence to suggest a Maori consensus on the matter. We say this for

26. Ibid, p127

27. Wai 550 ROI, doc A5, p19

28. Reply from Tapuika, Kohimarama, 13 July 1860, 'Papers Relating to the Present Disturbances in New Zealand, Despatches from the Governor', BPP, vol12, p114

29. Reply from Ngatitua, no 1, 20 July 1860, BPP, vol12, p105

30. Reply from Ngatiawa, no 2, 16 July 1860, BPP, vol12, p111

three reasons. First, the proposal, as put, does not appear to have gone beyond the need for an adjudicator of some description. There were no details about how the panel would be made up – the extent of Maori involvement or control – and the process to be utilised by the panel. These discussions were still to be had. They may well have been undertaken the following year if Gore Browne's promise of a second conference had been kept.³¹ Secondly, the responses above speak to a range of Maori opinion on the type and style of panel at least at that early stage. There was certainly no consensus. Thirdly, and perhaps most importantly, the views expressed at and following Kohimarama were those of either neutral or committed loyalist chiefs. A significant proportion of the Maori leadership – those who supported the Kingitanga – had even not attended Kohimarama. They had certainly not expressed support for a crown court to deal with Maori land. They were implacably opposed to the surrender of *mana* Maori as envisaged by Gore Browne. As Takerei Te Rauangaanga put it to a select committee of the House of Representatives in 1860, when asked to explain the origins of the King Movement:

Formerly, we were not possessed of Knowledge. The gospel came, and we sought out precepts in the Scriptures. The people then sought a Protector for themselves similar to yours. You have a protector. They proposed to elect a King for themselves, to protect them, to be a *mana* over them and over the land, over the portions in their possession. The idea was this – the Queen should be a *mana* over the Pakeha and over the land which you have acquired. The same with respect to the Maori King. There should be no interference with the portions of land which have been acquired by the Queen; but only with the land which was under the Maories of New Zealand.³²

Maori at this stage were interested in the possibility of a titles tribunal, but hardly committed one way or the other. The devil, as they say, would be in the details, and there were no details available. No further attempt was made to determine, in any comprehensive way, developing Maori attitudes to the court until 1871, and that only after a long period of bitter Maori protest at the 1865 version of the court.

Early in 1861, Gore Browne sounded out the idea of a court in which disputed claims to Maori land might be heard both with his Ministers and with the judges of the Supreme Court. The politicians were divided; the judges supportive. They suggested a 'land jury' drawn from members of the tribes, presided over by a European officer. In response to the Governor's interest in the idea, the General Assembly established a select committee in 1861 to report on the advisability of establishing a court with jurisdiction over native land title. But not long

31. No 39, 'copy of Despatch from Governor T Gore Browne, to his Grace the Duke of Newcastle', 28 August 1860, BPP, vol12, p96. While Gore Browne was keen to hold a second conference- he even persuaded the General Assembly to vote him the money- he was recalled in 1861. Grey was reinstated as Governor, and decided in the run up to the Waikato war, not to reconvene the conference, believing it to be a waste of time.

32. 'Further Examination of Takerei [te Rau], Wednesday 31 October 1860', minutes of proceedings of the Waikato committee, AJHR, 1860, F-3, p109

afterwards the Stafford Government fell; Governor Gore Brown was transferred to Tasmania and replaced by George Grey.

(3) *The 1862 prototype*

In the Native Lands Act 1862, a new court was established. It did not commence work until 1864. The Kaipara district was chosen as the pilot because it was more settled.

The court as proposed was not to operate as an ordinary English style court. It was, as Dr Loveridge points out, to be primarily a Maori body supervised by a European magistrate and it was to ascertain both title and entitlements according to Maori custom.³³ That is, it would in each division, comprise a panel of leading local chiefs chaired by a magistrate. The panel would merely declare customary entitlements. It would have no immediate mandate to transform those entitlements into English estates or interests in land. Section 4 provided:

It shall be lawful for the Governor from time to time by Commission or Order in Council to constitute a Court or Courts (hereinafter termed 'The Court') for the purpose of ascertaining and declaring who according to Native Custom are the proprietors of any Native Lands and the estate or interest held by them therein, and for the purpose of granting to such proprietors Certificates of their title to such Lands.

If titles were found to be tribal or community titles (both terms were used in the statute), then they stayed that way unless the tribe or community applied subsequently to subdivide their lands under section 20. Settler politicians of course hoped fervently that Maori would so apply but there was no statutory compulsion. That made sense, at least as matters obtained in 1862. In the precarious politics of the time, the whole system could only operate on active Maori support and there was no discernible Maori groundswell in favour of title transformation. To push matters too far would risk a Maori boycott and cause the entire initiative to fail.

In effect, the 1862 Act offered a compromise between the races as to which side would control title ascertainment. It was closest to Tamihana Te Rauparaha's hybrid model to which we have already referred.

In the Kaipara, John Rogan, a former Crown land purchase officer and now resident magistrate led the experimental court. Wiremu Tipene and Te Matikikuha were appointed to sit as Rogan's brother judges in Kaipara South. Te Keene and Tamati Reweti would sit with him in Kaipara North. All four Maori were local chiefs. They were officially designated Native Land Court judges. The subordinate term 'assessor' did not come to be applied to Maori members of the court until after the 1865 legislation. The style of the court appeared to be facilitative rather than adjudicative. That is, it encouraged consensus rather than contest amongst claimants and then expressed that consensus in its declarations as to title.³⁴ Rogan would import elements of that style into Turanga when he commenced sitting there in 1875.

33. Document A74, p190

34. Ibid, pp212–219

(4) *Qualified success?*

For a measure introduced without Maori consent and accompanied by considerable doubt as to its efficacy, even among its leading proponents, the 1862 version of the court worked surprisingly well in the Kaipara pilot. Perhaps it was because the court did not attempt to transform customary rights but merely declared them. Perhaps it was its facilitative approach. Perhaps it was just because it was tried in a 'safe' district. The choice of Rogan helped. He was known to Kaipara Maori and was clearly comfortable in working with Maori judges in what was designed to be a Maori forum operating in an essentially Maori way. Whatever one might argue as to the overall purpose of the reform (we deal with some of these issues below), the experimental court itself could rightly be described as a qualified success and could have provided a model for the changes Maori later sought.

We say that Kaipara was a qualified success because the prototype did not last long enough for a more complete assessment to be made. After Kaipara, a quite different court emerged. Within six months, there was a change of government: the Weld Ministry had taken office, Francis Dart Fenton had been appointed chief judge of an expanded national Native Land Court comprising eight judges, and 11 'native assessors', and work began on the watershed Native Lands Act 1865. The colonial politicians no longer saw any need to proceed cautiously.

8.2.4 Maori perspectives on the 1865 Act and the new land court**(1) *The approach of the 1865 Act***

All of these changes were in preparation for the arrival of the new court under the second Native Lands Act, which took effect on 30 October 1865. The preamble provided:

Whereas it is expedient to amend and consolidate the laws relating to lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs are the owners thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and to provide for the regulation of the descent of such lands when the title thereto is converted . . .

The Legislature now made it clear that title would be transformed. The Act provided that the transformation would occur immediately and not on a subsequent application to subdivide tribal titles as was the case under the previous Act. By section 5, the court was established as a 'Court of record'. It would be the mechanism by which the transformation would be achieved. The judiciary would be appointed by the Governor and hold office during 'good behaviour'. The native assessors would hold their appointments at the Governor's pleasure (s6). The assumption in the 1862 Act that Maori members on the court were judges was dropped. The whole approach of that Act – that local chiefs under the chairmanship of the local resident magistrate would resolve the title issues among contending parties in hui called

8.2.4(2)

for the purpose – was dumped. The Legislature opted instead for a formalised English style adversarial court. Each court would comprise a judge and two assessors. All three had to agree on an award, making it impossible for the two assessors to out vote the judge (s12).

The court, under Chief Judge Fenton's control, adopted the so-called best evidence rule – an approach peculiar to English legal tradition. The court was not to be a commission. It was not to make its own inquiries. Judges were restricted to taking account only of evidence actually given in court, even where it was a matter of common knowledge that the evidence was wrong or slanted because other unrepresented rights existed.

(2) *Inquiries into Maori opinion*

The Act was reviewed twice while it was still in operation – once in 1871 by Colonel Haultain at the request of Native Minister Donald McLean, and again in 1873 by a formal commission of inquiry into land alienation in Hawke's Bay. The Hawke's Bay commission was led by Justice CW Richmond and included as commissioners Native Land Court Judge FE Maning, Wiremu Te Wheoro of Waikato, and Wiremu Hikairo of Te Arawa. These inquiries received extensive evidence from Maori and settlers. They give a useful snapshot of Maori attitudes after six and then eight years' experience of the court.

Colonel Haultain's 1871 report declared that Maori were largely happy with the 'general principle of a Court for the judicial investigation and determination of titles'.³⁵ The evidence Haultain received simply did not support such a sweeping conclusion. On the contrary, leading submitters rejected the idea of a disinterested but ignorant European judge and assessors of limited capacity. Te Wheoro for example, whose opinion was important and moderate enough for him to be appointed to the larger 1873 Hawke's Bay commission, rejected the court outright in submissions to Haultain: 'I have always been opposed to the Court from the very commencement. It is a pity that the Maori were not consulted before the Act was brought into the General Assembly. You are obliged to apply to us now for advice and assistance.'³⁶

Te Wheoro proposed a system of arbitration which presaged later industrial relations legislation in New Zealand. He said: 'Instead of the present system of investigating titles to Native land, the Judges and Assessors should be done away with, and six Maori arbitrators should be appointed by opposing claimants, three by each side, who should hear and decide the cases; and if they agreed, their decision should be ratified by an officer of the Government'. Hikairo, another influential chief and assessor, admitted that judges could be useful if permanently stationed in a district, but it is clear that he preferred that the real work of title determination be undertaken by Maori themselves. He advocated the appointment of several *kaiwhakawa*

35. Haultain to Mclean, 18 July 1871, 'Papers Relating to the Working of the Native Land Court Acts', AJHR, 1871, vol1, A-2A, p3

36. Joint evidence given by Te Wheoro and Paora Tuheere, Auckland, 18 February 1871, Appendix to Colonel Haultain's Report on the Working of the Native Land Court Acts', AJHR, 1871, vol1, A-2A, p26

komiti (literally committees of judges) to work with the acting judge in his district and to settle boundaries and disputes outside the court wherever possible.³⁷

On the settler side, former Chief Justice Sir William Martin, in a lengthy report, confirmed Maori disquiet. He said 'it has now become known that many . . . grievances exist, and that the Court itself has come to be regarded by many of the most intelligent Natives with strong suspicion and dislike'.³⁸

It is true that almost all Maori who participated in the inquiry welcomed the innovation of an independent panel to resolve issues of title. To that extent, Haultain was right in his conclusion that Maori in 1871 were supportive. This new process provided an objective form of certainty which had not previously existed in customary tenure. Nor had it been needed until the advent of land alienation. And it removed the option of armed conflict. But that is as far as Maori support went. Beyond that, leading commentators on both sides considered that the precise model in the 1865 Act did not meet Maori needs. Most, like Te Wheoro, argued for greater Maori involvement in the decision making process while accepting the need for some form of official ratification of its result. Thus, if a Maori consensus could be discerned at all in those early days, it was one which welcomed English legal process and structure as long as it did not mean settler control of decisions which were for Maori to make.

(3) *The growth of komiti*

These attitudes took root elsewhere. By 1872, Ngati Whakaue of Te Arawa proposed its own runanga to deal with land matters. It eventually became the famous Te Arawa wide Komiti Nui or Great Committee. In the Urewera, the equally famous Te Whitu Tekau, or Council of Seventy, was established in June 1872 to deal with the same issues. It appeared that the desire for greater Maori control of land matters was by this time widespread. The issue had become so pressing that George Waterhouse chose to use his first parliamentary speech as Premier to highlight it. He said:

There is among the Natives a general desire that matters simply affecting themselves, the ownership of land, and various kindred matters, shall be settled by means of Committees, to be elected by the Natives in the various districts. I am told by those who are thoroughly competent to give an opinion upon this matter, that so firm a hold on the Native mind has this question obtained, that it has now risen to the prominence the king movement did some years ago. It may be now availed of beneficially, or, if it be allowed to be disregarded, this agitation may be attended with injurious consequences.³⁹

37. Wiremu Hikairo, 20 April 1871, Appendix to Colonel Haultain's Report on the Working of the Native Land Court Acts', AJHR, 1871, vol1, A-2A, pp 33-34

38. 'Memorandum by Sir William Martin on the Operation of the Native Lands Court', AJHR, 1871, vol1, A-2, p 3

39. G Waterhouse, 'Ministerial Statement', NZPD, 11 October 1872, vol13, p587 (Vincent O'Malley, *Agents of Autonomy, Maori Committees in the Nineteenth Century* (Wellington, Huia Press, 1998), p 53)

The Native Councils Bill 1872 was introduced as a consequence by Donald Maclean, Native Minister. It was welcomed by Maori, but opposed by a significant number of colonial politicians as well as Chief Judge Fenton. Their opposition reflected various fears: that settlers would be ruled by these councils in Maori districts, that it would lead to unhealthy Maori nationalism, but mostly fear that the land court would be sidelined by councils. The Bill was eventually dropped altogether on the basis that the new Native Lands Act 1873 superseded it.⁴⁰

(4) *The hardening of Maori attitudes*

Meanwhile the Hawke's Bay Land Alienation Commission reported in 1872 on dozens of claims of fraudulent or wrongful purchases in Hawke's Bay. Commissioners Hikairo and Te Wheoro found that purchases were characterised by serious fraud and grossly unfair practices. The European commissioners did not. On issues of more general policy, Justice Richmond found that the court was 'unfitted for the investigation of native title', a somewhat damning indictment of the Crown's new system.⁴¹ However, rather than dismantle the court (he argued that it was too late to do this) Richmond recommended creating new machinery for 'investigating the native title out of court'.⁴² The provision for district officers, and for Maori to negotiate the settlement of title rivalries outside the court, were included in the 1873 Act for this reason.

Maori dissatisfaction with the rejection by the European commissioners of their core claims gave impetus to the Repudiation Movement in Hawke's Bay and Wairarapa. It will be recalled that the movement and its leader, Henare Matua, had a significant impact in Turanga in the last days of the Poverty Bay Commission. The effect of Richmond and Maning's refusal to criticise the court's operation in Hawke's Bay was that the Maori leadership no longer believed, if they ever did, that settlers had the best interests of Maori at heart when developing Maori land policy. We are able therefore to make the following findings with some confidence:

- ▶ First, Maori were always interested in the establishment of an independent forum for resolving inter-community rivalry over land, but only ever on the basis that it would be Crown sponsored but Maori owned and operated.
- ▶ Secondly, Maori at a national level never actively supported the establishment of the court in its 1865 form. The enthusiasm which Maori showed for trying the court out in the early years, turned to deep suspicion after the Hawke's Bay experiment.
- ▶ Thirdly, by the time of the enactment of the Native Lands Act 1873, and after eight years' practical experience of its operation, Maori had come to view the court in an extremely negative light. While Maori leaders accepted that there was advantage in obtaining some

40. O'Malley, pp 56–57

41. 'Hawke's Bay Native Lands Alienation Commission Act, 1872, Report by Chairman of Commission, Mr Justice Richmond', AJHR, 1873, G-7, p 8 (Cowie, app 2, p 202)

42. Ibid, p 202

sort of official ratification of title – whether by the Crown directly or through a court – they sought consistently to protect the right to make their own decisions and resolve their own disputes in the first instance. The generally held view was that a court should be looked to for substantive assistance only if internal decision making processes did not produce a satisfactory result. The fact that a Maori consensus had crystallised around these ideas was reflected in comments made by both Maori and settlers at the time.

8.2.5 The crisis of the 1890s

(1) *The Commission on Native Land Laws*

By the 1873 Act, Parliament entrenched the court and firmly rejected Maori requests for its role to be reduced to make way for community decision making over matters of title and land management. Thus, the court continued largely unimpeded for the rest of the century, though in a more complicated and less certain statutory environment.⁴³ By the time of its arrival in Turanga in 1875, the court was already a *fait accompli*. Its central role in title transformation was no longer up for debate. Though many in the Maori leadership argued for it to go, many more flocked to the court to have their titles adjudicated. Protest against the court did not translate into refusal to use it. Quite the reverse in fact. For some, un-investigated customary title must now have seemed too precarious. For all of its faults, the land court could at least offer an officially sanctioned title. Given the confiscation of Patutahi and individual ‘rebel’ land rights, security of title was probably as important in Turanga as it was in Taranaki. In any event, in the context of the competition for land between Maori, it was better to get on the front foot and apply for title than to be an objector to someone else’s claim. For some, immediate sale would have been the purpose of submitting to the jurisdiction of the court – whether to meet a debt to the local storekeeper or purchaser, or for immediate cash. Indeed, in many cases, the land would be sold and the money dissipated well before any freehold order of the court was created in favour of the purchaser. Other owners, like Wi Pere in Turanga, clearly sought to pursue an active policy of transforming their spare lands into cash to fund development on retained lands. In all cases, the award of title would expose the land, if not already sold, to the slow and often secret process of piecemeal purchase. The chiefs were no longer in control. Pursuit of a single community-wide strategy for tribal lands had become inordinately difficult. Indeed, after the enactment of the 1873 Act, leadership itself had become inordinately difficult. For those, chiefs or otherwise, who wished to retain the land but could no longer influence what had formerly been a community decision, it must have been

43. In 1886, the Native Lands Administration Act 1886 introduced a form of community-based land management for a very short period, but it did not remove the court and was premised on vesting ultimate control of the land in Crown officials. It received little support from Maori.

demoralising. For those who saw their chiefs selling land against their wishes, it must have been equally so. Community control of chiefs had also gone.

As to the court itself, the technical requirements of alienation together with the processing of successions in an individualised share system meant it had become buried under the weight of its own convoluted processes. By the late 1880s, the court, indeed the entire system, was caught in a major crisis of confidence. Matters had become so dire and both Maori and settler complaints so vociferous, that another royal commission was struck. In modern parlance, it was to be a zero-based review. The commissioners were instructed to investigate the whole Maori land system, identify the causes of the crisis within it, and suggest new principles for its administration.⁴⁴ Dr Brian Gilling, who appeared as an expert witness for the claimants, described the background to the commission in the following succinct terms:

Once in power, the Liberals set up a royal commission to investigate the parlous state into which matters relating to Maori land had fallen. The commission was comprised of three members: East Coast lawyer and land developer W L Rees (chairman), James Carroll, the MHR for Eastern Maori and a former parliamentary interpreter, and Thomas Mackay, former trust commissioner of native reserves and trustee of the West Coast Settlement Reserves, who died during the life of the commission. The commissioners brought to their task extensive first-hand experience of the realities of the problem they were investigating; the voluminous report of the two surviving commissioners has become the most-cited source on nineteenth-century dealings with Maori land, while Mackay's contribution, completed by his nephew, Native Land Court judge Alexander Mackay, was published posthumously.⁴⁵

Commissioners Rees and Carroll spent several months holding sittings in 19 North Island centres and meeting leaders from most major North Island iwi.⁴⁶ They reported comprehensively in 1891.

The report could not have been more damning.

'The evidence', they said, 'was startling':

Every question, by its answer, disclosed fresh abuses; every subject of discussion disclosed some skeleton hitherto concealed. The actions of judges, lawyers, and conductors; adjournments, fees and rehearings of the Courts; the demoralisation and ruin of the Maories while attending distant Courts, were all commented upon. Every district also, beside its contribution to the general complaint, had its own particular grievance.⁴⁷

44. Earl of Onslow, 'Commission' Report of the Commission on Native Land Laws, AJHR, 1891, vol 2, sess 2, G-1, piii

45. Document A7, p33

46. We discuss this report in more detail later in the chapter. We note here that Mackay was unwell at the time and died during the inquiry. His nephew completed his report.

47. 'Report of the Commission appointed to inquire into the subject of the Native Land Laws', AJHR, 1891, vol 2, sess 2, G-1, pxiii

The commission was clearly interested in opening up land for settlement. Rees in particular, as we shall see later, was a land speculator, developer, and promoter of the Rees Pere trusts in Turanga. The commissioners blamed the 1873 Act, not only for injustices to Maori but for failing to advance settlement for Europeans as well:

This Act, having established the principle of individual title where no such title by nature existed, has been the foundation and source of all the difficulties which have since arisen, not merely in the transfer of land from Natives to Europeans, but in the settlement of the North Island of New Zealand.⁴⁸

As to the specific topic of the court itself, the commissioners found that it had not served Maori needs well. The court took longer to hear claims than had formerly been the case, it frequently postponed hearings, to the great inconvenience of the claimants and the charges were excessive.⁴⁹ Its lack of knowledge of local circumstances and local tikanga had led to abuses by opportunistic Maori, and mistakes by the court which embroiled communities in expensive rehearings and appeals:

Natives who, speaking in their own runangas, will testify with strict and impartial truth, often against their own interests, when speaking in the Native Land Court will not hesitate to swear deliberately to a narrative false and groundless from beginning to end.⁵⁰

Once again, the inquiry recorded extensive evidence of the Maori desire to control their own land matters:

Titles they believe can be found and determined, boundaries can be settled, and lists of owners prepared, by the Maories themselves, leaving only a few disputed cases to be determined by the Court. The respective interests of the owners they think can be arranged by the Committees, with the aid of the District Commissioner and District Judge . . .⁵¹

There was nothing new here. This idea had been a consistent theme in Maori dialogue with the Crown since Kohimarama. Rees and Carroll recommended accordingly.

(2) *Maori view of the land court nationally: our conclusion*

We conclude therefore that, at a national level, the Maori and non-Maori experience of the court under the 1873 Act was that it was a complete failure. Maori had said from the outset at Kohimarama in 1860 that they needed help from the Crown in providing the legal structures necessary for title determination, but that these structures had to reflect their own processes and empower them to make their own decisions. The proposals of Tamihana Te Rauparaha

48. Ibid, pviii

49. Ibid, p xi

50. Ibid

51. Ibid, pxix

and Epiha Karoro will be recalled. Maori had never wanted the land court in the form in which it operated after 1865. By 1891 they had said that in dozens of different ways to three separate inquiries. They had expressed their view in a series of regional movements culminating in the Kotahitanga movement in which Wi Pere was so prominent.

Meanwhile, Maori queued up at the door of the court to have their lands investigated. Some were willing participants, but some were not. The unwilling ones had no real alternative because they could no more avoid the court than iwi today can stand aside from the allocation of Maori fisheries assets. To refuse to join the queue was to risk losing everything.

8.2.6 Did Turanga Maori also oppose the court?

(1) *The repudiation movement and the Turanga komiti*

It should be recalled that the Native Land Court arrived in Turanga after the Poverty Bay Commission had been active in the area for four years. The commission itself comprised two Native Land Court judges and, as we have said, adopted standard Native Land Court procedures. With only a few exceptions, Turanga Maori took the side of the repudiation movement in opposition to the commission in 1873 when the leader of the movement, Henare Matua, visited Turanga.⁵² It will also be recalled that Maori protest at the operation of the commission forced its disestablishment in November of that year. Thus, Turanga Maori had already had a taste of a court-like panel before the court arrived and had rejected it. To this extent at least, the Turanga experience appears to mirror experience throughout the North Island. With the repudiation movement in full flight following the failure of the 1873 Hawke's Bay commission to support Maori claims, local chiefs protested about the court and its effects in Turanga. As with Te Arawa, Tuhoe and numerous other districts, Turanga chiefs actively pursued alternative mechanisms for title determination and management. In July 1872, Samuel Locke reported that there was a strong mood in favour of 'District Runanga composed of their leading chiefs, elected by themselves with an officer of the Government as their chairman, to discuss their requirements and represent them to the Government'.⁵³ Anaru Matete, Wi Pere, and other Turanga chiefs supported Matua's petition of 14 August 1873 on behalf of Taupo, Turanga, Wairoa, Heretaunga, and Wairarapa interests that criticised native land laws generally and the operation of the court specifically. On 1 October 1873, Matua and 29 others, claiming to represent 1661 Maori on the east side of the island, presented a further petition to the Legislative Council – the then Upper House. It called for Maori to be allowed to control their own lands and for the cessation of Crown interference by means of native land legislation:

52. Keita Wyllie and Riperata Kahutia were Henare Matua's primary critics and it was their applications to the commission which Matua effectively blocked.

53. Samuel Locke, 'Officers in Native Districts', AJHR, 1872, F-3A, p32 (doc A24, p23)

We cannot . . . concede to these laws governing 'Native lands' and 'Native reserves and leases', enacted by the Parliament this Session, and we hope that they will not be carried into effect on Maori land; but we trust you will permit our land to abide with us, for such was the Queen's promise at the Treaty of Waitangi, in 1840. The same promise was made at the Treaty of Kohimarama, when it was openly declared by Governor Browne that we should have the entire management of our own lands, snow crowned mountains, plains, hills, landing places, and fishing grounds. We do in consequence, consider that these laws should not by any means interfere with the Maori lands.

Friend Mr Speaker, we entreat you . . . to leave our land peaceably in our own possession. We wish these laws to have no effect upon our lands.

Friend, Mr Speaker, our candid opinion is this: we ought to project laws for ourselves, inasmuch as you have been these last thirty-two years enacting laws for the Maori people, and grievances to the Maories is the only result of your operations and your guidance.

We Maori have therefore assembled here in Wellington, asking your permission to devise laws for ourselves . . .⁵⁴

By 1873, a number of komiti had been formed among Turanga Maori to deal with a number of local issues arising from 'the confiscation', complications in title caused by private purchases, and a number of other land related matters. By the middle of the decade, momentum began to develop around a call for fully parallel Maori institutions – legislative, administrative and judicial. Turanga Maori attended a series of major hui of the repudiation movement during 1876 and 1877. In May 1877, the Turanganui a Kiwa komiti was formed with Wi Pere's guidance, 'to investigate and to hold an inquest into the problems and to set in place some rules and regulations pertaining to their lands and their administration'. On 29 June 1877, a notice published on the front page of the *Poverty Bay Herald* read as follows:

To Whom It May Concern:

Take notice that a native committee of twelve has been elected for the purpose of instituting an investigation into the alienation of land in this district, particularly those lands passed by the Commission under the Deed of Cession. Europeans who are occupying land, the titles to which are incomplete, will do well to perfect them as soon as may be.

Wi Pere

Chairman of the Committee⁵⁵

Turanga was divided into three areas – Oweta, Muriwai, and Waerenga a Hika. Three members were elected for each with Wi Pere as chair.⁵⁶ An anonymous observer wrote in the

54. 'Petition of Henare Matua and Twenty Nine Others' (translation), AJLC, 1873, no 22

55. *Poverty Bay Herald*, 29 June 1877 (doc A24, pp 41–42)

56. Document A24, pp 42–43. We note that, although the notice stated that 12 members would be elected, according to document A24 only nine were actually appointed.

Poverty Bay Herald that the komiti was intended to be effectively a parallel institution to the resident magistracy and Native Land Court.⁵⁷ It proposed to deal with land questions and civil and criminal cases, and set fines in the manner of the ordinary courts. It also dealt with questions of Maori land. For example, the komiti undertook an investigation into the title of the Tarewauru block. The komiti met at Pakirikiri in June 1877 to hear evidence from claimants and to inspect the block. A survey had been arranged by Ropata Whakapuhia of Rongowhakaata, but the komiti held that Rongowhakaata shared rights with Ngai Tamanuhiri. The komiti's decision was published in the *Poverty Bay Herald* in a kind of parallel to the publication of the Native Land Court decisions in the *Kahiti*. Turanga was once again asserting its mana Maori. Though it appears that they saw their komiti as complementary to, rather than in competition with the Crown's equivalents, Resident Magistrate Gudgeon noted that the komiti had applied to him to enforce the fines levied by them when they were not paid. Gudgeon recorded 'I of course had to refuse'.⁵⁸

In October 1877, Sir George Grey formed a new Ministry. Its accession to office was greeted with great enthusiasm in Turanga and by the repudiation movement generally. In January 1878, John Sheehan, a former repudiationist lawyer and now Native Minister, and Grey himself visited the Gisborne district. According to the *Poverty Bay Herald*, Sheehan told Maori he was fully aware of the grievances under which they laboured and that he would pass a new law to address them. The *Herald* reported:

The fundamental principle of the proposed law, would be to place in the hands of the natives the bulk of the work of ascertaining and determining the title to land. The law will start by declaring that the Maori people are, and ought to be, the best judge to whom the land belongs.⁵⁹

This was of course what Maori had been arguing for from the outset. At a hui in Tolaga Bay in the same month, called by Henare Potae, Wi Pere addressed those gathered. He stressed that the underlying cause of their problems was the lack of control over their destiny:

I am trying to control our particular area with rules and regulations for their protection and to be advertising openly. I hold my allegiance to the Queen . . .

The objection I hold against the Crown:

1. her regulation over the control and selling of our lands.
2. The Maori Land Court.
3. alcohol and other things.
4. I should not say these things, but, she should give us the rights to control our own destiny on things we do not agree with, with her endorsement to make it legal.⁶⁰

57. *Poverty Bay Herald*, 22 June 1877 (doc A24, p 43)

58. Gudgeon to Native under-secretary, 21 May 1879, AD103/9, pp617–628 (doc A24, p 44)

59. *Poverty Bay Herald*, 11 January 1878 (doc A24, p 46)

60. *Te Wananga*, 16 February 1878, translation by Rutene Irwin (doc A18(a), pp5976–5979)

Despite apparently broad support among Turanga Maori, these alternative structures could not be sustained and they did not last. There was, despite Native Minister Sheehan's generously expressed intentions, no official sanction for the komiti and therefore no incentive for Maori to toe the komiti line – at least none beyond cultural loyalty. Thus, it took only one or two influential people to break ranks and the precarious position of the komiti would be immediately undermined. Leaders would inevitably (and could legally) choose to step aside from the komiti if they considered it to be in their immediate interests to do so. In Turanga, that role was played by chiefs such as Riperata Kahutia and Keita Wyllie.⁶¹ These leaders rejected the repudiation philosophy and embraced the land court. Such engagement was enough to tip the balance against the komiti. Widespread support was not enough. Without unwavering unanimity, the komiti was bound to fail.

(2) *Turanga Maori utilise the court*

As with the wider North Island, these attempts to create parallel structures were accompanied paradoxically by extensive use of the Native Land Court as well. According to figures given by claimants, nearly half of the area of the inquiry district had been passed through the court by 1877. That is, by any measure, an enormous area of land in a very short period time. Paul Goldstone, who gave evidence on behalf of the Crown, recorded that land passed through the court during two distinct phrases. The first was from early in 1875 until 1877.⁶² The second was between 1880 and 1883.

In the first three-year period, according to Goldstone, 210,500 acres went through the court.⁶³ Ironically, this was at precisely at the same time that the Turanga leadership was calling for the court's abolition. Forty-six blocks passed through the Native Land Court during that three-year period. That would not have been possible without high levels of cooperation between claimant groups.

61. Riperata Kahutia used the Native Land Court to increase her whanau's land holdings. She was awarded over 4000 acres of land by the Poverty Bay Commission in the following blocks: Awapuni, Whataupoko, Waikanae, Waiohiorore, Kaiti, Matawhero, Makauri, and other blocks. A critic of the awarding of land to Maori as joint tenants, as we noted in chapter 7, Riperata Kahutia presented cases in the Native Land Court on behalf of her whanau, her hapu, and her iwi. In 1875, she claimed a share in Awapuni and Waiohiorore, a block rich in eels, mullet, and shellfish. According to claimant historian Professor Brian Murton, it was her testimony in this case that established her 'as one of the most able and eloquent claimants in the Native Land Court of the time': doc A26, p286. Riperata and her family kept most of their shares in the blocks awarded to them by the Native Land Court. She also acquired shares from other owners. Under the terms of the Poverty Bay Grants Act, upon the death of an owner the shares went to the surviving owners, rather than successors. Riperata therefore not only held onto the land that she was granted but also managed to increase her land holding at a time when most Turanga Maori were selling interests.

In 1886, Riperata entered into a trust agreement with WH Tucker in order to protect her lands. Tucker, a lawyer, was to manage it to the best advantage, selling bits of land if necessary to repay debts. This, he did successfully, so upon her death her children benefited.

62. Paul Goldstone stated that the first period was from 1874 until 1877. However, as we have noted, the Native Land Court did not actually begin hearing claims from Turanga iwi in the inquiry district until early 1875. The Native Land Court did sit in 1874, but it adjudicated on Ngati Porou lands.

63. Document F4, p5

The court's minute books consistently indicate that a small number of leaders, Panapa Waihopi, Wi Haronga, Wi Pere, and others were taking the initiative in ordering surveys and resolving ownership lists out of court. No doubt, they were assisted in their approach by Judge Rogan who sat on nearly all cases up until 1877. It appeared that his style was to encourage Maori themselves to resolve their disputes out of court.⁶⁴ Though the minute books do reveal some open contests between hapu, by comparison to other parts of the country, these contests were few.

(3) *Turanga Maori and the Native Land Court: our conclusions*

We are left therefore to reconcile extensive use of the court by Turanga Maori in two intense three year bursts, with constant calls, by the same people at the same time, for it to be abolished and replaced by Maori controlled structures. It is clear that leaders such as Pere came to hate the court and the utter disempowerment it stood for. He and his peers, who in their lifetimes had probably made the same resource allocation decisions now being made by the court, must have found its processes patronising and humiliating. They said so consistently in their public statements and petitions. Yet, Pere, Haronga, Waihopi and their ilk were as much realists as were Kahutia and Keita Wyllie. They knew the court was there and had to be engaged with. To turn one's back on it risked losing jealously guarded rights to a competitor willing to file a claim. The court was an evil but, for the time being anyway, an unavoidable evil.

The evidence suggests that even while accepting the reality of the court, Turanga Maori controlled the decision-making process themselves as much as possible through negotiation and cooperation out of court. It was usual for the court to be presented with agreed lists of owners for ratification rather than being required to decide between hapu in open conflict. That is not to say there were no contests in court. There certainly were – sometimes bitterly fought. The point is rather that there was much less evidence of this sort of conflict than we have seen elsewhere. This cooperative approach had an enthusiastic supporter in Judge Rogan. He encouraged out of court settlements wherever possible just as he had in the Poverty Bay Commission. This made possible the speedy completion of so many blocks in three years. Two points can be made. The first is that the ease with which so much land passed through the court paradoxically confirms that the court itself was an unnecessary imposition. Maori in Turanga showed that by cooperating they could reduce the court in many cases to a mere rubber stamp of decisions already made by themselves outside the court. Though in the end, and for other reasons, the Komiti did not succeed, this relative comity between hapu meant they could have succeeded if they had secured official support. The second point is

64. We note that section 46 of the Native Lands Act 1873 provided for the court to 'adopt and enter of record in its proceedings any arrangements voluntarily come into amongst themselves by the claimants and counterclaimants'.

an obvious one. Did Turanga Maori have any real choice here? Did they have the option to reject the court and opt for an alternative unsanctioned system for land administration? The answer is clearly no – at least not unless Turanga Maori could put aside all of their traditional enmities and, to a man, woman, and child, support the alternative without question. Even in Turanga, that was not going to happen. In the circumstances, it is extraordinary that the Turanganui a Kiwa komiti managed to achieve as much as it did.

Returning to the initial question, we find therefore that Maori nationally and in Turanga did not accept in the circumstances of the new economy, the need for an external adjudicator of customary entitlements in the form of the Native Land Court. They were extremely enthusiastic about the opportunities the colonial economy presented to them. They accepted that certainty of title was important for successful participation in the new economy. They accepted too that this would require new techniques for ascertainment of title. They needed, as we have said, officially sanctioned titles for the security they offered. But they overwhelmingly resented the land court to the extent that it was an attempt by the Crown to usurp their ability to decide these matters for themselves both within and between their communities. There were of course those who rejected the collective controls of the community and chose (as they were entitled) individual or family interest over the wider communities. But there is not the evidence to support the Crown's thesis that there was already a major social division developing within the Maori world, even before the court, between conservatives who preferred the old way and progressives who embraced the new. Maori met in large gatherings, they protested, they petitioned Parliament, they extracted promises from progressive politicians, they took matters into their own hands and established kaunihera, runanga and komiti to try and wrest back their traditional prerogatives. The Crown viewed all this with suspicion and sometimes hostility. Maori institutions were seen in the post war environment as potential threats to the authority of the Crown and the progress of settlement. That was why they were not supported. The court was imposed on an initially unsure and ultimately unwilling people in breach of their tino rangatiratanga guarantee in the Treaty of Waitangi. As the Tribunal in the Taranaki Report found:

The Treaty vested the authority of Maori lands in Maori, not in the Native Land Court, and that must have included the right of Maori to maintain their own way of reaching agreements. To the extent that it presumed to decide for Maori that which Maori should and could have decided for themselves, the Native Land Court encroached on Maori autonomy and was acting contrary to the Treaty of Waitangi. It follows that the legislation that permitted of that course was also inconsistent with Treaty principles.⁶⁵

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

8.3 THE INDIVIDUALISATION OF MAORI TITLE**8.3.1 Introduction and arguments**

In this section, we look to the new system of tenure introduced by the 1873 Act and administered by the Native Land Court. There are two questions to be addressed: was the new system of native land tenure designed to individualise community ownership? If so did Maori, in Turanga and nationally, actively seek this transformation?

The 1873 Act, as we have said, introduced the memorial of ownership – a technique whereby the Native Land Court allocated certain rights to individuals, either by hapu or whanau membership lists. The choice of whether the list should be at hapu or whanau level often depended on the scale and location of the block in question. The rights allocated did not however amount to a right to a separate allotment of land for each named individual. The court did no more than declare that each of the named owners had an interest in common with all the other named owners in a block of Maori customary land. The purchase of these undivided shares was the primary means by which both the Crown and private purchasers acquired Maori land in Turanga after 1873.

The claimants argued that the new regime of rights allocation was designed to strip them of their economic base by encouraging sale through forced assimilation. Did the 1873 Act individualise communal titles in allocating these rights? Did it merely represent an incremental shift in Maori land tenure consistent with developing Maori attitudes toward individualisation, or was it introduced against Maori opinion and designed to destroy traditional Maori tenure in order to get at the land? These are the fundamental issues which underlie the dispute between Crown and claimants in this area.

The Crown advanced three arguments in defence of Crown policy and practice during this period. The Crown relied firstly on the evidence of Dr Don Loveridge submitted in the Hauraki district inquiry but admitted by consent in our inquiry. Dr Loveridge argued that, while the Native Land Court individualised communal tribal titles, this was done for what politicians at the time considered progressive reasons. British policy with respect to Maori, in the period leading up to the Native Land Acts, rested on two basic premises he argued. First, the necessity for large-scale acquisition of Maori land for the purposes of settlement. Secondly, the unquestionable need to bring Maori people within the pale of civilisation. Dr Loveridge put the point in these terms:

While they [the British] believed in the superiority of their culture, religion and empire, they also believed that the indigenous peoples who occupied the lower steps in the scheme of things could (with varying degrees of difficulty) and should be raised to the top of the heap along side themselves. From the perspective of a relativistic age such as our own it was an arrogant point of view, to be sure, but not an inhumane one.⁶⁶

66. Document A74, p20

Thus, the coloniser did seek to break down tribalism and individualise Maori attitudes but that was, at the time, a progressive pro-Maori view, honestly held. It should not, argued Dr Loveridge, be judged by the mores of our time.

Paul Goldstone, a Crown historian whose evidence focused specifically on the Turanga experience of the Native Land Court, took a different view. He argued that Maori land titles were not traditionally tribal at all. In Turanga he said, land owning groups were small and rights were closely held.⁶⁷ In addition he suggested, the role of rangatira in controlling their communities had been considerably reduced as a result of the introduction of British law and settlers. Maori were, because of these two elements, acting more as individuals anyway. He argued therefore that the leap to individualised title made in 1873 was, in its context, a far smaller one to make than the claimants had suggested. He relied in large part on the writings of Dr Angela Ballara as a basis for his argument. Ballara wrote:

Some commentators suppose that iwi or tribes had continuous territories subdivided between their many hapu, that the territory of each hapu was continuous and contiguous to those of other hapu of the same iwi, and that the lands of the various hapu of any one iwi together made up the territory of the tribe . . . The land use of a minority of 18th century descent groups, particularly the ramified minor hapu of some relatively concentrated major hapu, resembled this model to a certain extent. But as the discussion of iwi and major hapu in earlier chapters should have shown, scattered independent colonies of descendants over a wide extent of country, interspersed with groups from other iwi and/or major hapu, were more common than otherwise.⁶⁸

This pattern according to Goldstone was dominant in Turanga as well. He said:

What is abundantly clear from the [Turanga Native Land Court] minutes is how people giving evidence saw their relationship with the land in a very localised way, with individuals claiming by different descent lines to particular pieces of land. Use rights were also very specific, to a particular area of fern root or where rats and birds were caught, ownership of a grove of [kahikatea] trees or a potato field, an eel weir, or garden of pumpkins . . . Lands rights were not expressed by belonging to the hapu, but were to specific lines of descent on specific use rights.⁶⁹

Thus, Goldstone argued, since Maori land tenure was not tribal at all but descent based, rights of use were personally held not shared at community level. For this reason, the introduction of individualisation was not the imposition that it is often argued to be in modern discourse. It can be seen that there was a certain dissonance between this line of argument and that adopted by Dr Loveridge.

67. Document F4, p 54

68. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisations, from c1749 to c1945* (Wellington: Victoria University Press, 1998), p194

69. Document F4, p 49

The third approach advanced by the Crown was to deny that individualisation occurred at all under the 1873 Act. Bob Hayes, an experienced historian and real property lawyer, posited that the 1873 Act in fact was designed to provide for communal ownership and management of Maori land.

The term ‘individualisation’ (of interests) does not aptly describe McLean or Parliament’s intention under the [1873] Memorial of Ownership regime. A prospective lessee or purchaser had to deal with the community of owners *as a community* in order to progress a transaction. As discussed below, individualisation, that is, the ability of an individual owner to deal with his or her interests as though held in severalty – to have a portion of land to the exclusion of the other co-owners – did [not] have full effect until 1882. [Emphasis added.]⁷⁰

It will be seen that the arguments advanced by the parties raised fundamental questions which must be answered before any useful resolution of the conflict between Crown and claimants can be arrived at. It is not possible to determine the effect, if any, of the 1873 Act on Maori society without first having a clear understanding of pre-existing Maori land tenure. Was it fundamentally communal? Did significant rights vest at ‘tribal’ level as the claimants argued? Nor can the impact of the legislation be assessed without forming a clear view of the policy underlying it. Did it in fact individualise Maori title in whole or in part? If so, did Maori support this to any significant extent as the Crown argued? We turn now to these two questions.

8.3.2 Maori land tenure

(1) *The Turanga landscape*

In chapter 2, we discussed, in general terms, the nature of land rights in traditional Turanga society. Hapu territories, we said, ranged over a number of different environments usefully described by Professor Murton as resource complexes. People moved between fertile flat lands, wooded hills, wet lands, lakes, inland waterways and the coast according to the seasons. Each area carried its traditional resources – the sea for kaimoana; rivers for tuna, kokopu, koura and manu; the bush for birds, rats, berries, fern and timber; the rich alluvial flats for cultivated kai – kumara, taro, and so on.

The evidence as we have said, suggested that rights in the alluvial flats were closely held and the allocation of rights between and within hapu tightly managed. In these areas, clear boundaries appear to have been in place even between whanau and within larger hapu, and multiple hapu communities. On the other hand, resources in the hills were less contested and appear to have been less closely held. In these areas, whole communities were more likely to hold

70. Document A75, p86. We have inserted the ‘not’ contained in square brackets because it appears to have been omitted from the evidence filed by Mr Hayes. There is no question that the proposition is intended to be stated in the negative as we have corrected it.

undifferentiated rights except for particular and exceptionally valuable resource centres – rat runs, berrying or birding locations, and the like. Thus, use rights were sometimes exercised exclusively by whanau or even individuals and could over time become almost infeasible – that is, unable to be overridden by others within the community in the ordinary course of events. After all, no collective economic system could operate without a basic degree of certainty as to who could access resources within the collective's control. To this extent, the tenurial scheme described by Goldstone appears consistent with the evidence.

Having said that, the oversight of such rights, no matter how firmly held, was unquestionably a matter for the wider kin group and its leadership. Whanau (and, occasionally, individual) rights were held on a substratum of community consent given in accordance with tikanga. Equally, community consent could be withheld, but again only in accordance with tikanga. It could not be arbitrarily or capriciously withheld. Thus, rangatira on behalf of the collective and in accordance with tikanga were entitled to be involved in the allocation and oversight of these rights. The transfer of rights outside the kin group was necessarily and importantly a matter for the collective and its leadership. This is because, as we have said, the well-being of the community depended on close control of which outsiders would be allowed access to the resource complex and its whakapapa lines. A market in use rights uncontrolled by the kin community is completely inconsistent with a tenurial system driven by descent.

(2) Polynesian comparisons

Interestingly, this picture of layered rights and interests sitting on a collective or community based foundation appears to be a system common at least to the people of eastern Polynesia of which New Zealand forms a part. Crocombe for example described a very similar pattern of rights distribution in traditional Cook Island Maori tenure:

It is inappropriate to say that anyone 'owned' land in Rarotonga, for this might suggest that individuals had absolute power to use and dispose of land as they wished. In fact, more than one person had an interest in every piece of land and the rights of every individual were conditioned, not only by rights of a similar order held by others in the same land, but also by a hierarchy of rights of different orders held at various levels within the society. No rights were recognised as belonging to the island as a whole, and no single individual has ever owned all the rights in any piece of land.

Land rights were held by social groups and the rights of each group were nominally vested in the title name of the head of that group, and it was by that name that the lands were known. All arable land on the island was associated with a particular tribe and a particular lineage, and that in current occupation at least was associated with a particular component *kiato* and/or household. There is no land which was not associated with a particular title and no title which was not associated with certain areas of land.⁷¹

71. R G Crocombe, *Land Tenure in the Cook Islands* (Melbourne: Oxford University Press, 1964), p38

The similarities here in structure and philosophy are, we think, quite striking.

(3) *New Zealand inquiries*

In New Zealand, inquiries into Maori land tenure undertaken by colonial authorities throughout the second half of the nineteenth century confirmed this Polynesian pattern, while greatly emphasising the importance of kin community ownership which was so foreign to nineteenth-century English law. In 1856, Governor Gore Browne commissioned an inquiry into the system utilised by the Colonial Government to purchase Maori land at the time. Central to that inquiry was the nature of Maori land tenure – how Maori titles were held and by whom. The Waitara land dispute, which sparked the Taranaki war, was still four years away and the administration was still clearly feeling its way forward in this area. The Board of Native Affairs, as it was generally known, heard evidence on these issues from 34 witnesses including nine Maori, six missionaries, the same number of Crown officials and 13 settlers. The board reported to the Governor in May or June of 1856 (the precise date is unclear). As Dr Loveridge affirmed in his evidence, this process probably constituted the most extensive public inquiry into Maori affairs up until that time. The board reported briefly but insightfully into the existence of individual claims in Maori land tenure. It said:

Each Native has a right in common with the whole tribe over the disposal of the land of the tribe, and has an individual right to such portions as he or his parents may have regularly used for cultivations, for dwellings, for gathering edible berries, for snaring birds and rats, or as pig runs.

This individual claim does not amount to a right of disposal to Europeans as a general rule, but instances have occurred in the “Ngatewatua” in the vicinity of Auckland where natives have sold land to Europeans under the waiver Crown’s rights of Pre-emption, and since that time the Government itself. In all of which cases, no after claims have been raised, by other members of the tribe, but, this being a matter of arrangement and mutual concession of the members of the tribe, called forth by the peculiar circumstances of the case, does not apply to other tribes not yet brought under its influence.

Generally there is no such thing as an individual claim, clear and independent, of the tribal right.

The Chiefs exercise an influence in the disposal of the land, but have only an individual claim like the rest of the people to particular portions.⁷²

The evidence heard by the board supported these conclusions. Te Hira Taiwhanga of Kaikohe, for example, said: ‘I am not aware of any individual claim among the native people.’⁷³ In similar terms, Riwai Te Ahu said: ‘I consider there is no individual claim. They

72. ‘Report of the Board of the State of Maori Affairs’, BPP, vol10, p511

73. No 27, Te Hira Taiwhanga, 26 April 1856, BPP, vol10, p560

are all entangled or matted together – the children of our common ancestor claiming the land bequeathed to the tribes. The Chief has a claim over the land.⁷⁴

Perhaps the most telling analysis was provided not by Maori witnesses but by Donald McLean. It will be recalled that McLean at the time was the Crown's chief land purchase officer and later, as Native Minister, he was to be the architect of the 1873 legislation. He said:

I do not think it practicable to give Crown Grants to natives by defining the boundaries of individual rights to land. It would be productive of quarrels and disputes as there is really no such thing as individual title that is not entangled with the greater interest of the tribe, and often with the claims of other tribes who may have migrated from the localities.⁷⁵

The impression given by both the board and witnesses reflects our perception of tenure in Turanga. A complex of individual and family rights tightly intertwined and subject always to the common right of the wider kin group variously called the hapu or the tribe. As Ballara pointed out, there were many instances where the rights of individual hapu were so interspersed with the rights of other hapu that some decisions to alienate became the decision of a complex of hapu acting as the single community.

Immediately prior to the enactment of the 1873 legislation, the Government undertook two inquiries into the operation of the native land system under the 1865 Act. We referred to them in the introduction to this chapter. The first was an inquiry by Colonel Haultain in 1871. The second was an inquiry, headed by Justice Richmond, and commenced in 1872. It was called the Hawke's Bay Native Land Alienation Commission. It was to investigate complaints by Hawke's Bay Maori into the operation of the land court there. The findings of these two inquiries in fact provided the impetus for the 1873 revision of the law. They assist us therefore in understanding the policies underlying the new Act. Both inquiries confirmed the orthodoxy that individual rights in land, in the sense that that term was used by English lawyers at the time, was simply un-Maori. Colonel Haultain made the point by accentuating the difference between tikanga Maori and 'civilisation'. He reported that it was the 'benevolent desire' of the settlers to 'break down those communistic customs which obstructed civilisation and prevented their [Maori] social improvement.'⁷⁶

In 1873, Justice Richmond reported as chair of the Hawke's Bay commission. He too confirmed the tribal nature of Maori titles by affirming the need to break them up:

No-one can doubt the expediency of legislation to promote the break up of tribal property. But, in effecting this, justice or at least good policy, requires two things: first that the native ownership be ascertained; secondly, that the general consent of the native owners to

74. No 16, 'Riwai Te Ahu, Native Deacon, 10 April 1856', BPP, vol 10, p 532

75. No 33, Mr McLean, Chief Commissioner, 17 April 1856, BPP, vol 10, p 578. McLean's reference to 'tribe' reflects the rather loose contemporary Pakeha understanding, where any communal rights were declared to be tribal.

76. Haultain, 'Colonel Haultain's Report on the Working of the Native Land Court Acts, AJHR, 1871, vol 1, A-2A, p 3

the extinction of native tenure be given. Simple as are these requirements, they have been disregarded in the existing law as presently administered.⁷⁷

And, later, in his report he confessed that it was true that ‘the procedure of the Court has snapped the faggot band, and has left the separate sticks to be broken one by one. But they should not impeach that procedure who have accepted under it the rights and advantages of independent proprietorship.’⁷⁸

In other words, even under the 1865 Act in which only 10 representative owners were allowed for each block, tribal titles were undermined and were clearly intended to have been so undermined. The message was that Maori individuals who had received the benefit of detribalised titles under the 10-owner system, should not complain about the injustices they suffered in the alienation of them.

In 1867, six years prior to the Hawke’s Bay commission, the Native Land Act had been amended. This was purportedly to abolish or at least modify the worst aspects of the 10-owner rule. It would be possible by this amendment, to supplement any award of title to 10 representative owners, with a hapu list. Those on the list would be treated as equitable owners in addition to the 10 chiefs with legal title whose names would be on the formal certificate of title. That the 1867 provision was used only rarely is demonstrated in both the fact and the findings of the two subsequent inquiries to which we referred. What is far more striking, is the view which Chief Judge Fenton of the Native Land Court took of that 1867 amendment. It was not, he said, consistent with the general thrust of settler policy in respect of native affairs.

It certainly does appear that the effect of the clause would be to make perpetual the communal holdings of the natives by getting them in their existing state registered in a Court of Record and made sustainable in the Supreme Court; but it is difficult to suppose that this would have been the effect intended, as it would be distinctly opposed to the declaration of the Legislature, and, in particular, to the essential object of the Acts . . .

It has been the practice of the Court hitherto, in cases where more than ten persons have appeared in the evidence to be interested in a piece of land, to order a subdivision or more subdivisions than one, if one subdivision did not sufficiently reduce the number of owners to the ten limited by the Act; and I believe this practice has been beneficial, and in furtherance of the great object of these laws, as declared in the preambles of the Acts of 1862 and 1865, in – namely the extinction of the native communal ownership, and the substitution of titles known to the law in lieu thereof.⁷⁹

77. Justice Richmond’s ‘Hawke’s Bay Native Lands Alienation Commission Act, 1872: Reports by Chairman of Commission, Mr Justice Richmond’, AJHR, 1873, G-7, p6

78. Ibid, p7

79. Opinion of chief judge on 17th clause of Act 1867, and letters 7 April 1868 Provincial Council Chambers

Chief Judge Fenton wrote again of the need to destroy tribalism, this time to Donald McLean in August 1871. In this case, it was in respect of complaints by Maori as to the operation of the court:

The objections to the present operation which are urged by such men as WiTako constitute, in my judgment, its greatest commendation. Shrewd men like him have not failed to observe that in the destruction of the communal system of holding land is involved the downfall of communal principles of the tribe, and the power of combination for objects of war or depredation.⁸⁰

The record through this period is replete with statements of this kind made by senior and, in the case of Fenton and McLean, well informed members of the colonial executive and judiciary. As Dr Loveridge is at pains to explain, these attitudes were seen as unexceptionable at the time. In the face of this, it is difficult to accept Mr Goldstone's thesis that the tribe – and we presume here he means hapu – had no interest in its own right in land. If titles were only held effectively at whanau level, as Mr Goldstone appears to argue, it is difficult to see why there would be a need to create an entire settler ideology around the destruction of tribal title. And even more difficult to understand why that ideology would be so fully supported by men such as McLean and Fenton. They at least had developed a good knowledge of Maori custom and law in their respective roles. If land was not in fact held tribally they would certainly have known it.

We have already referred to the 1891 parliamentary inquiry into Maori land administration undertaken by members of the House of Representatives William Rees and James Carroll. This inquiry picked up, among other themes, the issue of the form of individualisation provided by the 1873 Act. Witnesses were examined at length on the question. Some of the more insightful evidence in this respect came from two Turanga witnesses – Edward Harris and (by then) Lieutenant-Colonel Porter. It will be recalled that Harris was a surveyor of dual descent, and Porter was the Crown's land purchase officer. Harris's evidence in response to questions from the commission was as follows:

Q: According the custom of the natives, is it possible to individualise the land . . . can you according to native custom, say what each individual is entitled to?

A: Yes, the old cultivations.

Q: Would that not belong to the family?

A: The owner might be the only representative of the family.

80. Fenton to McLean, 1871, AJHR, 1871, A-2A, p10

8.3.2(3)

Q: Take any ordinary block of land, could you proceed according to native custom and state what every individual man, woman and child owned?

A: I think not, according to general lines. They would own in common; they would not own in equal shares.⁸¹

Lieutenant-Colonel Porter's view was equally clear:

Q: Was there anything such as individualisation among men, women and children in the old times?

A: No

Q: I suppose the division would be among the tribes and hapus?

A: Yes, the tribes, subtribes and families.

Q: The lowest entity would be a family?

A: Yes, and then the family's interest would not be always defined. They simply held that portion with the hapu; they had their defined boundaries generally within the subtribal boundaries; but the question as to the extent owned by the family or sub family was not defined.⁸²

The tenurial picture which emerges is once again, precisely as we described the Turanga landscape. That is not surprising given that the two witnesses were from Turanga. It is one of a hierarchy of vested rights down to whanau level in respect of particular resources. All lands, whether allocated to whanau or not, were held on a substrate of tribal (that is hapu) title vested in all members in common. Again, the evidence does not at all support the contention that whanau held rights in land which were separate from and independent of those of the hapu.

Having considered the evidence, the 1891 commission rejected individualisation as a legitimate policy objective in the administration of Maori land after nearly 20 years of experience in the operation of the 1873 regime. The criticism was pointed:

In 1873 the Legislature again interfered. It had become evident that as long as the heads of the hapus were permitted to deal in private with the lands of their people, and receive the purchase-money or rents without the knowledge of the co-owners and without restrictions upon their power of appropriation, frauds and malversation of such funds would be the rule. *In the Native Lands Act of 1873 the system of individual ownership was carried to its furthest limits.* From granting land to a tribe by name as intended by the Act of 1865, the whole people of the tribe individually became the owners – *not as a tribe but as individuals*. Every Maori

81. Edward Francis Harris, 6 March 1891, minutes of evidence, 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, sess 2, G-1, p 2

82. Lieutenant-Colonel Porter, 6 March 1891, Minutes of Evidence, Report of the Commission appointed to inquire into the subject of the Native Land Laws, AJHR, 1891, sess 2, G-1, pp12-13

man, woman and child was declared to be an owner of land. This carries a right of property in individuals far beyond any law hitherto made. [Emphasis added.]⁸³

The criticism was even stronger once in 1888, the Legislature required the court to define the individual interests of each owner.

In the Native Land Court Act of 1888 the climax of absurdity was reached by Parliament. The Legislature was in truth consistent, but it was consistent in a system that was as impotent for good as it was powerful for harm. The 21st section of that Act provided that the Court in every case where an original order of ownership or of partition was made, the respective individual interest of each native should be defined in such order. How was the Court to decide the individual interest of those who held no individual interest at all? By what principle of partition was it to be governed? In all the range of experience there was not a solitary precedent to follow nor a solitary rule to guide.⁸⁴

These comments leave no room for doubt. Individualism was seen by witnesses and commission alike as fundamentally un-Maori. While, as Goldstone rightly observed, particular rights or interests could vest by descent lines at whanau level, it was the role of the hapu in allocating and maintaining those rights in accordance with tikanga which represented the fundamental difference between English and Maori tenure. As the 1856 board of inquiry so rightly pointed out 35 years earlier:

While they [Maori] continue *as communities* to hold their land, they will always look to those communities for protection, rather than to the British laws and institutions, which, although brought so near, does [*sic*] not embrace them in regard to their lands. [Emphasis added.]⁸⁵

Individualisation was to carry with it both civilisation and the means for practical assertion of British sovereignty. The court was designed to be, and was in Turanga, the institution which nailed home British ascendancy following the wars. But the more astute observers such as McLean, knew that subdivision of Maori land into individual allotments could not be practically achieved because of the complexities of vested rights. As he said, a system based entirely on right by descent from within tribal descent lines created far too many stakeholders at too many levels to be unpicked into individual lots. Crocombe made precisely the same point a century later about the traditional Rarotongan system. Another way had to be found to flatten out the network of rights into a simpler and more easily digestible one to

83. Report of the Commission appointed to inquire into the subject of the Native Land Laws, AJHR, 1891, sess 2, G-1, pviii

84. Ibid, pxvii

85. Report of the Board of Inquiry into the State of Native Affairs, BPP, vol10, p512

enable alienation. The memorial of ownership under the Native Lands Act 1873, as we shall see, served that purpose.

(4) Conclusions – tribal title

It follows, as we have said, that we do not accept the argument that Maori land tenure, either nationally or in Turanga was, as Goldstone argued, a semi-individualised system without any elements of tribal title. To the extent that he relied on Native Land Court minutes to support that thesis, he relied on flawed evidence. Since the Native Land Court was designed openly to destroy tribal titles, one would not expect such an institution to emphasise in its record that which it is required to undermine. A system designed to flatten out the network of rights in Maori tenure would not be at all interested in hearing of the collective rights of tribal communities. That argument, the same argument as between Wiremu Kingi Te Rangitaake and Te Teira at Waitara which had caused the Taranaki war, had already been resolved in the legislation itself, in favour of owners acting individually.

Nor can Goldstone's thesis be substantiated from Dr Ballara's work, as he alleged. When she, in her seminal work *Iwi* rejected the notion of tribal title she rejected *iwi*, not *hapu*, title. For example:

One initial impact of the Court system had been to emphasise the hapu as the landowning unit. It was quickly (and correctly) established by judges that land ownership could not be adequately decided through ancestry alone; mere membership of a large, geographically dispersed descent group or tribe was not acceptable evidence of ownership. For example, descent from Rahiri, generally regarded as the founding ancestor of Nga Puhi usually deemed to be a tribe, would not give residents of Te Rawhiti in the Bay of Islands any claim to land at Rawene in the Hokianga, even if the people there also identified themselves as Nga Puhi. Unless the hypothetical Te Rawhiti residents would demonstrate that they, or one or other of their parents, or debatably, one of their grandparents, belonged to a hapu usually resident at Rawene and had occupied or exercised other acts of ownership there without opposition, they could have no land rights. Mere membership of a common tribe was not enough.⁸⁶

In any event, it is clear that those who appeared in the Native Land Court in Turanga and elsewhere, almost always identified their hapu to the court. This was done not as a matter of mere identity but as a source of rights. Indeed, the form of the memorial of ownership provided in the 1873 Act, requested both the hapu and the 'tribes' of the listed owners to be carefully recorded. The reason was that, as the court showed time and time again, hapu membership created memorial rights.

86. Ballara, pp270–271

(5) *Mana and alienability*

One corollary of this network of rights in traditional Maori tenure was that responsibility for management and maintenance of the hapu estate lay with leading rangatira – the embodiment of the hapu. The prerogatives of rangatira management were significant. The readiness of communities to accept chiefly representative title in the first few years of the Native Land Court, and even after the abolition of the 10-owner rule, clearly demonstrates this. Yet, it is fundamental to tikanga that rangatira prerogatives were not unfettered. They were clearly constrained by obligation. That also is demonstrated first by the way in which many chiefs acted as trustees for the people even though the law in 1865 relieved them of that obligation, and second by the way in which those chiefs who succumbed to the temptation presented by the new system, were brought to account by their people. Thus, tikanga was a two-way system. It provided for chiefly leadership in land management but imposed reciprocal obligations on the chiefs to act as kaitiaki of their people.

It will be recalled that Mr Goldstone argued that the authority of rangatira had been waning for sometime and that this had given greater impetus to the acceptance by Maori of individual rights in the 1870s. We frankly do not see any evidence to support this proposition. At least not up until 1865. It is true that the broad acceptance of Christianity in various forms had softened some of the harsher elements of tikanga. The use of taurekareka had mostly been discontinued and it was clear the chiefs no longer exercised the power of life or death over their kinspeople as they once had. But the existence of healthy debate within and between hapu had always been an aspect of tikanga Maori. The regularity with which hapu split to form new communities demonstrated that there was in traditional Maori life a very healthy level of debate sanctioned by tikanga and maintained within accepted parameters.⁸⁷ We see no reason to view post-contact debate between chiefs and their people any differently to its pre-contact equivalent. These tensions were a part of Maori life rather than a symptom of fundamental change, in our view. The scale of these communities needs to be continually borne in mind. Hapu usually numbered no more than a few hundred and leading kaumatua within a hapu would invariably be cousins, uncles or aunts of the rangatira. A community as intimate as that had little room, or capacity, for governance on any basis other than broad consensus. People who did not support a rangatira's position either forced through debate, a change in position, or left the community altogether. Certainly in Turanga, leading hapu rangatira were clearly enormously influential in their own communities. The generalship of the chiefs at Waerenga a Hika shows that.

The evidence is rather that the accepted parameters for debate did not change fundamentally until the years immediately following the Native Lands Act 1865. The change to which we refer was not that the hapu members suddenly wanted to act and own land individually. It

87. We note, for example, the way in which Keita Wyllie rigorously defended her right to take land to the Native Land Court to Henare Matua, the repudiationist leader.

was that some of the chiefs, whether by reason of debt, greed, or unfamiliarity with the new system (there was evidence of all three in the Hawke's Bay land alienation inquiry of Justice Richmond), started to act as individuals and not as kaitiaki on behalf of their people. The 10-owner rule cut the people out and let the chiefs act like individuals. Some chose and others were forced. In a sense, this breached the ancient social contract between rangatira and hapu – the obligation to use the mana of leadership for the good of the hapu on the one hand and the counter-obligation of the hapu to remain loyal to the rangatira and community. Kaitiakitanga from the one side and kotahitanga from the other. As a result of this breach, the people began to question whether the rangatira had their best interests at heart anymore, and whether the obligations of tikanga continued to bind rangatira in the management of community assets. The important point is that this shift was not an evolutionary one at all. It was created by the individualised rights in the 1865 Act. Were it not for that initial change in law, the social contract between rangatira and hapu to which we have referred could have remained intact. As Dr Loveridge argues, the maintenance of communal attitudes in Maori society was unthinkable to the colonial administration.

A second corollary of the rights network of Maori tenure relates to alienability. There was a high degree of interdependence between right holders and between levels of right in Maori land tenure. A change in ownership of any rights in the complex affected every other right-holder. As a result individual or whanau rights could not be alienated outside the group without the active consent of the group. Certainly community rejection of an attempted transfer would be fatal. Lieutenant-Colonel Porter of Turanga made the point in evidence before the native land laws inquiry of 1891:

Q: Before the Europeans came how would land pass?

A: Meetings of owners would be held; the chief men and spokesmen would get up and address the assemblage and express their views. Those who had the right to speak would do so, and the meeting generally went by the voice of the majority. A general opinion was taken and it was decided that certain things should be done or agreed to. In every hapu and tribe there are head men who are looked up too, who have more knowledge, even if they are not chiefs by birth.⁸⁸

This alienability limitation is absolutely crucial. The alienation of rights was a community decision, not an individual one. Limited rights could be transferred to spouses for their lifetime, and sometimes community acquiescence was sufficient evidence of consent, but that was always on good behaviour and could never completely displace the underlying descent rights. The more important the right for transfer, the more important the requirement of active community consent. Free trade in closely held use rights was, as we have said, simply

88. Lieutenant-Colonel Porter, 7 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p13

unthinkable in tikanga Maori. It would have quickly undermined the kin-base communities and the culture which underpinned them.

(6) *Summary*

The picture that builds up from 1856 to 1861 becomes, in our view, quite clear:

- ▶ Rights in land could be closely held, but underlying title was communal, held usually at hapu level.
- ▶ Management of the land was carried out by rangatira subject to important kin-based obligations in favour of the hapu. Those obligations were found in tikanga.
- ▶ Closely held rights could not be freely alienated without recourse to the collective.

8.3.3 The nature of Native Land Court titles

(1) *Issues and argument*

Having found that Maori titles were complex, multi-layered but ultimately vested in the kin community, the next question is whether the 1873 Act undermined those community titles. Was it true that, as Rees and Carroll said, the Act individualised that which was not divisible?

The Crown argued before us that a fundamental change in the nature and incidents of Maori title had to be introduced because of the equally fundamental economic changes that had been brought by colonisation. Mr Goldstone argued:

Overlapping interests in land based on traditional resource use (ie birds' snares, cultivations etc) and lines of descent were simply not appropriate for a new economic system based on the exploitation of entirely different resources (ie grazing sheep or milling timber) and dependent upon clearly discernible boundaries and defined ownership. By the 1870's Maori tribal tenure as it may have existed prior to 1840 was simply not the reality on the ground in Poverty Bay. It is significant that large blocks that passed through the Poverty Bay Commission in 1869 were already leased to pastoralists. Turanga Maori were using the Poverty Bay Commission to regularise what was already happening on the ground.⁸⁹

There is much force in this view. The 1873 Act, as we have said, transformed the entire notion of Maori land and its ownership in Turanga. As Goldstone correctly points out, engagement in the new economy would require precise boundaries and certainty of ownership.

Section 47 of the Act provided for both in the new memorial of ownership. The memorial named and described the land being investigated. A plan was annexed to it. The memorial would also contain 'the names of all the persons who have been found to be owners thereof . . . and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner'. A copy of the list,

⁸⁹. Document F4, p 29

certified by a judge was deemed, by section 51 to be conclusive proof of the ownership of the land by 'native custom'. By this simple means, the 10-owner rule was abolished. All owners of each block would now be listed.

(2) Customary land becomes alienable

Crucially, the legal status of the land would not change. It would remain technically customary land and therefore, formally at least, outside the pale of English law and commerce. But with one absolutely fundamental exception – the normal rule which made customary land inalienable except to the Crown was also abolished. For the first time, probably since King George III's royal proclamation of 1763, the law provided that customary land could be legally purchased directly by settlers.⁹⁰ Sections 48 and 49 did this in a curiously roundabout way. Section 48 declared that the owners under a memorial of ownership had no power to alienate the land except by lease for up to 21 years. But section 49 provided that the owners could sell none the less if they were unanimously in favour of that course or, if they subdivided the land between sellers and non-sellers so that the selling group was now unanimous on its new subdivided title. This process of community separation through subdivision was repeated thousands of times over the next 50 years and would become the primary process by which Maori land was bought and sold in the years that followed 1873. Initially, the subdivisational rules were that a majority of owners had to favour subdivision before one could be sought.⁹¹ By 1878, however, the Crown could apply to partition out the interests it had purchased and by 1882, all owners and any purchasers who had bought interests prior to the passage of the Act could do the same.⁹²

By the terms of section 80, the modified customary title provided by section 47 could be commuted to unfettered freehold title if the owners of the land numbered no more than 10. In theory, this would be achieved by a gradual process of subdivision among those listed in the memorial of ownership. At least, that was Donald McLean's intention.⁹³ Although we have no statistics on the point, we did not detect a rush of Maori owners toward securing unfettered freehold titles either in Gisborne or elsewhere as a result of the enactment of section 80. In fact, land that remained in Maori ownership after 1873 tended to stay as customary memorial

90. We note FitzRoy's proclamations of March and October 1844, which purported to waive the Crown's right of pre-emption. Grey halted such purchases in November 1846, and FitzRoy's proclamations were declared unlawful in *R v Symonds* the following year. *R v Symonds* (1847) NZPCC 387, 393, per Chapman J.

91. See section 65. We note that the majority of owners could either be a majority of sellers or a majority of non-sellers.

92. Section 4 of the Native Land Division Act 1882 provided that 'if any Native grantee be desirous that division shall be made of the land included in his grant, or any part thereof, he may apply to the Court to make such a division'. Section 23 of the Native Land Court Act 1886 provided that 'any Native owner of land held otherwise than in severalty, or any person who may claim to have purchased or acquired an undivided share therein, may apply to the Court to make a partition thereof, and thereon the Court may proceed to partition, as hereinafter provided'.

93. John Curnin, 14 May 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, pp170–171

of ownership land. This was partly because the process of surveying out and subdividing blocks with dozens or even hundreds of owners was too time consuming and expensive. But it was also because, as we shall see, a sort of officially supported black market in undivided interests developed which avoided the need to secure freehold titles.

(3) *Individualisation for the purpose of sale*

For all of that, the effect of the requirement to name all customary right holders in a block on a memorial did not individualise title in the true sense of that term. As we have said no individual owner could point to his or her own allotment. The Act in fact provided only a kind of virtual individual title. Section 47 recognised a form of right held by individuals but the right remained vested in common with all other owners. It was merely a share in a wider hapu estate. It could not be laid out on the ground unless the owners partitioned down to individual shares. Nor could these individual shares be traded, at least technically. Section 87, to which we made reference earlier, rendered void and unenforceable any purchases of individual shares prior to vesting by the court. Land held in a memorial of ownership could be effectively and completely transferable only in court according to the Supreme Court in *Poaka v Ward*.⁹⁴ This was, according to the court, in order to allow the Native Land Court judge to be 'judicially satisfied of the assent of all the collective owners'.⁹⁵

Mr Hayes, expert witness for the Crown, argued cogently that a system which allowed alienation only if the owners were unanimous was not a system of individualisation at all – it provided for a form of community title. That is, a community title in the sense that a purchaser was required to deal with the community of owners, as a community, in order to progress a transaction. Far from destroying tribal title, memorials of ownership confirmed it according to Mr Hayes.

At one level, Hayes clearly has a point. The court process did not result in the wholesale creation of individual allotments. The memorials were effectively community lists – usually, but (as Goldstone points out) not always at hapu level. And, according to the Supreme Court, all owners had to agree together, in court, before a sale took effect.

While section 49 did not fully individualise title, we cannot accept the argument that it in fact protected community title and decision making. The reality of land transactions, both with the Crown and with private purchasers, was not as the Supreme Court described it. Section 87 made pre-court individual dealing unenforceable, but did not *ban* it. Purchasers prepared to risk their capital could buy up individual interests, and avoid community decision making, if they were prepared to rely on the likelihood that sellers would not renege once the sale proposal came before a judge for affirmation. The Crown had the added advantage that it was not bound by the terms of section 87. That section applied only to private purchasers.

94. *Poaka and others v Ward and Smith* (1889–90) 8 NZLR (CA) (doc F33, vol10, pp3482–3495)

95. *Ibid*, p348 (p 3487)

While Mr Hayes' argument appears theoretically compelling, a careful reading of the schedule to the 1873 Act shows that it is flawed. Indeed the provisions of the Act and actual practice demonstrate that the Supreme Court in *Poaka v Ward* misunderstood the system in operation. We do not think that section 87 was ever intended to stop individual dealing. Nor was it intended to prevent pre-court transactions as Justice Richmond suggested. The terms of section 59 of the Act make that clear:

In any case any sole owner, or *any number of collective owners*, shall be desirous of selling the land they hold under Memorial of Ownership, . . . the Court shall make inquiry into the particulars of the transaction and on being satisfied of the justice and fairness thereof, of the assent of all the owners to such sale, . . . and of the payment of the whole amount of the purchase money stipulated upon, without any deduction whatever *except for advances of money made to the native owners by way of earnest money to bind the agreement for such sale*, the Court shall make an indorsement upon the Memorial of Ownership, which shall be presented to the Court for the purpose, to the effect that the transaction appears to be *bona fide*, and that no difficulty exists in respect of the alienation of the land comprised in such Memorial. [Emphasis added.]

Section 59 gave the court the role (among other things) of safeguarding Maori against unfair or unjust transactions and ensuring that payment was made before the transfer was confirmed. This section made it obvious that section 87 was not designed to discourage individual pre-court trading at all. Section 59 proceeded on the basis that an agreement or agreements had already been reached between the owners and the purchaser. In fact, the section presumed that the purchase money had already been paid before the matter came before a judge for vetting. The court's role was merely as a final check on deals that had already been done. We note that the Crown conceded as much in its closing submissions.

The Crown accepts that the term 'absolutely void' [in section 87] at least in its practical and commercial application, probably does not equate with nullity in the modern public law sense. It is fair to say that there was probably some undeniable commercial reality about pre-partition transactions (ie prior to the particular interest/s crystallising into a piece of land on the ground as vetted by the Native Land Court).⁹⁶

It appears that in order to ensure that the court's supervisory function was taken seriously, the Legislature used the technique of declaring these pre-court agreements unenforceable until vetted by the court. This appears to have been simply a way of preventing title passing to the purchaser before the check had been completed. What is more, while 'earnest money' payments – that is, payments to individuals to lock the sale in – were void under section 87, the amount could under section 59 be legally deducted from any purchase price paid. If the

⁹⁶. Document H14(12), p14

Legislature had really intended to discourage agreements entered into outside the court, earnest payments would not have been deductible at all.

There is no question therefore but that the intention and effect of the memorial of ownership was to create individually tradable interests in land where none had existed in Maori custom. There is no provision in the Act that required, as Hayes argued, that purchasers deal with the community of owners *as a community* in securing agreement for sale. What is more, section 59 contemplated ‘any number of collective owners’, wanting to partition for sale. The community was not required to make a single community decision as a prerequisite to sale. The section contemplated agreements with any number of collective owners – including individual ones. The Legislature clearly expected private purchasers to pay sellers before court and clearly expected the court to enforce those transactions provided they were found to be otherwise fair and just. The sellers could be groups or individuals. The Act accommodated all modes. The facts in *Poaka v Ward* to which we have referred, demonstrate this. In that case, Ward and his partner Smith, were seeking court ratification for the acquisition of 18 of the 30 shares in the Puketarata block. The transfer of those 18 shares was recorded in three separate memoranda of transfer: the first dated 24 March 1882, and the second and third dated 25 November and 2 December 1886 respectively. It is clear, therefore, that the purchase of the 18 shares involved at least three different transactions. It is possible that there was in fact more negotiation and more actual transactions than the three memoranda. It is possible that shareholders were approached and their signatures secured individually, or in smaller groups. In short, one piece of paper does not necessarily represent one negotiation.⁹⁷ It is clear that only just over half of the land owning community wished to sell. The other 12 owners did not participate. More importantly of all, the record shows no point at which the community came together *as a community* to decide whether the block should be sold.

Thus, any formal power of chiefs, by tikanga, to prevent individuals from selling was overridden in effect by the philosophy of the 1873 Act and the specific terms of section 59. Nor did the community by consensus have any veto against the sale of individual interests. By the terms of section 65, if a majority agreed to allow the sellers to partition out their interests for the purpose of sale, the court could do so. Within seven years, this majority requirement was dropped. Any individual could partition out his or her interests.⁹⁸

There can be no argument about this. The 1873 Act individualised the sale of Maori land. In fact, it individualised Maori title *only* for the purpose of alienation. For every other purpose, it was merely customary land outside English law and commerce. Again, the Court of Appeal in *Poaka v Ward* made the point that:

By the memorial of ownership under the Act of 1873 the Natives mentioned in it were adjudged owners of the land described according to Native custom. They had therefore

97. *Poaka and others v Ward and Smith* (1889–90) 8 NZLR 338 (CA)

98. Native Land Division Act 1882, s 4

8.3.3(4)

no estate known to the law, and, if their interest was by statute made dependable, it was desirable, if not absolutely necessary, to prescribe in what manner a disposition could be effected.⁹⁹

The objectionable effect of the Act was therefore that Maori could participate in the new British prosperity only by selling or leasing their land. The colonial economy would recognise no other form of engagement.

It is true of course that the Act abolished the oppressive 10-owner rule which so damaged the relationship between chiefs and their communities. But the new law did not seek to repair the damage brought by the 1865 Act. In fact, it severed the relationship between chiefs and their hapu entirely. It is true also that in its terms those individuals who steadfastly refused to sell could not be forced by law to do so. But what it did do was take the community out of the equation altogether. Individuals could sell community assets without the community even knowing that they had been sold. There was no requirement for community meetings let alone community consensus.

(4) *Did Maori want individualisation?*

Having described the process of individualisation, we now consider the ultimate question: did Turanga Maori want their land to be individualised? Did they see individualisation as a new tool to help them enter the new economy?

The Crown argued that Turanga Maori flocked to the courtroom in great numbers. That demonstrated, it was said, that the new title was not only acceptable but welcome.¹⁰⁰ There is no question but that Turanga Maori wanted a state sanctioned and certain title so they could engage in commerce. That is not the same, however, as saying they wanted an individual title. It is certainly true that Maori did take their land to the land court, and we will deal with this in detail in the next question. However, the Crown has, we believe, conflated two arguments. The question of whether Maori wanted a new secure and certain title, and the question of what form it should take are related but not the same. Demand for the former should not be read automatically as demand for individualisation.

On the second question, there were some Maori who sought individualised titles. Those who had seen Hawke's Bay chiefs selling land after the introduction of the Native Lands Act 1865 and the 10-owner rule, may well have had their confidence in old ways severely dented. And those trying to grow wheat or potatoes may have found the idea of being able to farm, fence, and improve a particular piece of land overwhelmingly attractive. And for those who were in debt to settlers such as Read, the possibility of offsetting those debts with some judicious selling must have seemed like a windfall.

99. *Poaka and others v Ward and Smith* (1889–90) 8 NZLR 338, 360 (CA)

100. Document H14(12), p10

None of these things could be said to demonstrate that Maori in the 1870s overwhelmingly desired individualised title. The evidence is entirely to the contrary. From the 1850s until the turn of the century, the komiti and runanga indicated that the weight of Maori opinion was strongly in favour of the communal forms of decision-making. There was not an internal division between conservatives and modernists as the Crown argued. There were some who embraced individualisation but they were unquestionably in the minority. That much was obvious to Cecil De Lautour, a barrister and solicitor from Turanga. In his evidence given to the Native Land Laws Commission in 1891, he said: 'Nor am I aware, from my reading that I have been able to bring on the matter, that the individualisation of Native title was at all sought for by the Natives themselves. As far as I can judge, it has been forced on them with a view to purchasing from them.'¹⁰¹

The real Maori hopes could be found in the Native Councils Bill of 1872 which Maori had long agitated for, and in the operation of the komiti and runanga in the face of Crown policy at the time. These are examples of Maori seeking to make their way in the new circumstances of the colony by adapting traditional collectivism to new vehicles.

The best evidence that Turanga Maori did not become reconciled to the new form of individualism under the 1873 Act can be found in the actions of the leaders. Turanga chiefs continually sought ways to turn the system towards a communal form of decision-making. At a hui held at Oweta on 17 May 1877, a new form of runanga was established. The komiti comprised representatives from Rongowhakaata, Te Aitanga a Mahaki, and Ngai Tahupo and immediately published its intention of 'instituting an investigation into the alienation of land in this district'.¹⁰² The komiti regarded itself as running in parallel to both the resident magistrate and the land court, rather than competing with it. But the resident magistrate did not agree and wrote that he had pointed out to them that they 'had no jurisdiction from a legal point of view'.¹⁰³ Chiefs such as Wi Pere continued to push for a corporate form of title, experimenting with trusts and block committees, which we deal with in detail later. Petitions were lodged, letters sent and meetings held over a 30-year period – most complaining in some way of the inability of their communities to organise collectively under the legal regime in place. This level of activity, which continued well into the twentieth century, does not, it appears to us, signify a wholesale acceptance of individual tenure. On the contrary, it demonstrates a deep commitment to community title.

(5) *Summary*

We find therefore that the 1873 Act did not make provision for community ownership and management of Maori land. Instead, the Act:

101. Evidence of Cecil De Lautour, 6 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p7

102. *Poverty Bay Herald*, 29 June 1877 (doc A24, pp 41–42)

103. Gudgeon to Native under-secretary, 21 May 1879, AD103/9, pp 617–618 (doc A24, p 44)

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

This selective individualisation breached the express guarantee in article 2 of the Treaty's Maori text; the guarantee of *tino rangatiratanga*. Autonomy, authority and control are all commonly understood meanings of this well used phrase. *Tino rangatiratanga* was promised in respect to 'whenua' (land), 'kainga' (villages), and 'taonga katoa' (all things treasured). Crucially, the promise was made explicitly to all levels of right holders in Maori society: 'ki nga rangatira, ki nga hapu, ki nga tangata katoa' ('to the chiefs, hapu, and all the people'). By excluding hapu from sale or lease decisions, the Act removed a separate right holder to which an explicit Treaty promise had been made. By failing to provide legal support to chiefly leadership in questions of land alienation, the Act similarly breached a Treaty promise explicitly made to hapu leaders. In this way, the Act confiscated rights formerly vested in *tikanga* Maori. It effectively removed from these two levels, the right to participate in the most important decisions the community collectively and its members individually would ever make.

We say that individualisation under the 1873 Act was selective because it applied only to sale or lease. For all other purposes, Maori customary title remained completely alien to the new colonial order. This, in our view, greatly exacerbated the breach. It meant that the law facilitated Maori involvement in the colonial economy only through the alienation of individual shares but not by any other method. Titles could be commuted and fully individualised to freehold titles, but that had proven impracticable in most cases. In short, the legal regime made it easier to sell land than to retain and utilise it. It is difficult to see how a system so heavily weighted against retention in this way could be consistent with the equal rights guarantee in article 3 of the Treaty.

8.4 WAS THE NATIVE LAND COURT SYSTEM SIMPLE AND EFFICIENT WHILE PROVIDING ADEQUATE SAFEGUARDS FOR MAORI IN LAND DEALINGS?

8.4.1 Introduction: the issues

In this section, we move from our earlier assessment of the structure of the new Native Land Court system and the philosophy underlying it, to the nuts and bolts of that system. That is, we accept for present purposes, the existence of the Native Land Court and the individualisation of titles, albeit in the face of Maori opposition, and assess how the system actually worked. Did it assist Maori owners to extract reasonable value from their land asset, by giving them a useable title arrived at through a simple and efficient process? In addressing that question, we consider the cumulative effect of the many legislative changes on the process of both

securing and utilising titles. We also evaluate the mechanisms provided to protect Maori owners from transactions that were either inherently flawed, or would result in landlessness.¹⁰⁴

The answers to these questions will assist us to determine whether Maori had access to a simple, efficient, and fair land title system consistent with the title guarantee in article 2 of the Treaty, the equality guarantee in article 3 and the Crown's overall obligation of active protection of the Maori interest.

We turn first, however, to summarise the arguments advanced by the parties.

8.4.2 Crown and claimant cases

(1) *Complexity of the system*

Claimant counsel argued that the legislation was complex and unworkable, leading in the end to the establishment of the Validation Court – a jurisdiction to clean up the mess created by the constantly changing native lands legislation.¹⁰⁵ Furthermore, counsel argued that, as the new system was imposed on Maori, the Crown should have ensured that the system was simple and just, and failed to do so.

The Crown argued that the Native Land Court system was simple and efficient. It was, the Crown argued, a simple conveyancing code or framework, to govern dealings in Maori land.¹⁰⁶ Maori, it was argued, took to the land court with alacrity, both in Turanga and throughout the colony. In Turanga, for example, the evidence showed that Maori processed over 440,500 acres through the land court in two three-year bursts. This could not have been done without active Maori participation. It also demonstrated that the system was reasonably efficient. Having said that, the Crown accepted that the Native Lands Act 1873 introduced an experimental system, which would necessarily require adjustment as problems were identified. Counsel argued that those problems were dealt with in an increasingly sophisticated manner as the Crown gathered experience over time.¹⁰⁷

(2) *Adequacy of safeguards*

With regard to the question of protections, claimant counsel argued that the legislative provisions simply did not work. The Trust Commissioner system did not provide adequate protection and the commissioners did not prevent improper purchases. Their investigations were perfunctory and focused only on the most blatant of frauds, otherwise giving the purchaser 'the benefit of the doubt', such that they became a "rubberstamping" mechanism'.¹⁰⁸ Counsel also argued that the Crown failed to ensure that Turanga Maori retained an adequate land

104. By which under the 1873 Act meant fewer than 50 acres per head of Maori population.

105. Transcript 4.15, p 40

106. Document H14(12), p 6

107. Ibid, p 4

108. Document H2, pp108–111

base.¹⁰⁹ Reserves were not maintained because their inalienable status was not protected, and the Crown took no account of community needs or original reservations when it purchased land later. Together, these factors negated the supposed protections in the Native Lands Act 1873 and its successors.

The Crown's response was that it did in fact provide adequate protection mechanisms, but that it had to weigh up the Maori right to deal as they saw fit, against the need to be protected during the process of dealings. As such it sought to 'protect Maori in their dealings in land', rather than restrict them.¹¹⁰ Trust commissioners were appointed both to prevent improper purchases and to ensure that Maori had 'sufficient land left for their occupation and support'.¹¹¹ The Crown concluded:

Given the prevailing philosophy that Maori should have choice in the management of their lands, including the right to choose to participate in economic activity not dependent on land ownership, the 50 acres per head figure is not necessarily unreasonable – albeit a crude number. As Mr Hayes indicated in cross-examination, it cannot be assumed that all Maori wished to be farmers.¹¹²

Secondly, counsel submitted that the Crown reviewed the legislation on a regular basis and argued that the Native Lands Frauds Protection Act 1881 was a 'more sophisticated' regime than its predecessor. Thirdly, counsel agreed that while the Crown had some obligation to ensure that Maori did not become landless, again this had to be balanced against the right to trade in their lands if they wished. Furthermore, the land Acts' requirement that 50 acres per individual to be set aside, indicates some concern to protect Maori. The Crown did concede that 'viewed from today's perspective, the Crown can be criticised for failing adequately to recognise the significance of land to a communal people'.¹¹³

We turn now to analyse these arguments.

8.4.3 The court in action

(1) *The size of the court's operation*

The first matter to be considered is the degree to which the Native Land Court provided Maori applicants with a cheap, simple system of clothing their land with a legal and usable title. We will deal with issues of expense in section 8.5.7. Here, we note that there is much to be said for the Crown's argument that the amount of land put through the land court in Turanga demonstrated the system's efficiency. It will be remembered that 210,500 acres had passed

109. Document H2, p107

110. Document H14(17), p13

111. Ibid, p13

112. Ibid, p20

113. Ibid, p20

through the court in Turanga within four years of the 1873 Act.¹¹⁴ Another 230,100 acres was processed by the court in the three years from 1880 to 1883. The Crown reminded us that by modern standards the court in Turanga was a tiny operation responsible for a large district (East Cape to Urewera to Hawke's Bay). The staff comprised no more than a judge and a part time assessor, an interpreter, a clerk, the Crown agent and district officer Samuel Locke, and a contract surveyor. To have processed this acreage in Turanga, in addition to the other lands processed within the court's district, demonstrates that the court was reasonably efficient. It also demonstrates, as we have said, that Turanga Maori cooperated fully with the court in the title transformation process and in the main resolved their disputes outside the courtroom.

There is evidence, however, that all was not plain sailing. A system that operated at this pace with this staffing level was likely to make mistakes. In order to be truly efficient, the court had to be properly resourced. It also had to be armed with safeguards both to prevent mistakes from happening and to correct them if they were made. How did the system fare in these respects? There are three possible areas of concern: whether the judge could look beyond the evidence given in court, whether hearings were adequately notified, and whether mistakes in the award of title could be corrected. We address these issues now.

(2) *The court as an investigator of title*

As we noted in the introduction to this chapter, both Maori and Pakeha complained that, in general, neither the judge nor the Maori assessors (being from outside the district) were knowledgeable in local tikanga.¹¹⁵ This had led elsewhere, to unsafe awards. As we will see in the Mangatu title investigation chapter, there were examples of the same phenomenon in Turanga.¹¹⁶ As we indicated in the introduction, the Legislature acknowledged the problem and made provision for the appointment of district officers in the 1873 Act. Their task would be to prepare two things: a map recording hapu and iwi boundaries, and a sort of *Domesday Book* recording individual family land interests and whakapapa within the district. The district officer would be required to appear in court on every application for investigation of title, in order to assist the court. The district officer, it was hoped, would provide a kind of objective reality check to help the court avoid errors.

As we have said, in general, the system failed for lack of funding. In most areas, district officers were not even appointed. In Turanga, Locke was appointed in 1874. The evidence indicates that he discharged his functions as diligently as he could in the circumstances. His position was part-time only and he was responsible for the area between East Cape to Hawke's Bay and inland to Taupo. He resigned in 1877. He complained that his district was too

114. Document F4, p 5

115. See, for example, Mr Theoph Heale to the Chief Judge, Native Land Court, Enclosure 5 in No 2, Papers Relative to the Working of the Native Land Court Acts, AJHR, 1871, vol 1, A-2A, pp18-19; Paora Tuhaere to Hon the Native Minister, 5 April 1871, Appendix to Colonel Haultain's Report on the Working of the Native Land Court Acts, AJHR, 1871, vol 1, A-2A, p 27

116. See chapter 11 for a discussion of this.

8.4.3(3)

large, the time required for the job too great, and that he never saw his family.¹¹⁷ He was not replaced.

We acknowledge Locke's three years' work and his diligence, but beyond that, the system was abandoned. The lack of an independent officer with local knowledge meant that ownership lists prepared by agreement between claimants could not be verified. Nor could evidence of customary right or whakapapa be checked by someone with knowledge where there was no party contesting the evidence of an applicant. Thus, it was inevitable that mistakes would be made, unless the system of notification was robust. As we shall see, even the judges acknowledged that it was far from perfect.

(3) Rehearings

Turanga Maori mostly entered the courtroom with lists of owners that they had prepared themselves. As we have said, the Native Land Court system relied on Maori to be cooperative with court officials. There were too few officials for the system to work otherwise. However, section 58 of the Native Lands Act 1873 provided a check. If Maori were dissatisfied with the hearing result, they could apply for a rehearing.

The Crown argued that the rehearing process ensured that the system was fair, and it is apparent that, in many instances, this was the case. The number of applications for rehearing was low, which indicates a background level of agreement with the court's decisions. The rehearings that did take place were often successful from the applicant's perspective, particularly those led by chiefs, and applicants who had been excluded were often added to the memorial of ownership. In general, rehearings took place about a year after the original decision – claimants had six months in which to apply – though this was reduced to three months in the Native Land Act Amendment Act 1878 (No 2) (see s10). Put together, these factors suggest initial success on the part of the court in determining title quickly and relatively accurately.

There are three issues, however, that need to be addressed. First, Maori did not have access, as of right, to a rehearing. They had to apply. Of course, if successful in their application, claimants would face a second round of court costs, a fact which may have contributed to the low rehearing rate. Secondly, applications could be refused, and in some cases were so repeatedly. The reasons, when given, indicate some inconsistencies in the court system. Hoani Matiaha, for example, was not named as an owner in the Tauwharetoi, Whareongaonga, and Hangaroa Matawai blocks. This despite the fact that, in his letter to Chief Judge Fenton, he stated that he was named as an owner when the land was ceded to the Government in 1868.¹¹⁸

Hoani Matiaha claimed he was cultivating potatoes in the bush at the time of the hearings, and had not been notified. On returning to Turanga, he immediately applied to Judge Rogan

117. Document A17, p140

118. Hoani Matiaha, Turanganui, to Chief Judge Fenton, 12 July 1877, Tuwharetoa block order file 1042 (doc A24, p146)

for a rehearing. It was refused. Chief Judge Fenton, commenting on Rogan's decision to refuse the application, wrote:

No doubt if rehearings were granted on such grounds, no case will ever be finally determined. It may be true that Hoani did not know of the court in time. It is impossible to prove the contrary: and what ever I do, I can never be certain that all claimants are warned, for no one knows who they are, or where they spring from; so it is a necessity that such grounds of rehearing should be rarely admitted.¹¹⁹

Fenton acknowledged that it was impossible to notify all owners of hearings. Given communication in the nineteenth century, and the terrain around Turanga, this is not surprising. However, the judges also encouraged out of court settlement of ownership lists. While this was understandable and even laudable, pre-agreed lists were not without risk. There was always the possibility that an owner might be excluded either if he or she were absent, or because of inter-family or inter-hapu politics.

The problems of communication and the fact that lists were being drawn up out of court meant that the Crown had to ensure that there was a proper and accessible system of checks. On this count, the court system was not always up to standard, as Fenton's comment makes clear. In fact, the court used the fact that Maori had created the ownership lists to validate their refusal to grant rehearings. The Paritu and Takararoa blocks, for example, went before the Native Land Court in 1879. Paritu was awarded to eight hapu, with 102 owners. Takararoa was awarded to three hapu, with 64 owners. When the ownership lists were announced, some believed that they had been left off the original list of owners, and applied for a rehearing. Their application was turned down for two reasons. First the court said the lists had been prepared with care, and secondly, no obvious discontent was expressed at the hearing. Claimant historian Keith Pickens argued that the decision shows not only that the court encouraged Maori to organise their lists but that it was not prepared to go behind the decision made by the Maori community as to who should be identified as owners. The fact that the Maori community produced the list gave it credence.¹²⁰ Individuals, particularly those without chiefly status, who had not been notified or were simply left off the list therefore had no guaranteed avenue for redress.

In the case of Hoani Matiaha, the court produced an ad hoc solution to an obvious failure of the rehearing safeguard. Fenton did eventually concede that, if the claim were proved correct, Hoani would receive part of the purchase price, even though the application for a rehearing was still refused (the Crown began negotiating for the block once the list was released). This happened in 1879. As a seller, he was reimbursed although as an owner he could not get a rehearing.

Thus, while it was reasonable for the court to rely on lists provided by Maori themselves in

119. Fenton to Native Minister, 2 October 1878, Maa-MLP1, 1902/12 (doc A24, p146)

120. Document A19, p92

awarding of title, the dangers of mistake or abuse meant that there had to be a guaranteed right of appeal or rehearing for all who claimed to have been left off by their relatives. The provisions in the Act for rehearing contained no such guarantee. Indeed, it was not until 1894 (30 years after the court was created) that a full right of appeal was introduced.¹²¹

8.4.4 Complexity and inconsistency in the law

It is apparent from our discussion above that the system was relatively quick and efficient, as it operated in Turanga, during the initial phase of obtaining a title. Mistakes were possible, as we noted, and the process of rehearing was an uncertain remedy. Even so, the low number of rehearings meant that Turanga Maori obtained greater finality in their titles earlier than Maori in some other districts. This obviously gave them greater security. Their lands were not tied up for decades in appeals, rehearings, select committee inquiries, and (generally) further rounds of rehearings, before finally getting a secure title. The engagement between Turanga titleholders and the court, however, did not end with the initial award. The subsequent use to which those titles could be put, and the role of the court in administering them, was just as significant. We deal with the economic and commercial utility of the titles below. Here, we focus on the administration of titles under the constant, rapid amendments of the native land laws in the last quarter of the nineteenth century.

In the 11 appendices to his book *Te Kooti Tango Whenua*, Dr David Williams sets out the primary changes in policy underlying native land legislation from 1865 to the 1909 consolidated Native Land Act. The changes cover everything from the definition of Maori land to the rights of the Crown. The number and frequency of changes is astonishing. Native land legislation in the late nineteenth century appears to have been amended as often as the modern Income Tax Act. The legal complexity created from such piecemeal change was of the same order, if the level of litigation arising out of the native land regime is anything to go by. In this section we will analyse these matters.

A good starting point in isolating problems in the system is the 1891 Native Land Laws Commission to which we have already made extensive reference. The commission's hearings were well attended by Maori, settlers, officials and practitioners such as lawyers and surveyors. The evidence therefore included lay and technical insights into the way in which the native land regime had operated since 1873. The evidence was uniformly critical. Lieutenant-Colonel Porter, who had worked with the Native Land Court in Gisborne since it first began hearings, said that 'every new Act creates an immense amount of confusion, that none but experienced men can arrive at an understanding'. Furthermore, he said, 'There is no uniformity of practice in the Native Land Court'.¹²² Samuel Fitzherbert, a barrister and solicitor said:

121. Native Land Court Act 1894, ss 79–95

122. Evidence of Lieut Colonel Porter, 6 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p12

‘I think it is obvious to any person who has much to do with the matter that there has been a multiplicity of conflicting legislative enactments, which has rendered the whole subject exceedingly cumbersome and beset with difficulty.’¹²³

Maori also spoke of the confusion they faced every time they dealt with the court system. Hamiora Mangakahia, of Hauraki, said:

The difficulties will rapidly increase, instead of being diminished, if these laws are not repealed, because there is a continual changing of these laws, and a constant taking of clauses from one Act and then putting them in another, and then afterwards repealing them, and then, with all of this, there are amendments going on, the effect being to so complicate matters that the greatest confusion prevails.¹²⁴

Porter again:

I think the laws are thoroughly incomprehensible. It was understood when a new Native-land law or Bill was brought into force it was intended to repeal those that were incomprehensible, but it appears that every new Act creates an immense amount of confusion that none but the most experienced men can arrive at an understanding.¹²⁵

In its final report, the commission expressed its agreement with these comments. Much of the blame, the commissioners suggested, could be attached to piecemeal legislative changes in response to particular problems of individual settlers, without reference to any underlying rationale or philosophy:

Many of the intricacies and contradictions of the Native Land legislation arise from the occasions which have called that legislation into existence. Persons wishing to deal with Natives have found certain legal restrictions existing which effectively barred their progress. Determined to acquire a title, they have proceeded, trusting to the power of political parties in Parliament to alter the law so as to validate their illegal bargains . . . Thus a network of incongruous legislation has been evoked piecemeal, out of which it is impossible to produce a certain law.¹²⁶

We have already noted Lieutenant-Colonel Porter’s conclusion as to the complexity of the legislation. Cecil de Lautour, a barrister and solicitor in Turanga, agreed. He thought that governments had introduced hastily drafted legislation to enact constant policy changes, resulting in laws ‘that neither lawyers nor laymen understand’. Bona fide purchasers could

123. Evidence of Samuel Thomas Fitzherbert, 27 April 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p106

124. Hamiora Mangakahia, 16 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p35

125. Evidence of Lieut. Colonel Porter, 6 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p12

126. W L Rees and J Carroll, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, pp xii-xiii

then be defeated by technicalities, while others 'bought openly in defiance of declared Acts or restrictions and Proclamations'.¹²⁷ The outcome, in the view of Gisborne solicitor FW Skeet, was: 'Under the present system neither the European nor the Native gets justice. The Native does not get the value of the land, and the European is perplexed and surrounded with difficulties.'¹²⁸

It is necessary to turn now to the particular areas that created problems for Turanga Maori. Much of the evidence for these problems comes from a stream of Supreme Court litigation over disputes between Maori and settlers regarding purported transfers of land. Disputes of this nature arose throughout the colony, but we were struck by the disproportionate number of cases that came from Turanga, particularly given its size and relative isolation. According to Professor Murton, Turanga sustained a considerable legal community. There were four solicitors for a population of 554, compared to 10 for a population of 10,924 for Christchurch. By 1886, there were 16 lawyers and 18 surveyors resident in Turanga.¹²⁹

As far as we can ascertain, most problems arose in the following categories:

- ▶ Confusion within and between the procedural and technical safeguards enforced by the Native Land Court and trust commissioners in land transactions.
- ▶ The constant change in subdivisional rules, which bedevilled dealings with the land. and
- ▶ The confusion about, and ineffectiveness of, restrictions on alienation.
- ▶ Related conflicts between the native title system operated by the land court and the land transfer system operated by district land registrars.

We address each of these categories below.

8.4.5 Procedural and technical safeguards in land transactions

(1) *The Native Land Court*

Native land legislation contained a raft of procedural safeguards for the benefit of Maori owners. They were designed primarily to prevent the completion of transactions which involved fraud, or took unfair advantage in select ways, of the Maori owners. Examples of the latter included: payment in alcohol or arms, failure to pay all or part of the consideration, or sale at less than a fair price. To a more limited extent, protections also existed to prevent Maori from becoming landless through sales. Some of these protections were provided for in the 1873 Act and applied by the Native Land Court. For example, the court was required to be satisfied of 'the justice and fairness' of the transaction, the assent of all the owners, and the payment of the stipulated price together with any charges in relation to partition (s59). The court was also required to explain to the owners, and satisfy itself as to their understanding, that: 'the

127. Evidence of Cecil de Lautour, 6 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p 6

128. Evidence of FW Skeet, 6 March 1891, Minutes of Evidence, Report of the Commission into Native Land Laws, AJHR, 1891, sess 2, G-1, p 5

129. Document A26, p111

effect of such sale will be absolutely to transfer their own rights in the land to the proposed purchaser without any further claim on their part, either on the land or their proceeds' (s60).

There were further formal requirements in the Act. We have already mentioned the requirement in section 47 that a plan of the land duly signed by the judge and carrying the seal of the court be annexed to every memorial of ownership. As we see shortly, Judge Rogan did not always ensure compliance with this requirement.¹³⁰ In addition, each transfer of an undivided interest had to be witnessed by a judge or resident magistrate and a 'male adult credible witness'. The terms of any transfer had also to be explained to the vendor by an 'interpreter of the court' and signed by that person (s85).

There were a number of early cases, several of them out of Turanga, which challenged transfers that failed to comply with these formalities and safeguards. For example, in *Te Waka Kawatini v Kinross*, the court found that it was necessary for an interpreter and an adult male witness to attest a deed of transfer but that it was not necessary for the interpreter's declaration to be made within three months of the translation.¹³¹

(2) *The trust commissioners*

There was also a parallel system of safeguards in operation. The Native Lands Frauds Prevention Act 1870 created the office of Trust Commissioner. The commissioner sat as an independent quasi-judicial officer to determine whether alienations by Maori were 'contrary to equity and good conscience', not in contravention of any trust, and not paid for with liquor or arms (s4). The commissioner was also required to be satisfied that 'sufficient land is left for the support of the Natives interested in such alienation' (s5).

Four trust commissioners operated in Turanga between 1870 and 1900: Hanson Turton in 1871, Dr Nesbitt between August 1873 and the end of June 1874, Matthew Price between 1880 and 1883, and James Booth, 1883 to 1900.¹³² Commissioners' courts were held on a regular basis, Booth held court every Monday that he was in town, and the sittings were advertised in the *Gazette* and *Kahiti*. Commissioners did not adopt a uniform procedure. Turton required the purchaser to attend the court accompanied by the Maori seller, where he routinely questioned them as per the Act. Booth, on the other hand, accepted signed declarations from the seller, and, it appears, only examined cases personally when there were objections. In the case of Booth's court, vendors attended only rarely.¹³³

The usual process appears to have been that the trust commissioner would execute a certificate confirming that the relevant requirements had been satisfied. He then transferred the certificate to the Native Land Court, where the court's own procedures came into play. The

130. See our discussion of the *Assets* cases below.

131. *Te Waka Kawatini v Kinross* (1878) 3 NZJur (NS) 149. Attestation by interpreter and male adult within three months.

132. Document A24, pp106–107

133. Document 4.18, pp38–39

8.4.5(3)

relationship between the procedures of the land court and those of the trust commissioner was at issue in another Turanga case which came before the Supreme Court. In *Hurrey v Booth*, the plaintiff sought to force Commissioner Booth to issue her with a commissioner's certificate in respect of the purchase of interests in the Whatatuna block.¹³⁴ Despite it being normal practice, Justice Richmond indicated it was 'irregular' to go to the trust commissioner before a purchase had been confirmed by the Native Land Court. Since section 87 of the 1873 Act rendered any transfer void until so confirmed, the trust commissioner was being requested to certify something which did not exist, according to Justice Richmond's reasoning. In addition he said: 'the two sets of officers [the court and the commissioner] have much the same duties, but I cannot say the duties are identical'.¹³⁵ The problem appears to have been exacerbated when Native Land Court judges were routinely appointed as commissioners as well. In his evidence before the 1891 Native Land Laws Commission, James Mackay said:

The other day I had a case or two before the Trust Commissioner. A few days afterwards I saw a notice that these same cases were again to be before the judge. The same Judge was sitting as Trust Commissioner. He called the cases on, and began to inquire where the purchase money had been paid. I said 'Excuse me, but you are not sitting now as a Trust Commissioner'. He replied, 'Oh pardon me, I had quite forgotten that I am now sitting as a Native Lands Commissioner (sic – he clearly meant judge)'.¹³⁶

The combined effect of the section 87 voiding provision and the lack of a clear demarcation between the work of each office was clearly causing a good deal of confusion, even amongst those responsible for administering the Act. We shall return to this point below when we consider the compounding effects of statutory amendment over time.

(3) *Procedural and technical safeguards become ineffective*

Here, we note that Parliament's intention, whether carried out by the trust commissioners or the Native Land Court, was capable of both a broad and a limited construction. A broad construction would have gone a long way towards meeting the Crown's Treaty obligation of active protection. The questions of whether transactions were equitable and in good conscience, whether a fair price had been paid, whether the proper forms and procedures had been followed, whether consent had been properly obtained, and whether the vendors had sufficient land left for their support, were all considered necessary at the time, and could have been administered in a spirit that was genuinely protective. The investigations could have been resourced for varying degrees of intensity. Instead, it appears from the evidence presented to us that both commissioners and court were under-resourced and carried out

^{134.} *Hurrey v Booth* (1885) 4 NZLR 179, 180 (SC)

^{135.} *Ibid*, p181

^{136.} Evidence of James Mackay, 6 March 1891, Minutes of Evidence, Report of the Commission on Native Land Laws, AJHR, 1891, sess 2, G-1, p 44

limited, mainly paper-based checks. There was no spirit of generosity in how the provisions were applied. Nor, after 1877, was there a district officer available for ensuring that a minimum of 50 acres per head was reserved. Even if there had been, the requirements of pastoral farming at the time were clearly in excess of this figure, which took no account of the size of families, location, and quality of land needed for workable farms. There was little actual protection to be found, therefore, in either the letter or the execution of the law.

We wonder whether the concession that the Crown did not, according to today's values, take sufficient account of the significance of land to a communal people was necessary.¹³⁷ Ministers and officials knew very well that land was held communally; a principal function of the Native Lands Acts was to reverse that fact. They were also very aware of the importance of land to Maori. It follows, therefore, that a requirement for each man, woman, and child to own 50 acres was fundamentally misconceived, at least until after Maori had individual titles that they could use other than to sell or lease. Claimant counsel noted that the Crown did not attempt to ascertain and provide for sufficiency of land at a hapu level.¹³⁸ The Crown responded that it had 'some obligation' to do so.¹³⁹ It is instructive that the Crown's remedial attempts, providing a 4000-acre block in 1877 'in recognition of the landlessness of Rongowhakaata', and a 450-acre block to 'landless Whanau a Kai' after 1882, were both necessary and carried out at a hapu level.¹⁴⁰ Too little too late does not negate the fact that the Crown was capable of conceptualising needs at a hapu level, had the land to provide for them, and needed to do so.¹⁴¹ Counsel, of course, argued that the system could not be judged by its outcomes (in this case, landlessness), because the system was 'principally designed to protect Maori in their dealings in land rather than protect them in retention of land'.¹⁴² There is some truth to this view of the Crown's intentions, but we must none the less judge it at least partly by its results. Good systems can produce bad and unintended outcomes. We will return to the overall question of landlessness below in section 8.5.9, but here we note the obvious ineffectiveness of paper protections to prevent it.

8.4.6 Shifting subdivisional rules

An extreme example of constant changes in both law and policy can be seen in the way in which native land subdivision rules evolved between 1873 and 1909. It will be recalled that section 65 of the 1873 Act allowed the court to subdivide the land between sellers and non-sellers but only if a majority of the owners consented to the subdivision. Subsequent

137. Document H14 (17), pp20–22

138. Document H2, p107

139. Document H14 (17), p21

140. Ibid, pp21–22

141. Document A24, pp162–163. Although the reserve was for the 'Rongowhakaata Tribe', the title was for individual grantees.

142. Document H14 (17), p13

legislation eroded even this limited protection. In section 6 of the Native Land Amendment Act 1877, the Crown could apply to cut out its proportionate share where it had been active in buying up undivided interests. The Native Land Act Amendment Act 1878 (No 2) provided that an owner or other interested person could apply to the court to determine the value of any interest they held, in order to partition out an equivalent portion of the land. An 'interested person' included a purchaser of any undivided interest. Thus, the safeguard, such as it was, of majority veto in respect of subdivision, was effectively removed within four years of its enactment. This was not, at this stage, a problem arising from conflicting law changes so much as a substantial weakening of protections over time.

Four years later, the rules changed again. Under section 11 of the Native Land Division Act 1882, only Maori would be entitled to seek partition – purchasers could not, except in respect of interests they had bought before the date of the Act.¹⁴³

Another four years later, in 1886, the entire philosophy of native land legislation turned 180 degrees, as a result of a change in government. By the terms of the Native Land Administration Act of that year, direct settler purchasing was prohibited (s33). A new system was set up for a Government commissioner to sell or lease land on behalf of block committees. This would have left settlers who had bought undivided interests, but not yet cut them out, in a sort of tenurial limbo. Section 23 of the Act, therefore reversed the 1882 change yet again. Any person, Maori or Pakeha, could apply to the court to have their share partitioned out.

This u-turn lasted for two years only. In 1888, the Native Land Court Act 1886 Amendment Act tried to unravel the confusion that had been created, and direct private purchasing was restored. Partition was, by the terms of section 12, made compulsory whenever the court found, in a title investigation, that there were more than 20 owners and it was practicable to reduce the number of owners in each subdivision to 20. The power of the Crown to cut its interests out was affirmed (s7). While the Act did not contain provision for purchasers to cut their interests out, it did allow for any deeds or memoranda of transfer to be registered in court (s3).

In 1889, a purchaser could apply for partition but the deeds which formed the basis for the partition had first to be certified by the trust commissioner.¹⁴⁴ In 1893, the Validation Court was established under the Native Land (Validation of Titles) Act 1893 to enable (among other things) partitions to be perfected in respect of transactions that did not comply with the procedural requirements in the legislation. We will deal with this issue in more detail below. One year later, in section 17 of the Native Land Court Act 1894, any person 'interested in the land' could commence partition proceedings in the Native Land Court. The trust

143. Section 12 provided that 'any person who before the passing of this Act has acquired an undivided share in any land granted to Natives, or any estate or interest therein, may apply to have his estate or interest defined, and thereupon the Court may order a defined portion of the block to be granted to him proportionate to the value of the estate or interest acquired'.

144. Native Land Court Acts Amendment Act 1889, s6

commissioner requirement was dropped. That remained the position until the 1909 consolidation and reformulation of native land law in the Native Land Act of that year.

Thus, we started in 1873 with partition by Maori only, and then only by majority. In the 20 years that followed, the subdivisational rules u-turned three times by our count. At one point, certain subdivisions were even compulsory. To further confuse matters, the rules applying to Crown and private purchasers were sometimes different and sometimes the same.

8.4.7 Restrictions on alienation

(1) *Standard restrictions and the creation of reserves*

The alienation of Maori land was restricted in two ways. First, land awarded to Maori in memorials of ownership had a standard inalienability clause attached (s 48). Secondly, sections 24 to 31 of the Native Lands Act 1873 provided for the creation of specifically designated reserves selected by the district officer, as we have already discussed.¹⁴⁵

The standard restriction imposed on a memorial of ownership was recorded on the title and forbade the alienation of the land except by a fairly limited lease (21 years). As we have already noted, this section of the 1873 Act (s 48) was in effect negated by section 49 and section 65. The former allowed owners to sell if unanimous. The latter allowed a majority to partition for sale if unanimity could not be achieved (see ss 24, 25). The cumulative effect of the sections meant that the manner of alienation was restricted, but alienation itself was not.

As to the creation of specific reserves, section 27 provided that on the application by the district officer, each reserve would be investigated in the Native Land Court and a memorial of ownership issued listing the individual owners. The legislation provided that Maori could, with the consent of the Governor in Council, have the restriction on alienation removed.¹⁴⁶

Mr Hayes argued before us that the Crown never intended such restrictions to be permanent, citing Richmond's comment in 1867 that restrictions on alienation were intended to be 'such as might be removed from time to time as occasion might require, and formed a sort of cushion upon which the Native race might be let down more gently into perfect self-reliance'.¹⁴⁷

We note that the terms 'inalienable' and 'reserve' were used loosely by district officer Samuel Locke and his contemporaries.¹⁴⁸ In the end, we believe it mattered little which phrase was used once the 1873 Native Lands Act came into force. If the majority of the owners wished to sell or lease for a longer term, they could apply to the Governor in Council in the case of a

145. Section 27 provided that each reserve would be investigated in the Native Land Court. Section 28 provided that a memorial of ownership would be issued which listed the individual owners. Section 31 stated that, with the consent of the Governor in Council, the land, 'or any part thereof' became subject to the Act, 'as if the Memorial of Ownership had been made under the forty seventh section of this Act'.

146. Document F15, p 78

147. NZPD, 1 August 1867, vol 1, p 272 (doc F15, app, p 35)

148. Document F15, p 78

8.4.7(2)

reserve, or, in the case of a standard block with a standard restriction, simply partition the land.¹⁴⁹ Those who objected were awarded their proportion of the block, but lost their ability to keep the land intact. They also had to pay their share of the costs of partition.

Legislation that provided for inalienable reserves that could none the less be made alienable, while limiting the effective use of land thus restricted in the meantime, reveals the conflicting aspirations of colonial governments between acquiring Maori land and, as Richmond put it, cushioning some of the effects of alienation. Maori themselves did not necessarily realise the limits built into these mechanisms, nor that they might not be as permanent as they seemed. *Te Waka Maori* printed a description of the provision for reserves in the 1873 Act, in both English and Maori:

No man will be able to sell the land so set apart and henceforward it will not be in the power of the chief to sell all the land of the tribe and leave the tribe without any land; but by the new law every man, woman, and child will be counted, and a large piece of land for the whole of them, in proportion to their numbers, will be kept for them; where they can live, and where they may die, for it will not be lawful for anyone to sell that land, or take it from them, or prevent them from living on that land and cultivating it.¹⁵⁰

It is clear that alienation restrictions and reserves did not perform the function described in *Te Waka Maori* at all. In the event, it appears to us that restrictions were not at all effective in protecting Maori land. They were too easily removed or evaded by purchasers with ready cash and Maori owners in need of it. It is not surprising, then, that of the 13 reserves owned by Te Aitanga a Mahaki in 1886 only six remained by 1916.¹⁵¹

(2) *Court of Appeal criticises the state of law on alienation restrictions*

As we noted previously, there was a duplication of protective roles and responsibilities between the Native Land Court and the trust commissioners. This led to confusion, which was soon mirrored in the administration of restrictions on alienation. Part of the confusion arose from the interaction of sections of the 1873 Act itself, where section 48 restricted alienation to short-term leases, unless (s 49) all owners wanted to sell, or (s 65) a majority applied for a partition. These rules were routinely breached in the way private purchasers bought up land. Usually, individual undivided shares were progressively bought up (we describe this process in more detail in section 8.5.2) until either all shares had been purchased or sufficient had been purchased to justify partition in accordance with the requirements of section 65 or

149. Minutes of meetings with Natives and others, Report of the Commission appointed to inquire into Native Land Laws, AJHR, 1891, sess 2, G-1, pp 35–36. We note that in the 1891 commission Rees was quite specific that Maori could not have the restriction lifted unless for a specific purpose. It would not be done for a broad reason.

150. *Te Waka Maori o Niu Tirani*, vol 9, no 16, 29 Oketopa, pp 140–141 (Jenny Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Waitangi Tribunal Rangahaua Whanui Series, 1997, p 42)

151. Document H2, p 114, fn 213

later amendments. But, until the buyers had got the sellers to partition out their shares and then obtained a freehold order in their favour, the individual purchase agreements remained void in accordance with section 87. Ordinarily, this made for a slow process, but acquisition of enough shares was usually achieved over a period of months or sometimes years.

The real problems (for purchasers) started, however, when the Legislature repealed the 1873 Act in 1886 and reinstituted Crown pre-emption for a brief period. When the new regime was instituted, those who had only partially completed their purchases in 1886 were potentially left high and dry. There were hundreds – if not thousands – of individual share purchases left uncompleted in the process of partition. The buyers argued that the repeal of the old restrictions meant their previous purchases were no longer void and section 87 no longer applied. The issue sparked a tense stand off between the Legislature and the judiciary. Predictably, the controversy was centred in Poverty Bay.

A year after the introduction of the 1886 Act, the continued effect of the section 48 ban on sales unless unanimously agreed by all owners on the title was tested in the courts. The case of *Seymour v MacDonald* related to the sale of undivided interests in the Whangara block just north of our inquiry district.¹⁵² The Native Land Court had imposed an alienation restriction on the block, prohibiting sale or lease for more than 21 years. Seymour had purchased a number, but not all, of the undivided interests in the block. Before he could complete the acquisition of the remaining interests, or apply for partition, the 1873 Act was repealed. Justice Richmond found that the several transfers of undivided interests to Seymour were in breach of the restriction and void under section 87. The decision was unanimously affirmed in the Court of Appeal when Seymour appealed. The Court of Appeal found not only that Seymour had breached section 48 but also that he had failed to comply with the requirements of sections 59, 60, and 61 of the Act. The 1886 Act did not, the court said, absolve him of compliance with those requirements.

Shortly after that case, almost the same issue arose a second time, once again in the Poverty Bay district. In the case of *Matthews v Paraone*, Matthews had also purchased undivided interests while the land was subject to restriction.¹⁵³ Some time later, the land had been divided between sellers and non-sellers under the Native Land Division Act 1882. New titles were issued. The purchaser argued that the court could disregard the old restriction applicable when the purchases were originally made, because all the sellers were now on a new title and the new title had no such restrictions. The Court of Appeal rejected that argument. It said that the Legislature had in 1873 specifically ruled that certain transactions would be treated as void unless and until the Native Land Court made an order for a fresh title in favour of the

152. *Seymour v MacDonald* (1887) 5 NZLR 167 (doc F33, vol10, pp3446–3450). In fact, the court dealt with a similar restriction imposed under section 17 of the Native Lands Act 1867, but the court found that the effect of this restriction was the same as section 48.

153. *Matthews v Paraone* (1889) 7 NZLR 528 (CA) (doc F33, vol10, pp3476–3481)

purchasers. If they were void at the time of transfer, then they would remain so. The 1886 Act did not clearly intend to validate those transactions retrospectively. In the court's view:

If the legislature has declared a certain class of transactions to be contrary to public policy and void, a very clear expression should be required of the subsequent intention of the legislature to validate transactions which had been entered into in the face of the previous enactment.¹⁵⁴

These decisions had a destabilising effect on the market. There were clearly very many settler purchasers who were in the same position as Seymour and Matthews and who might now be prevented from perfecting their defective titles after the 1873 Act was repealed. The colonial Legislature moved quickly to override the effect of *Matthews v Paraone*. Section 16 of the Native Land Court Act 1886 Amendment Act 1888 provided that:

Land or shares in land owned by Natives shall be deemed to have been transferable, and may hereafter be transferred by deed . . . But this provision shall not apply to any deed purporting to alienate land where such alienation was restricted or recommended to be restricted by order of the court.

It appears that the Legislature was trying to draw a distinction between standard restrictions, such as those provided in section 48, and specific restrictions on sale imposed directly by the court case by case. Standard restrictions were to be overridden retrospectively so that Matthews could get his titles. Specific restrictions imposed by the court in particular titles would remain. This would have greatly reduced the number of buyers caught out by the 1886 law change.

The amendment was almost immediately tested in the Wanganui case, *Poaka v Ward*. The restriction in question was a general one provided by section 48 and should have been overridden by the new section. The Court of Appeal found, by a two-to-one majority, that the Legislature had failed to achieve its purpose. Justice Williams reflected the mood of the majority of the court:

It is certain, in the first place, that, if transactions have been entered into which at the time they were entered into were distinctly contrary to the policy of the law and ineffectual, the language of a section in a subsequent Act, which it is suggested gives retrospective validity to these transactions, should be clear beyond question, and open to no doubtful interpretation. *The Court ought not be compelled to search through a mass of conflicting legislation for hints and sidelights to show an intention to legislate retrospectively.* [Emphasis added.]¹⁵⁵

In a rare moment of candour, even by today's standards, the country's senior judges declared in no uncertain terms, that the law was a mess. We can only agree. The attempt to

154. *Matthews v Paraone* (1889) 7 NZLR 528 (CA) (doc F33, vol10, pp3430)

155. *Poaka v Ward* (1890) 8 NZLR 338, 361, per Prendergast CJ and Williams J

save hundreds of buyers left high and dry through the use of a single sweeping amendment had failed. The Court of Appeal was obviously too concerned at the injustices which would have occurred if the checks and restrictions so central to the 1873 regime could now be retrospectively disregarded. The Legislature abandoned its strategy of enacting a one-hit override clause. Instead, the Validation Court was established to perfect transactions after inquiry into the merits of each case.

8.4.8 System malfunction – the creation of the Validation Court

It soon became clear that the problems facing Seymour, Matthews, and Ward after 1886 were just the tip of the iceberg. The 1886 law change exposed a host of cases in which the processes and safeguards under the 1873 regime were not being complied with. These were a mixture of protections which on the one hand failed, were misapplied, or not applied at all, or on the other hand were defeated by the constant law changes. Crucially, the problems exposed a fundamental inconsistency between section 87, which voided all transactions prior to the date that the court awarded title to a purchaser, and the rest of the Act which proceeded on the basis that transfers would be agreed to and paid for piecemeal prior to the purchaser coming to court. The various categories of defective purchases demonstrated with particular clarity the extent to which the system had collapsed under its own weight. In addition to otherwise legal but partly completed transactions which would have been completed by partition under the 1873 Act, the problem categories included:

- ▶ Titles based on transactions which did not comply with the formal requirements of the law at the time – for example failure to secure a trust commissioner's certificate.
- ▶ Titles based on transfer documents which breached the rules for execution – for example, failure to have the transfer witnessed by a judge or resident magistrate.
- ▶ Titles where the land carried restrictions or recommended restrictions on alienation at the time of the transaction.
- ▶ Titles affected by various irregularities in the procedure of the Native Land Court – such as failure to procure a survey plan before partition.
- ▶ Titles based on orders of the court for which there was clearly no jurisdiction – for example, partitioning on the application of a minority of owners.

We have no way of knowing how many such transactions there were, but as individual piecemeal transfers, there must have been thousands. No settler parliament could abandon at least the good faith purchasers even where they had failed to meet the legal standards imposed. In addition, there were of course a number of irregular transactions which were inherently undeserving of assistance. For example, purchases tainted by fraud or where the purchase money had not been paid. Some way of sifting them out had to be found so that intentional breaches of the requirements were not encouraged. After one more failed attempt

at resolution,¹⁵⁶ the Native Land (Validation of Titles) Act 1892 was enacted. It authorised Native Land Court judges to investigate these invalid transactions and recommend their validation, so long as:

- ▶ there was no fraud;
- ▶ there was no intent to evade the law;
- ▶ the transaction was not ‘contrary to equity and good conscience’ (s5); and
- ▶ validation would not be contrary to the ‘true interests’ of the Maori sellers (s10).

The following year, a separate Validation Court was formally established with George Barton (a former land court judge) as its first judge. The court was later given the power to validate even fraudulent dealing. It sat almost solely on the East Coast. As we shall see in chapter 9, a major part of its work involved validating transactions between Maori and the New Zealand Native Land Settlement Company brought before it by the Carroll Pere trust. For present purposes, however, it was the necessity at all for the court which is important. It demonstrated most eloquently the problems inherent in a system of individualised purchase from Maori. Firstly, it showed that safeguards were continually disregarded at the time of transaction. The supposed protections in the Acts had not worked. Secondly, it demonstrated more effectively than any other single piece of evidence that the system under the 1873 Act was complicated, contradictory and ultimately unworkable. An efficient system of title investigation, management, and transfer would not have needed a Validation Court.

As we shall see, the importance of the court in fixing the system’s problems came to be drastically reduced as a result of further litigation out of Turanga.

8.4.9 Two systems, one winner: native land safeguards and the Land Transfer Act

While the formalities and restrictions overridden by the Validation Court were very complex, both for vendor and for purchaser, even greater complications arose out of the interplay between the native land system and the Land Transfer Act 1870.¹⁵⁷ Some of the most important litigation in New Zealand legal history arose out of conflict between these two systems. We must turn therefore to consider this issue because it so significantly affected the success

156. Document A17, pp 570–573. In 1889, the Crown established a commission to ‘inquire into all the circumstances attending any alleged alienation or acquisition of land’. Worley Edwards (a lawyer) and John Ormsby (part Maori) were appointed commissioners in 1890. Six months after they were established, the commissioners had received more than fourteen applications, mainly from the East Coast. The commission was not a success, the commissioners finding that the provisions of the Native Lands Act Amendment Act were too narrow to enable them to validate any of the purchases in the applications. The Native Land Laws Commission, commenting on the failure of Edwards and Ormsby to validate Reeve’s purchase of the Wharekaka block reported ‘this decision, which itself seems correct and unimpeachable, spread dismay throughout the East Coast. No further deeds were brought were brought before the commission. It sat no more in that district and was finally cancelled in the early part of this [1891] year’: AJHR, 1891 G1, p xvii (doc A17, p 573).

157. The system of land registry was introduced in 1860 but the Act of 1870 applied until its repeal and replacement in 1885.

of the native land system in protecting Maori interests. It is important also because this litigation, predictably, arose in Turanga. First some background. The Native Land Court's memorials of ownership provided for a form of Maori title registration. The land court was (and remains) a court of record, holding its registry and up-to-date records of the owners and former owners of all lands within its jurisdiction. For practical purposes, the Land Transfer Act provided for the registration of settler titles.¹⁵⁸ Once titles for sale had passed through the system of safeguards outlined above, the land court would send an endorsed memorial of ownership to the Governor, with a recommendation that a Crown grant be issued in favour of the purchaser. However, under the 1894 Act, a referral to the Governor was no longer required. Instead, after a court order was made determining entitlement, the district land registrar issued the purchaser with a Land Transfer Act certificate of title in lieu of a Crown grant. This meant that court orders themselves became directly registerable. Registration in this way was extremely important. It made the purchaser's title indefeasible. That is, except in the case of fraud, when a person registered his or her title, the fact of registration was conclusive proof of ownership, for all purposes.

On 1 March 1905, the Judicial Committee of the Privy Council issued judgments in three sets of Turanga appeals.¹⁵⁹ The first arose out of the acquisition of Waingaromia 3 block: *Assets Co Ltd v Mere Roihi and Others* and *Assets Co Ltd v Wi Pere and Others*. The second arose out of the acquisition of Waingaromia 2 block: *Assets Co Ltd v Panapa Waihopi and Others* and *Assets Co Ltd v Wi Pere and Others*. The third related to the purchase of the Rangatira 2 block: *Assets Co Ltd v Teira, Ranginui and Others* and *Assets Co Ltd v Hemi Tipuna and Others*. These three blocks adjoin the Gisborne inquiry district on its eastern side. The lead plaintiffs were all Turanga rangatira. The key figure was, of course, Wi Pere.

Assets Company Limited was a company established out of the liquidation of the City of Glasgow Bank in 1878. It was created to hold lands over which the bank had foreclosed as mortgagee during the depression of the 1880s. In all three blocks, the procedural safeguards provided for in the native land system had been breached in some way in the process of transfer to settlers. In the case of Waingaromia 3, the court issued a memorial of ownership, which failed to comply with the Native Lands Act 1873 because no certified plan had been appended to the memorial as required by section 47. Cooper, a settler, then acquired various individual interests in the block. As a result, on Cooper's application, the court issued freehold orders in his favour. Those orders should not have been issued because the court still lacked a properly certified plan. The Maori parties also alleged significant irregularities in the acquisition of their individual interests. For example, alleged sellers had not signed and minors had been unrepresented. None the less, on the strength of the Native Land Court's freehold order, Cooper obtained registration of his title under the Land Transfer Act. As we have said, Assets

158. It was possible to register Maori titles that had been commuted to Crown derived titles, but, as we have noted earlier, most Maori land remained in memorial form. Nearly half of all Maori land titles are still in that state today.

159. *Assets Company Ltd v Mere Roihi* [1905] 176 (HL, PC) (doc F33, pp3530–3548)

took the title on Cooper's default under the mortgage and registered its own title. We note that the problems exposed by this case were significant failures to apply the Acts in force at the time, rather than arising from changes to the law.

In *Waingaromia 2*, the orders of the court carried the same irregularity. The Maori owners claimed that they had 'neither sold to the appellants [Assets] nor done any act by which they ceased to be owners, nor had the memorial [of ownership] been cancelled or destroyed in accordance with law.'¹⁶⁰ The court issued freehold orders without a plan and the same Cooper obtained a registered title on the strength of those orders. Again, there was a failure to apply the law properly, rendering nugatory its protections, limited as they may have been.

In *Rangatira 2*, a series of individual transfers were made to Graham and Kinross, well known stock and station agents in the district. These were made under the 1873 Act and were approved by the trust commissioner. The land of the sellers was partitioned in 1886. No freehold order was issued by the court at that stage. The purchaser took no further steps until 1894. In that year, the requirement for the purchaser to go back to court for final confirmation of the transfers was dropped.¹⁶¹ Assets, which had by now taken over the rights of Graham and Kinross, simply registered the individual transfers in the Land Transfer Office. They apparently considered that it was unnecessary to go back to the Native Land Court even though the purchases had been made under the former regime. The Maori parties argued that the transfers were void because the court had not confirmed the transactions as required by the old Act. In this case, the problem was not so much the failure of protections per se, but that changes to the law appeared to have defeated them.

In New Zealand, the Court of Appeal found in favour of the Maori owners in all three cases. The irregularities, according to the court, rendered the transfers void, and registration under the Land Transfer Act did not save them.

In London, in a single consolidated judgment, the Law Lords reversed the decision of the New Zealand Court of Appeal. They found that, unless actual fraud could be imputed to Assets itself as the registered proprietor, no irregularity in the land court's processes could disturb the company's title. In these three cases, the irregularities could be attributed only to Cooper, or Graham and Kinross. Assets had done nothing wrong. In particular, Assets had committed no fraud. By registering its titles therefore, Assets corrected any flaws that may have existed before it acquired the titles. In the words of Lord Lindley:

Their Lordships are keenly alive to the necessity of vigilance to protect natives against unfair and oppressive dealings on the part of Europeans; but on the other hand it is equally important not to disturb registered titles of bone fide purchasers, especially when accompanied by long possession and large outlays.¹⁶²

160. *Assets Company Ltd v Mere Roihi* [1905] 176 (HL, PC) (doc F33, pp 3531

161. See section 73. By the terms of the Native Land Court Act 1894, all Maori customary land held under a memorial of ownership was declared to be held under freehold tenure.

162. *Assets Company Ltd v Mere Roihi* [1905] 176, 211 (HL, PC) (doc F33, vol10, p3547)

The effect of this decision on procedural safeguards in respect of Maori land was enormous. In a competition between the two sets of safeguards – one for Maori the other largely for settlers – the Land Transfer Act would now almost always win. As is obvious, the efficacy of the safeguards within the Maori system was greatly reduced. Catching and preventing irregularities now depended on the owners asserting their rights before purchasers got to the District Land Registry.

8.4.10 Inconvenient complaints – Maori access to the courts removed

To complete this rather grim picture, at around the same time Maori rights were being further limited, not by the Privy Council, but this time by the Legislature. On 3 October 1902, the Land Titles Protection Act received the royal assent. The preamble is worth setting out in full:

Whereas several actions by Natives calling in question, after a lapse of at least thirty years, certain orders of the Native Land Court made under the provisions of ‘The Native Lands Act, 1865,’ and the Crown grants and other instruments of title issued in pursuance thereof, have lately been taken in the Supreme Court of the colony: And whereas the said actions have been dismissed by the Court of Appeal, and the Native plaintiffs have been cast in costs and expenses amounting in aggregate to at least two thousand pounds: And whereas, through the death or retirement of Judges of the Native Land Court and other responsible officers of the public service who could give official evidence, the defence of such actions may be a matter of very great difficulty, if not an impossibility: And whereas considerable alarm has been caused amongst the European landholders of the colony at such attacks upon their titles, and it is expedient that reasonable protection should be afforded to the holders of such titles.

By the terms of section 2, no Crown grant, court order or other instrument relating to Maori land, could be called into question in proceedings in any court if the grant, order, or instrument was more than 10 years old, without the express consent of the Governor in Council. Effectively, that meant Cabinet could veto any litigation by Maori in respect of native land legislation from the 1870s and 1880s – the period during which the law was most confused and least principled. To its great credit, the New Zealand Court of Appeal was uncowed. Twenty-six days later, the court issued its judgments in favour of the Maori owners in two of the three Assets cases. Judgment in the third was released on 8 November. Had those cases not commenced before the enactment of this Act, the Maori parties would have been barred from issuing proceedings. Contrary to the terms of the preamble to the Act, the Maori plaintiffs did not have hopeless cases at all. In fact, in the Court of Appeal, they had won. In the event, as we have said, the reversal in the Privy Council greatly reduced the scope for Maori litigation

anyway, and the Act lost its significance. Once again though, we are reminded, as we have been so often during the course of the Turanga inquiry, just how fragile the rule of law can be.¹⁶³

8.4.11 Conclusions and findings

Was the Native Land Court system simple and efficient, and did it provide adequate safeguards for Maori? In the end, the question became merely rhetorical. The plain fact is that it is difficult to conceive of a title system which was more complex, more inefficient, and more replete with its own internal contradictions. Protections clearly failed in many cases, both because they were inadequate per se and because the passage of time and conflicting legislation allowed them to be evaded. The end result was that Maori were safeguarded neither in their land dealings (which the Crown argued was the main object of protections) nor in the retention of their lands.

Nor was it just the Court of Appeal that complained of the state of the system. We need do no more than quote the view of the Native Land Laws Commission expressed while the system was still in operation:

So complete has the confusion both in law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been. Were it not that the facts are vouched upon the testimony of men whose character is above suspicion and whose knowledge is undoubted, it would be well nigh impossible to believe that a state of such disorder could exist.¹⁶⁴

Returning now to the issues we have specifically addressed in this section, we find therefore that:

- ▶ The process of title allocation through the Native Land Court lacked sufficient checks and balances to protect those who were aggrieved by the court's decisions.
- ▶ The procedural and technical safeguards introduced in 1873 to ensure fair dealing in Maori land were narrowly interpreted, confused (even in the minds of experts) and ineffective in preventing Maori landlessness.
- ▶ In addition to the inefficiencies inherent in individualised land sales, Maori land administration after 1873 was characterised by constant and sometimes radical changes in law and policy which added to the complexity, inefficiency and inconsistency of the system.
- ▶ The problems became so bad that the Legislature was directly criticised by the courts, and a special court had to be created to return order to the system of land transactions.

¹⁶³. It is interesting to note that section 2 of the Land Titles Protection Act survives in modified form in section 77 of the Ture Whenua Maori Act 1993.

¹⁶⁴. WL Rees and J Carroll, Report of the Commission on Native Land Laws, AJHR, 1891, sess 2, G-1, pp xi – xii

- The 1902 decision of the Privy Council in the *Assets Company* cases effectively contained these problems within the Maori system by allowing settler purchasers to override the safeguards contained in Maori land legislation if they registered their titles under the Land Transfer Act.
- In a final insult to Maori landowners, Parliament then removed access to the courts altogether in respect of Maori complaints about transactions which were more than 10 years old – a provision which remains in the law to this day.

While we readily accept that procedural safeguards and restrictions on alienation were necessary for the protection of Maori landowners and the prevention of landlessness, it appears that native land legislation in the nineteenth century produced the worst of both worlds. It significantly complicated Maori land transactions without providing any effective protections for owners at all. We find that this system of land administration was so complex, inefficient and contradictory as to be inconsistent with the equal treatment guarantee under article 3 of the Treaty. That is, it was inherently discriminatory to subject Maori landowners to a system of administration that was so unworkable. We find further that the system failed to meet the Crown's obligation of active protection of the Maori interest under the Treaty in that the system did not provide a reasonable level of protection to Maori landowners in the administration of their lands. In particular, it did not protect Maori landowners from unfair or inappropriate land transactions and it did not prevent Maori landlessness.

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?

8.5.1 Introduction

These questions lie at the heart of the entire debate about the operation of the native land regime in the nineteenth and early twentieth centuries. Put simply, claimants throughout the country have consistently argued that the regime was specifically designed by the Crown to part Maori from their lands as quickly and cheaply as possible. The claimants argued that in order to achieve that outcome, the Crown designed the system so as to undermine Maori social structures – for it was these structures which represented the primary obstacle to fast, cheap acquisition. It was, they said, *raupatu* by another name and the culpability of the Crown for the resultant land loss should be assessed accordingly. The Crown, on the other hand, has been equally consistent in its rejection of the claimants' position. Maori, the Crown argued, were not forced to go to court and they were not forced to sell. They did so willingly and we should respect the choices, right or wrong, that Maori made. While the Crown provided a system that facilitated purchase, it did no more than meet an overwhelming Maori desire to sell. If the Crown had an obligation at all, Crown counsel argued, it was to protect Maori

from becoming landless in their enthusiasm for sale. Thus, from the Crown's perspective, the culpability debate ought to occur in a far more limited arena.

This contest was played out again in the Turanga inquiry. It is important that it be resolved.

But first to recapitulate our conclusions to this point. So far, we have concluded that Turanga Maori preferred to resolve their own title issues internally. There were notable exceptions to this general observation, but they were clearly exceptions. We have also concluded that customary Maori land tenure consistently described by Maori and settlers (in Turanga and elsewhere) in the second half of the nineteenth century remained essentially collective in nature. Thus, while Maori clearly acknowledged that certain boundaries and precise ownership were both essential for proper engagement in the new pastoral economy, there was no discernible Maori groundswell either in Turanga or nationally for wholesale individualisation of tribal titles. Against this, the 1873 Act introduced two innovations:

- ▶ It allowed tribal lands to enter settler commerce but only by way of alienation by sale or lease.
- ▶ It individualised that alienation process in that undivided shares were required by law to be purchased on a share by share basis. If vendors sold or purchasers bought from communities on a collective basis, they did this despite the system in place, not because of it.

When these changes were combined with complicated safeguards against fraudulent or unfair dealing, and constant piecemeal amendments to the Act, the resulting system was, as we have concluded, complex, inefficient, and contradictory. It followed that attempts by Maori (using trusts) to engage in the new economy on a collective basis were deemed by the courts to be unlawful.

In this section, we consider whether the system, with its limited options, its individualised sales and its unwieldy processes caused Maori to alienate land they would not otherwise have alienated. We state the issue this bluntly because this is the question that underlies all others with respect to the Native Land Court, and it has yet to be satisfactorily answered.

In order to properly address this question, it is necessary to set out the salient facts at some length. The period of our inquiry divides itself naturally into two distinct phases. The first is 1869 to 1908. By far the largest area of land was alienated in this period. It commences with the Poverty Bay Commission sales and leases, encompasses the arrival and operation of the Native Land Court and ends with the Rees Pere trusts, and the Mangatu Incorporation.

The second phase is 1908 to 1969. It commences with the seminal review of the state of national Maori land holdings, carried out by Sir Robert Stout and Apirana Ngata in 1907 to 1908. This is the primary period of the Tairāwhiti Maori Land Board leases, the Maori incorporations and the East Coast Native Trust. Alienation continued into the 1960s. Overall, private buyers bought more land than the Crown, but with over two-thirds of the district sold by this time, the scale of alienation was much smaller. Instead this period was characterised also by a new phenomenon: land title fragmentation and ownership fractionation. This was the inevitable result of the dramatic reduction in Maori land holdings that occurred in

the nineteenth century, combined with consistently high birth rates from the start of the twentieth century. In Turanga the main attempt to confront this title disintegration was the Manutuke consolidation scheme. The scheme was implemented between 1959 and 1969.

The mid-century years were also important because of the return to Maori control of land from various Maori authorities: the land board two-term lease lands, the Mangatu Trust lands in 1947 and the remaining East Coast Native Trust lands in 1954. These were to be the new cornerstone of the Maori economy in Turanga.

When we conclude our survey, we turn to our analysis.

We are assisted, both in our summary of the facts and in our analysis of them, by the fact that in Turanga two quite distinct narratives emerge. One is from the nineteenth-century native land regime; that is, from the simple and familiar story of rapid sale of individual undivided interests by Maori owners to both Crown and private buyers. The same story was being repeated in varying degrees throughout the North Island at this time. The other narrative is unique to the East Coast. It is the story of extensive efforts by Turanga leaders throughout the last quarter of the nineteenth century, to control land alienation and retention through the use of trust and company structures.¹⁶⁵ For example, we referred to the Rees Pere trusts in the context of the Pouawa block in previous sections. These various efforts to recollectivise Maori land management provide an extremely valuable counter-narrative against which to assess the approach of the 1873 Act. The popularity of these alternatives among Turanga Maori allows us the rare luxury of testing what actually happened against a realistic ‘what if’ scenario. If these collective strategies could have produced better Maori control of land alienation, and if policy makers at the time were aware of them, then the omission to make general provision for them at the outset is unlikely to have been an accident.

We will therefore, throughout our discussion of the relevant facts and our analysis, distinguish between the experience of those whose lands were subject to individualised administration and those who attempted to create collective systems.

8.5.2 The first phase: land alienation in Turanga, 1869–1908

(1) *Before the court*

In 1865, before Waerenga a Hika, Matawhero, the deed of cession or the Poverty Bay Commission, virtually all the land in Turanga belonged to Maori. It will be recalled the Crown had purchased 57 acres, called ‘The Government Paddock’. Settlers had entered into transactions in breach of Crown pre-emption. Although the transactions were illegal, and not validated until the arrival of the Poverty Bay Commission, they covered an area of just under 1500 acres. Beyond that, the district comprised uninterrupted Maori title.

All of that changed with the arrival of the Poverty Bay Commission in 1869, and then its

165. We note that Major Kemp tried to get a trust system going in the Whanganui area. It was not, however, as extensive as Rees and Pere’s scheme in terms of the extent of the structures established.

replacement by the Native Land Court in 1875. It will be recalled that the Poverty Bay Commission processed just over 100,000 acres of land on the Turanga flats. Titles were transformed into joint tenancies held in fee from the Crown. These titles were individualised, severable, and largely unencumbered by restrictions on alienation. It is difficult to trace the rate and volume of alienation of these lands because they quickly became merged administratively with land held under Native Land Court titles. But there is no question that they passed out of Maori ownership rapidly. It is to be continually borne in mind therefore, that the operation of the Native Land Court in Turanga was preceded by an earlier title determination and transfer mechanism, which saw settlers acquire the lion's share of the most valuable and productive land in Turanga.

In the land court era, this pattern continued. Crown purchasers now entered the scene too, but in Turanga, private buyers bought twice as much land as the Crown.

(2) *The statistics*

Understandably, we were provided with no consistently calibrated statistics on land alienations within the inquiry district between 1875 and 1907 from the many parties in the Turanga inquiry. We were left instead to distil an indicative picture from various and occasionally conflicting sources. Claimant historians gave their figures by iwi without reference to the time phases we are using or to the geographical boundaries of the inquiry district.¹⁶⁶ The Crown focused primarily on Crown purchases.

For Te Aitanga a Mahaki, counsel calculated that, by 1897 (the date of the last Crown purchase in this period), the Crown had purchased 203,352 acres of Te Aitanga Mahaki land.¹⁶⁷ Private purchasers had acquired an additional 256,948 acres of the land holdings of that iwi by 1900.¹⁶⁸ Katherine Rose estimated the overall Mahaki land base at 700,000 acres.¹⁶⁹ Thus, the figures suggest broadly that they retained only a third of their land base after 25 years of the land court's operation. It should be noted, however, that some of the land sold had been acquired by the Rees Pere trust or its successors.

The figures provided by Rose also comprehensively covered the land holdings of Te Whanau a Kai and Ngariki Kaiputahi and it is not necessary for our purposes to separately analyse land alienation statistics for these two groups.

According to Fiona Small and Phillip Cleaver, the Crown had purchased 12,800 acres of core Rongowhakaata lands between 1873 and 1900.¹⁷⁰ This is in addition to that acquired in the Patutahi take – some 50,000 acres. Small and Cleaver add that the Crown purchase of Tauwharetoi (60,680 acres), Whakaongaonga (18,500 acres), and Tuahu (10,820 acres)

^{166.} We note for example, that Katherine Rose completed her report on Te Aitanga a Mahaki alienations before the inquiry district boundaries had been determined.

^{167.} Document H1, p85

^{168.} Ibid, p79

^{169.} Document A17, p8

^{170.} Document D9, para 117

included the acquisition of peripheral Rongowhakaata interests, the acreage of which is more difficult to assess. During the same period, private individuals purchased approximately 21,570 acres of core Rongowhakaata lands. If Patutahi is excluded from the calculation, Crown and private purchasing during this period, accounted for 60 per cent of those core lands.¹⁷¹ If Patutahi is included, the extent of Rongowhakaata loss is of course much higher – perhaps as much as 90 per cent. In addition, the loss of non-core or peripheral lands appears also to have been significant but it is not possible to calculate their extent with any accuracy.

Claimant historian Keith Pickens estimated that in the nineteenth century, private buyers purchased approximately 20,000 acres of Ngai Tamanuhiri land, or approximately 35 per cent. The Crown did not differentiate on the basis of iwi, but Mr Hayes very helpfully provided a complete list of Crown purchases.

Purchases	Date of purchase	Area (acres)
Goverment paddock	1857	57
Turanganui 2	1869	741
Wharekopae	1880	16,566
Motu	1880	63,391
Waikohu Matawai 1	1880	34,579
Hangaroa Matawai	1880	3269
Waihau	1880	12,800
Whakaongaonga	1880	12,418
Waikohu Matawai B	1881	1300
Waikohu Matawai	1881	900
Poututu B1	1882	853
Poututu C1	1882	683
Hihiroroa	1882	3149
Poututu A1	1882	720
Waikohu Matawai C	1883	1362
Umuhaku	1884	396
Tahora 2C3 section	1896	20,637
Tahora 2C2 section	1896	9049
Motu 2A	1896	548
Kopuaatuaki 1	1896	1071
Maraetaha 2, section 1	1896	4760
Wharekopae 1B1, section 2	1896	586
Wharekopae 1B3, section 2	1896	1694
Maraetaha 2A, section 1	1896	1620
Waikohu Matawai A	1896	3400
Waikohu Matawai 1A	1896	775
Hangaroa Matawai A	1897	4273
Hangaroa Matawai 2A	1897	275
Whakaongaonga	1897	66
Whakaongaonga 3A	1897	903
Whakaongaonga 2D	1897	1736

171. Ibid, paras 87, 88, 117

There was some disagreement between the Crown and claimants as to whether Mr Hayes' list was comprehensive. None the less, by 1897, the cumulative total for Crown acquisitions in the inquiry district, according to Mr Hayes, was 204,577 acres, or 29.5 per cent of the district.¹⁷² This was by far the most active period of Crown purchase.

Private purchasers bought 298,518 acres within the inquiry district.¹⁷³

Despite the differences in approach to data presentation, both among claimants and between claimants and the Crown, the picture that emerges is relatively clear. Most alienations occurred in this period. Most iwi appear to have lost at least 70 per cent of their land base to sales in the first 25 years. Rongowhakaata and Te Whanau a Kai lost much more. Ngai Tamanuhiri lost between a third and a half in the nineteenth century. They lost more after 1902. On the face of it, these are extraordinary figures.

Communities were unquestionably engaging in sales likely to lead to the destruction of the communities themselves. In order to determine why this happened, it is necessary to set out how it happened. We turn now to consider the evidence relating first to how the Crown and private buyers bought Maori land, and second, why Maori sold.

(3) *Crown purchasing on the ground*

It will be seen, from the table provided, that Crown purchasing was completed in two phases: 1880 to 1884 and 1896 to 1897.

How was Crown purchasing done? We were reminded by Mr Hayes, at an early stage in our inquiry, that the rules relating to the private purchase of Maori land interests as provided by sections 59 to 68 of the 1873 Act did not constrain the Crown. Crucially, the Crown was not affected by section 87, which declared the purchase of individual interests void until confirmed by the court. Nor did it need to await judicial investigation of ownership. In fact, the Crown could buy land from its owners even before the owners had been ascertained in the court.¹⁷⁴ The Crown had one other valuable advantage. By the terms of section 42 of the Immigration and Public Works Act Amendment Act 1871, and section 3 of the Government Native Land Purchases Act 1877, it could exclude private purchasers from acquiring interests in any block in which the Crown was actively negotiating to lease or purchase. Put bluntly, the Crown could, by proclamation in the *Gazette*, give itself a monopoly whenever it wished to.

Hayes argued that these considerable advantages were leavened by the carefully considered instructions issued to land purchase officers by McLean. Officers were to ensure that all negotiations were conducted in a public manner, the leading chiefs consulted, and 'behind the scenes' negotiations with individuals, avoided.¹⁷⁵

172. Document F22, app A, p 84

173. We base these figures on those provided to us on an iwi basis. Those for Ngai Tamanuhiri are an estimate.

174. Document F22, pp 4–7

175. Draft circular, 17 April 1875, MA-MLP1874/60 (as cited in doc A18 (a), vol 5, p 2870)

A number of full time Crown purchase officers were active in Turanga in this period. In addition, some local settlers were contracted to negotiate the purchase of specific blocks for the Crown. We now provide such information as we can about the activities of these men: what they purchased or leased, and how they did it.

(a) JA Wilson: JA Wilson operated in the East Coast during the crucial four-year period, from 1873 until 1877. His purchase activities were the subject of considerable scrutiny and debate between the parties in our hearings. They were also the subject of an inquiry at the time, that led ultimately to his removal from office. We therefore have more information on his activities than on other officials.

- ▶ Wilson focused on the large inland blocks within the rohe of Te Aitanga a Mahaki, Te Whanau a Kai, and Ngariki Kaiputahi.
- ▶ He initially leased Maori land. His leases in the inquiry district include: Motu, Mangatu Matawai, Waipaoa Matawai, and Waikohu North (Puhatikotiko).¹⁷⁶
- ▶ He bought individual interests in the following blocks: Waikohu Matawai, Tauwhare-parae, and Wharekopae.¹⁷⁷ Wilson's negotiations in Te Aitanga a Mahaki lands covered 250,448 acres worth of individual interests. He never succeeded in acquiring all of the interests in a single title. That is, all of his purchases were part-purchases only. Of these, 133,448 acres was purchased and 117,000 acres leased.

His tenure was characterised by the following:

- ▶ *A preference to invoke the Crown's monopoly by proclamation whenever possible.* He even sought to issue proclamations when negotiating leases. He initially sought to proclaim land under section 42 of the Immigration and Public Works Amendment Act. When informed by his superiors that section 42 did not apply to leased lands, he sought a blanket proclamation of the entire East Coast district. This was also rejected. He was more successful in obtaining a proclamation for individual blocks he sought to purchase. However, these were outside the inquiry district.
- ▶ *The use of leases as a precursor to purchase.* Wilson usually inserted a clause in the lease agreements he negotiated that prohibited Maori lessors from selling the freehold to anyone other than the Crown as lessee.
- ▶ *The payment of deposits or advances in order to secure purchases.* Wilson stated later that his aim was to complete a purchase 'as far as practicable before the passing through the Court' (*sic*). For example, in Waikohu Matawai, Wilson paid what he called an advance of £300 on the 43,479-acre block. In our hearing, Mr Hayes for the Crown expressed some concern at the fact that Wilson appeared to be tying owners to sale through the use of advances without first settling with them either a price per acre or an overall price for

176. Document A17, pp 61–62

177. Document A18 (a), vol 9, pp 5555–5556, 5616

8.5.2(3)(b)

the whole block.¹⁷⁸ The practice of making advance payments on lands that had not passed through the courts was stopped in 1879 by direction of Native Minister John Bryce. There is, however, evidence that the practice continued in some places.

- *The progressive purchase of interests from small groups.* Wilson did not generally acquire interests on a completely individual basis (though this was occasionally done). Nor did he secure purchases at large community meetings of all owners within a single block, in the style of some of the 1850s Crown purchases, although he did on occasion hold public meetings as a precursor to acquiring signatures. Instead his usual mode appears to have been more incremental. He would procure signatures progressively from what appear to have been groups of owners at whanau or some other sub-community level. This process clearly took time since, as we have said, Wilson failed to complete any of his purchases.

Although somewhat complicated by the fact that the land was vested in quasi-trustees under the Native Lands Amendment Act 1867, the acquisition of Waikohu Matawai appears to illustrate Wilson's typical approach. In that case, signatures were acquired on 10 separate deeds of conveyance. The 65 owners were listed on the deed in smaller groups of between five and 10 and appear, within each group, to have signed together at one time.

(b) JA Hamlin: JA Hamlin, a purchase agent based in Hawke's Bay, took over all East Coast negotiations after Wilson's departure on 31 December 1876. He negotiated subsequently for the purchase of Tauwharetoi, Whakaongaonga, part of Hangaroa Matawai and Waihau blocks.¹⁷⁹

(c) Richard Maney: Richard Maney was a private farmer and land speculator. He was commissioned by the Crown between 1874 and 1877, specifically to purchase what were known as the Hangaroa lands. This was a large district of 185,000 acres straddling Hawke's Bay, Turanga, and the Urewera. He negotiated for the purchase of Tauwharetoi, Whakaongaonga, Hangaroa Matawai, Waihau, and Tuahu. Of these blocks, Hangaroa Matawai, Waihau, and Whakaongaonga are recorded as having passed to the Crown in 1880 and 1881. In 1875, Maney produced three 'statements' signed by rangatira and iwi representatives, acknowledging the receipt of £1500 as 'a first charge out of the proceeds of the sale' of certain of the Hangaroa lands.¹⁸⁰ Little information exists as to how Maney acquired his 'statements'. He appears to have been working with groups led by rangatira but none of the sales were completed in the term of his agency and we do not know either how those signatures were procured or whether others

178. Document 4.17, p171, para 236

179. JP Hamlin, Napier, to under-secretary, Native Department, Napier, 4 July 1877, AJHR, 1877, G-7, no 7, p16 (doc A18(a), vol9, p5639)

180. Document A24, p113

were acquired after 1877. In respect of Hangaroa Matawai, a Crown interest of 3269 acres, was subdivided out in 1880.¹⁸¹

(d) Samuel Locke: Samuel Locke, whom it will be recalled acted as district officer between 1873 and 1877, was officially Crown purchase officer from May 1877 until 1878.¹⁸² He spent most of his short tenure determining how far Wilson had progressed in his dealings. Locke bought interests in the following blocks within the inquiry district: Tauwhareparae, Waihora, Motu, Waikohu Matawai, Wharekopae, Mangatu Matawai, and Waikohu North.¹⁸³ He also bought Waihirere 1 (a small quarry) in 1875.

(e) Colonel Porter: Thomas William Porter was land purchase officer from 1877 to 1878, 1879 to 1881, 1886 to 1887, and then again during the mid-1890s. It will be recalled that he was an officer in the Crown forces during the pursuit of Te Kooti. His tenure initially overlapped with Locke's.¹⁸⁴

In the late 1870s and early 1880s, Porter completed purchases that Wilson had initiated, particularly the Motu and Waikohu Matawai blocks. Other completed purchases for the Crown in the inquiry district included Tauhu, Wharekopae, Waihora, Waihora 2, Hangaroa Matawai 2, Whakaongaonga, and Tauwharetoi.¹⁸⁵ He was not always successful. In 1881, he tried to purchase Waipaoa, but could not get his superiors to agree to the price the owners wanted. The same year, he also tried to purchase Mangatu 6. However, when the owners identified the portion to be sold, Under-Secretary Gill refused to accept it on the basis that the land would be difficult to farm.

There are three things we can say about Porter's purchase methods. First, it would appear that like Wilson, Porter did negotiate with chiefs on some occasions at least. In the Wharekopae purchase, Wi Pere and Peka Kerekere assisted Porter to get signatures and Porter reached agreement with the chiefs that, as principal grantees, they should secure additional payments.¹⁸⁶ Porter met with the owners in a body at least twice during these negotiations. On 13 September 1879, he reported that: 'they agree to sell 30,000 acres retaining 3738 acres'.¹⁸⁷ However, it is also apparent that Porter actively pursued individual non-sellers in order to complete a purchase. In the purchase of Motu, for example, Porter reported that six grantees

181. Document F22, app B, p86

182. Colonel Thomas Porter also worked as Crown purchase officer for a year, apparently at Locke's direction, during the latter's tenure.

183. Return of Lands Purchased and leased, or under Negotiation in the North Island, under the 'Immigration and Public Works Act 1870', amending the same, AJHR, 1877, c-6, pp11-12 (as cited in doc A18(a), vol9, pp5559-5560)

184. Document A17, pp 241-242, 246. Lock assumed official responsibility for Crown purchases at the beginning of 1879, but Porter was in effect in charge of Poverty Bay purchases from an early stage. By 1878, Porter was officially in charge. He resigned towards the end of 1878, reapplied and was reappointed in 1879.

185. Document F22, app A

186. Porter to Gill, 3 September 1880, MA-MLP1, 1900/90 (cited in doc A18(a), vol7, pp 4474-4476)

187. Porter to Gill, 13 September 1880, MA-MLP1, 1900/90 (cited in doc A18(a), vol7, p 4448)

8.5.2(3)(f)

had yet to sign and that he would visit them to get their signatures. He even passed the deeds of both Motu and Waikohu Matawai to Captain George Preece (the resident magistrate at Opotiki) to get the signature of Wiremu Kingi Tutehuarangi, who had moved further inland.¹⁸⁸ He was authorised to make additional payments to overcome resistance and to offer reserves.¹⁸⁹

Secondly, Porter had the visible support of his superior, and more funds. RJ Gill (the under-secretary of the native land purchase branch of the Native Department), spent some time at Turanga in early 1879 in an attempt to rectify the bad impression that the public Rogan–Wilson confrontation had had on local Maori, and to impress on private buyers the Crown’s determined re-entry into the market.¹⁹⁰ Gill was prepared to pay considerably more than Wilson had to complete the purchases. It is clear that he supervised Porter’s purchases carefully, and made the final decisions as to price and conditions of purchase.¹⁹¹ The central government had a strategy for completing purchases of the larger inland Turanga blocks.¹⁹²

A further crucial reason why Porter was able to complete Crown purchases, was that he operated in a very different legislative regime from Wilson. Section 5 of the Native Land Act Amendment Act 1877 allowed the Crown purchase officer for the first time, to apply directly to the court for a partition order. Furthermore, section 6 provided that the court could grant ‘such order as to it shall be seen fit’ and declare all the lands identified in the order to be the property of the Crown. Once this came into force, the Crown could simply partition out the interests it had purchased. Porter found the Act very useful to facilitate the speedy completion of transactions ‘as against unreasonable and obstructive dissentients who do invariably dissent for the purpose of obtaining higher payments or greater shares than entitled to’.¹⁹³ He frequently appeared in the Native Land Court to partition out the Crown’s interests in major blocks, from the interests of non-sellers.

(f) WJ Wheeler: WJ Wheeler was Crown agent between January 1895 and December 1897. He bought interests in a number of blocks in our inquiry district, including Hangaroa Matawai, Motu, Tauwharetoi and Whakaongaonga blocks. We know that he had a tendency to act independently, sometimes before the necessary checks had been made. Patrick Sheriden, chief land purchase officer in Wellington, chastised Wheeler for getting into contact with the

188. Document A17, p255

189. Ibid, pp257–263. As in Waikohu Matawai. See the Porter–Gill correspondence on grantees who did not agree to sell their interests.

190. Document A24, p85–87. Judge Rogan and James Wilson engaged in a very public dispute and which led to the temporary closure of the Native Land Court in Turanga.

191. Document A17, p270. In the Wharekopae purchase for instance, Gill refused to uphold Porter’s agreement to pay the some of some £500 to the principal grantees, as well as other sums he had undertaken to pay, to Porter’s embarrassment.

192. Ibid, pp247–249. On 12 March 1879, Gill noted that Wilson had paid from two shillings to two shillings sixpence per acre. Gill considered that four shillings was a fair price, and for new purchases between five shillings and seven shillings sixpence. Wharekopae was purchased at five shillings per acre.

193. Document A17, pp249–250

surveyor William Tattley regarding a lien Tattley had taken out on Wharekopae 1. Wheeler had contacted the surveyor about getting the lien discharged without getting prior approval from the department.¹⁹⁴ On another occasion, Wheeler was censured for beginning a purchase without checking that the list of owners was correct.¹⁹⁵

It is apparent that Wheeler frequently dealt with individuals:

The owners . . . *must be dealt with individually*, as the majority of them, if assembled in public meeting, would be filled with righteous indignation, of the thought of parting with their birthright for a mess of pottage; but within 24 hours, the same persons would gladly sell, if they could do so unobserved by their fellows. [Emphasis in original.]¹⁹⁶

Wheeler favoured this form of dealing because it increased sales, and it meant he could occasionally buy land more cheaply. He wrote with regard to Waikohu Matawai 1, for example, that he would offer five shillings per acre, even though the owners, ‘as a body’ were unlikely to sell for less than 7s 6d.¹⁹⁷ Individuals might, however, accept the lesser amount. When negotiating for Hangaroa Matawai, he tried to undercut even the Government survey office, by offering one shilling per acre. The survey office had recommended two shillings per acre.¹⁹⁸ This was despite Maori opposition to individual dealing. Wheeler was aware, for example, of an agreement made amongst Maori in 1895, ‘that any found guilty of selling in blocks whose sales had not been approved by the majority, should be fined £5, and also excluded from the list of owners’.¹⁹⁹

(4) Private purchasing on the ground

As we have indicated, settlers were also acquiring Maori interests. Settlers in Turanga purchased twice the volume of Maori land acquired by the Crown. Three settlers were particularly active: G E Read, James Cattell, and F J Tiffen. We now look briefly at how they completed their acquisitions.

(a) George Read: Read was a local a trader and storekeeper. His purchases extended throughout the area and occurred largely in the 1870s and related mostly to Poverty Bay Commission granted lands on the Poverty Bay flats. By 1876, he had bought interests in an estimated 29 blocks, though he rarely acquired sufficient shares to successfully partition.

It is clear from the trust commissioners’ records and anecdotal evidence that Read used the following techniques to acquire his land:

194. Document A18, p138

195. Ibid, p134

196. AD103/17 (document A24, p139)

197. Document A18, p130

198. Ibid, p130

199. Wheeler to Sheriden, 26 June 1896, AD103/17 (as cited in doc A18 (a), vol1, p114)

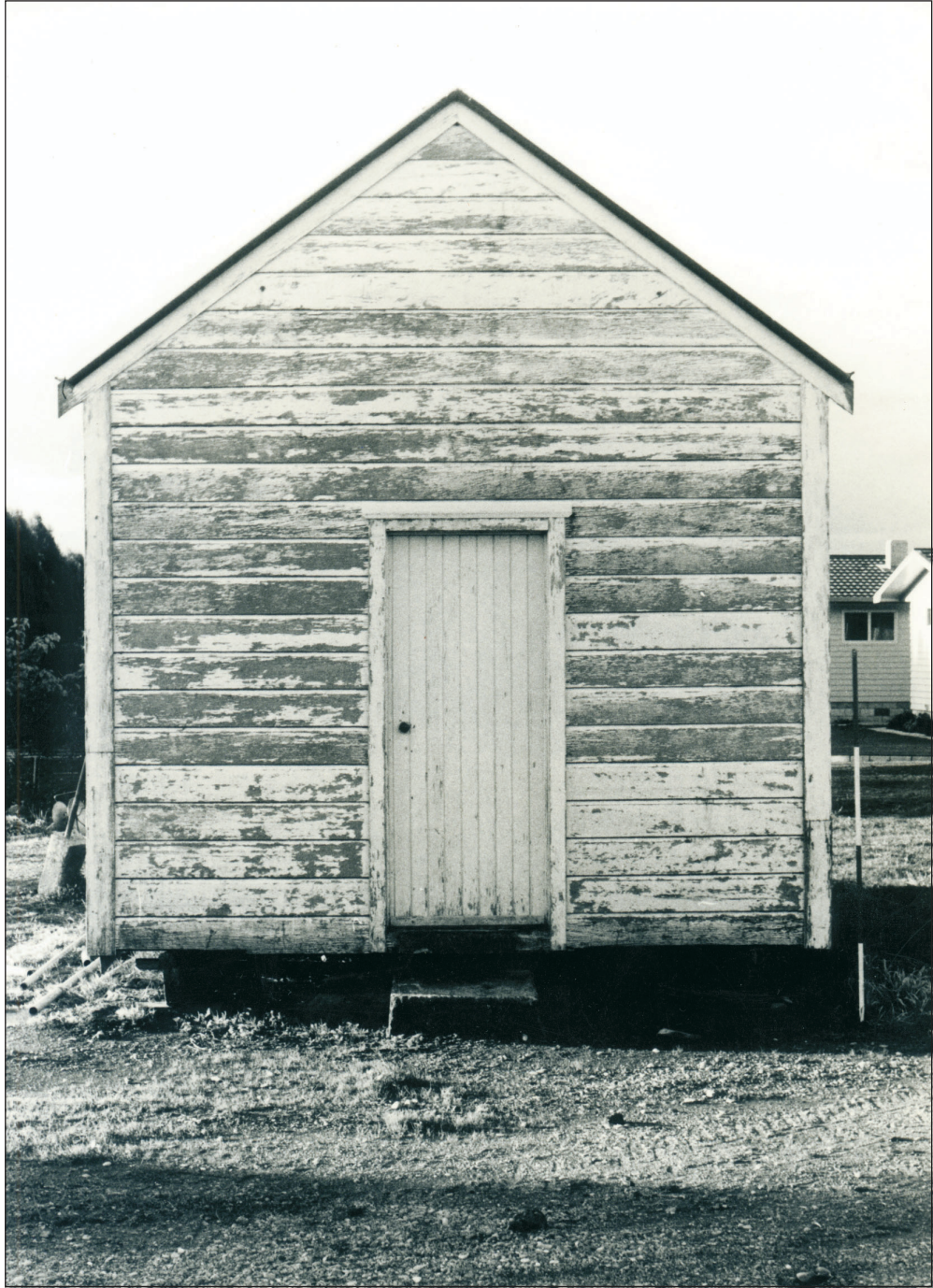


Fig 14: Sled house. Photographer unknown. Reproduced courtesy of the Tairāwhiti Museum, Gisborne, New Zealand (1978-601-14). The notice beside the sled house, which stands outside the Tairāwhiti museum, reads: 'The runners underneath allowed the house to be moved by a team of bullocks. This was needed in the 1870s when land possession was uncertain, floods frequent and fear of Hauhau uprisings general. The house's last site was in Bushmere Road.'



Fig 15: Close up of sled house runner. Photographer unknown.

Reproduced courtesy of the Tairāwhiti Museum, Gisborne, New Zealand (332-37).

- ▶ Like Crown purchase officer Wheeler, Read purchased interests from individuals, rather than from groups of owners.
- ▶ He used debts owed to him in his business as a storekeeper to acquire some of the interests he purchased. For example, in 1869 he gave Rāhuruhi Rukopo, and a number of others with interests in the Crown granted Whataupoko block, a mortgage of £1817 10s to cover a debt they owed him presumably as storekeeper. Two years later, having acquired other interests, he registered a deed stating that he had bought the block for £734 plus the mortgage.²⁰⁰ It appears, therefore, that Read bought the interests for the cash amount plus the amount of the mortgage. Whether this meant that he got a better deal is unclear. However, it is likely that the knowledge that Read held the mortgage would have discouraged other interested buyers from obtaining interests in that block.
- ▶ Like Crown purchase officer Wilson, Read leased lands as a preliminary step to purchase. In 1870, for example, he leased Kaiporo from Epirata and a number of other owners. By 1875, he had purchased several interests in the block.²⁰¹
- ▶ Read was willing to use unorthodox tactics to pressure Māori to sell. He built a mobile house on runners to allow him to squat on lands he wished to purchase. According to claimant historian Katherine Rose, he then resisted the owners' attempts to move him off, until someone accepted an offer. Porter wrote to McLean, in reference to the Okirau

200. Document A24, p66

201. Ibid, p68

8.5.2(5)(b)

block of 'a house of Capt Read's being two or three times dragged off a piece of land forcibly possessed by him'.²⁰²

(b) James Cattell: James Cattell, on the other hand, did most of his purchasing in the 1880s, under a different legislative regime. The 1873 requirement that a majority of owners must agree before the court could order a partition was removed in 1878. Under section 11 of the Native Land Act Amendment Act 1878 (No 2), 'any Native owner' could alienate 'any share in the land'. Furthermore, the same section enabled non-Maori purchasers to partition. Prior to the introduction of this Act, only Maori could bring apply for a certificate of title.

From the evidence, we know:

- ▶ Cattell bought 9000 acres out of a total of 11,000 acres in four blocks: Rangiohinehau, Tarewauru, Tiraotane, and Ranginui.²⁰³
- ▶ He paid five shillings per acre for land in the Tarewauru block and 10 shillings an acre in the Rangiohinehau block.

(c) FJ Tiffen: We have limited evidence on the activities of the third settler, FJ Tiffen. However, we do know the following:

- ▶ He frequently attended the commissioner's court.²⁰⁴ He presented 106 separate deeds to the Trust Commissioner over 10 years regarding his purchases in Mangatu 2. He presented a further 47 deeds between 1894 and 1901 to the commissioner for purchases in the Puhatikotiko block.²⁰⁵
- ▶ It is clear from the minutes that he was buying individual interests. Like Cattell, he was not constrained by the majority rule of the 1873 Act.

(5) *Some conclusions on purchase activity*

The evidence of Crown and settler purchase activity, though general in nature, is sufficient to support the following conclusions:

- ▶ Crown and settler purchasers were engaged in parallel purchase campaigns on an unprecedented scale.
- ▶ The Crown was advantaged as a purchaser through its ability to remove competition for land it wanted. This advantage was extensively utilised in Turanga.

202. Porter to McLean, 23 August 1873, McLean Papers, f.510 (doc A24, p 69)

203. Document A19, p155–157

204. As we have noted, the trust commissioner was required to vet private transactions to ensure that they met the measures of equity and good conscience. The records of the trust commissioner therefore provide an indicator of how much land settlers were purchasing. Between 1891 and 1901, for example, 446 deeds passed through the Trust Commissioner's office. Of these, the majority involved purchases: some 335. The rest were leases (44), mortgages (50), and conveyances in trust (17).

205. Document A18, p79

- ▶ Settler traders such as Read could, and did, take advantage of Maori debt, acquiring land. They occasionally resorted to novel tactics in order to pressure Maori to sell.
- ▶ Leasing was a significant technique to secure purchase. As solicitor De Lautour noted in 1883: 'Native Leases are regarded, not so much as value for grazing, but as potent weapons by use of which the speculator sees his way to wrest the freehold before 21 years expire from the Native Landlords.'²⁰⁶
 - The Crown leased land extensively in Turanga even though it was not itself engaged in extensive pastoral farming. Since the Crown did not lease to farm, leases were obviously used as an unthreatening (and relatively cheap) way of establishing priority of interest in the land.
 - Settlers who belonged to the local community (and had often married into them) also leased to purchase.
- ▶ Purchases took time, often years, to complete.
- ▶ Most importantly, land was invariably purchased from individuals or small groups, mostly at whanau level in a number of separate transactions. This explains why purchases took so long.

(6) *The proceeds of alienation*

Given the level of alienation during this period, and bearing in mind the patterns of Crown and private purchase outlined above, two questions follow: how much did Turanga Maori get for their land and how did they get it?

It is not possible to do any more than provide an average range of prices received per individual owner. This will of course vary significantly according to the quality and situation of land, as well as the number of owners. Generally speaking, as we have said elsewhere, the hinterland blocks were less valuable on a per acre basis than those on the flats. They tended to have many more owners – not just one hapu community but sometimes many. On the other hand, they were usually very large blocks. This meant that absolute prices per block (as opposed to price per acre) could match or even better those for the smaller blocks on the river flats. These distinctions must be borne in mind in assessing the average range of proceeds per individual owner. In addition, there is insufficient information for us to construct a complete database of average prices. In some cases we have been unable to establish the number of owners, in others the price is not stated in evidence. That said, we have been able to establish an indicative range for sales with some confidence. We set out below the high, mid and low range for purchase prices per individual owner.

In 1884, Marara Whaipata, the sole owner of Matawhero 5A, sold the 30-acre eight-perch block on the rich river flats for £400 – a clearly significant sum.²⁰⁷ In 1883, part of the

206. Cecil de Lautour to the Native Minister, 30 June 1883, AJHR, 1883, G-2A, p 2 (cited in doc A4(a) volJ p5)

207. Database of the Rongowhakaata blocks, p121. We note that this is the database referred to in app7, doc A24, p196, which was used to compile the table of core Rongowhakaata blocks.

Whatatuna block, again on the river flats, was valued at £55 per acre.²⁰⁸ In 1894, a one-acre three-rood 22-perch part of Whataupoko D sold for £87 15s.²⁰⁹ In 1886, 23 owners of the Arai Matawai block, adjacent to the Waimata River, sold their shares. The area sold amounted to 4214 acres. This was relatively valuable river valley land. It sold for approximately £10,535 with each owner receiving £458, or £2 10s per acre.²¹⁰ These examples are clearly at the top end of the scale. We saw very few of them in our survey.

The 10 deeds in the Waikohu Matawai purchase, conducted by Wilson for the Crown between 1875 and 1883, show that the 65 owners received on average, about £50 each for their shares. Individual payments at this level were more common, particularly if the sellers were the original grantees so that fragmentation had not set in. Having said that, payments at this mid range were still relatively rare.

By far the bulk of owners appear to receive average payments ranging from less than £1 to around £20:

- ▶ The 153 owners of the 16,670-acre block, Maraetaha 2, received £19 each from the Crown in 1895.²¹¹
- ▶ The owners of the 924-acre block Maraetaha 2A, received 12s 6d each from the Crown, at the same time, the land being considered less valuable.²¹²
- ▶ The owners of Umuhaka received £4 7s for their 396 acres in 1884.
- ▶ Aohuna 1 was sold for £153 in 1886. The evidence does not give the number of owners but describes them as ‘numerous’. We take that to mean at least more than 10. If that assumption is right, the average payment could have been no more than £15. We suspect that it was considerably less.²¹³
- ▶ The 100 plus owners of Okahuatui 1A received approximately £1 10s each.²¹⁴
- ▶ Puhatikotiko was progressively acquired over a number of years by different settlers.²¹⁵
 - In 1881, Panapa Waihopi (the chief) sold his shares for £148.
 - In 1882, 69 owners sold for £736, or £10 12s each on average.
 - In 1883, 24 owners sold for £175, or £7 6s each on average.
 - In 1884, 24 owners sold for £186, or £7 15s each on average.
 - In 1885, 23 owners sold for £280, or £12 3s each on average.
 - In 1886, 24 owners sold for £212, or £8 16s each on average.

This pattern of relatively small payouts to all but the largest landowners, and to owners of all but the best land, prevailed in Turanga throughout the main alienation period, that is from the late 1870s to the mid-1890s.

208. Database of the Rongowhakaata blocks, p352

209. Ibid, p393

210. Ibid, p25

211. Ibid, p109

212. Ibid, p111

213. Ibid, p14

214. Ibid, p145

215. Document A26, pp109–110

While these were the formal prices, they did not necessarily represent the sum received in the hands of the owners. Charges had first to be deducted. It was usual practice in Turanga to deduct the cost of survey from the purchase price. For example, Porter reported to the Native under-secretary in 1876:

I have instituted the system of throwing the onus of this [payment for surveys] upon the Natives, by arranging with them the price per acre less the cost of survey. I have found this a very good precaution, as, knowing they have to pay, the Natives are careful not to cause delays, or to lead over wrong boundaries, as is often the case in surveys of Native lands to which the title is disputed, and further, the government incur no risk of loss.²¹⁶

As we have said, survey charges, particularly in the larger, less valuable hinterland blocks, could represent a sizeable proportion of the purchase price.

As to the question of how the money was paid, it is evident from the purchase of Puhatikotiko and Waikohu Matawai, that it was usual for individuals to be progressively bought out over a period of years. In addition, both the Crown and private purchasers frequently adopted the practice of making deposits to 'bind' the purchase.²¹⁷ Section 59 of the 1873 Act made provision for such payments. The rest would be paid off closer to the date of completion of the purchase. Alternatively, as we have said, purchases often followed initial lease arrangements. The final purchase price would have the value of the lease deducted. Either way, relatively small individual prices would often, perhaps usually, be split into two or more even smaller payments spread out over a longer period. Both practices tended to reduce the options available to owners in utilising the limited proceeds they received. There was certainly no pattern of single large payments to communities in a way which would have made utilisation of the purchase price for capital investment possible.

While the evidence is occasionally patchy, the picture that emerges from 25 years of individualised alienation is unarguable:

- ▶ The bulk of the district was sold and purchased by piecemeal purchases of individual interests rather than by communities.
- ▶ Purchases, whether by Crown agents or private buyers, were from individuals or small clusters of owners – probably at whanau level.
- ▶ While there are some examples where individuals received significant sums for their land, in most cases payments are less than £20. This trend towards smaller payments became even clearer as the second generation of owners succeeded to their parents' remaining interests.

Even small payments were often, perhaps usually split, and paid out over a lengthy period.

216. AJHR, 1876, vol2, G-5, pp9–10

217. We note that Crown historian Bob Hayes conceded as much: doc 5.17, p178.

We will address the crucial question of the use that these sums could be put to at the time in our analysis. We will also assess whether the overall prices paid on Maori land compared favourably with prices for Crown granted land.

With that picture in mind, we turn now to attempts by Turanga leaders to introduce recollectivised land management systems.

(7) *Trusts, companies, and incorporations*

While under the 1873 Act the Crown and settlers purchased shares on a piecemeal basis, Turanga leaders sought alternatives that would allow communities to better control alienation and retention of land. We now set out the salient facts with respect to the pursuit of these alternatives. We commence by tracing the development of the schemes lead by Wi Pere, a rangatira from Te Aitanga a Mahaki and Te Whanau a Kai, and William Rees, a liberal lawyer and politician. We then introduce Wi Pere's own 1882 initiative which started out as the Mangatu Trust and became the Mangatu Incorporation.

(a) The Rees Pere trusts: It will be recalled that when the Poverty Bay Commission closed its proceedings in 1873, Wi Pere proposed in court that the returned lands be awarded to the three iwi collectively, rather than to individuals. He proposed the appointment of 12 trustees to administer what would have been a vast estate on behalf the beneficial owners. He was unsuccessful in that bid. Despite the setback, Wi Pere continued to promote the concept of community management. Pere invited W L Rees to move to Gisborne in 1878. Rees had been working with Sheehan for the 'repudiation movement' in Napier and had developed an interest in the title problems the 1873 Act caused for both Maori and settlers.

Rees was prominent throughout the last quarter of the nineteenth century as a radical liberal, parliamentarian, and land developer. He would later chair the 1891 Royal Commission into the Native Land Laws, whose watershed report we have already referred to at length.²¹⁸

Rees and Pere sought to create an alternative mechanism to the atomisation of Poverty Bay Commission Crown grants and Native Land Court memorials of ownership. It will be recalled that community management was not provided for under the 1873 Act.²¹⁹ The trust scheme developed by Rees and Pere was therefore an attempt to fill the gap that the Act had left by allowing for executive management of land by community leaders appointed as trustees in accordance with English law. The community, through trustees, could then decide which land they were happy to sell and which lands they should retain and develop with the proceeds. Rees and Pere wanted the Maori communities themselves to control the pace and

²¹⁸. We discuss Rees's political career in chapter 9.

²¹⁹. We note that the Crown argued that community management was provided for in the 1873 Act, once the owners had been awarded a Crown grant. However, as this could not happen until the ownership lists had been divided into 10-owner parcels, the price of Crown grant was the dismantling of community ownership. Once titles were individualised to that level, there was no longer any point in vesting the land in trusts anyway.

density of Pakeha settlement in an overall strategy. They envisaged a system of close settlement where individual trusts would develop the infrastructure for settlement (roads, bridges, and schools) but retain control of the process. In short, Maori would do the things which up until that point, the settler Government and private corporations had done. By this means, Maori would reap the profits from settlement. Ironically, this was the approach originally provided for in the first Native Lands Act of 1862.

Rees and Pere faced two initial obstacles. First, they needed to convince what were now individual Maori owners on a memorial of ownership, to re-vest their recently acquired individual interests in the new community management structure. Most did, some did not. The trustees paid the consenting Maori landowners a nominal amount. In return, the owners agreed to vest their interests in the trusts to be managed by the trustees. The owners, however, retained an input into the management of their lands. Block committees of owners were established to consult with the trustees. The deed for the Paremata block (outside the inquiry district), for example, specified that while the trustees had wide ranging powers of alienation, they had to obtain the consent of the majority of the block committee before they exercised those powers.

The second obstacle was far more problematic. By 1878, when the trust model was developed, a number of strategic blocks for settlement had already been sold or part sold by individuals. Rees and Pere appear to have adopted the view that because the best lands had been lost to sale, the success of their scheme depended on re-acquisition. The trusts therefore had to buy land back from settlers who had either purchased undivided interests (ie, land held under a memorial of ownership) or who had leased or bought Crown-granted land (awarded under the Poverty Bay Commission).²²⁰ This proved enormously, and in the end, crippling expensive.

According to the scheme, once the trustees had acquired land, it could be surveyed and broken up into small-holdings. These could either be sold or leased to incoming settlers, or developed by the trusts themselves, for Maori occupation. Rees and Pere expected considerable profits from the sale of individual titles within these close settlement schemes. They expected that profit to easily meet the repayment of debt incurred in reacquisition, leaving ample profit for distribution to the Maori owners.

We cannot state with any certainty exactly how much land was vested in the Rees Pere trusts, but there was unquestionably overwhelming Maori support for the idea. Rees later claimed that the figure was 400,000 acres, while Crown witness Michael Macky said that 200,000 acres was a more realistic figure.²²¹ The reality was probably somewhere between

220. Document F11, pp 39–40. Settlers might also purchase from Maori who held certificates of title under the 1867 Native Lands Act

221. Transcript 4.20, p5. Macky suggested that Rees inflated the figure when he was giving evidence before the Native Affairs Committee in 1891, in an attempt to impress on the committee the considerable extent of the trust lands. He noted that in 1880 Rees gave a figure of 200,000 acres for land vested, or under negotiation: doc F11, pp 41–42.

8.5.2(7)(a)

these two figures. We do know the trusts extended north up the East Coast to take in some Ngati Porou lands, and as far south as at least Mahia, where Ngati Kahungunu lands were included.²²² The statistics are more reliable in terms of the inquiry district. Fourteen blocks, or 74,199 acres, were vested in the trusts.²²³ Twelve of these, including the large Whataupoko and Maraetaha blocks, were awarded as Crown grants by the Poverty Bay Commission. This equates to approximately 10 per cent of the inquiry district.²²⁴ Given that the Poverty Bay Commission confined its awards to the fertile flats, those 12 blocks would have been highly valuable.

If we accept the Crown's figure of 200,000 acres for the total trust land, around 37 per cent of the trusts' lands were within the inquiry district.²²⁵ The list of blocks confirms that most Turanga communities supported the initiative.

It was not long, however, before the trusts ran into major difficulties. Within two years, the legality of the scheme came under question. It is worth setting out the facts in detail here. The case involved the 19,200-acre Pouawa block just north of Turanga. All but a few of the 62 owners of the block assigned their interests to the trust by trust deed. The trustees, Rees, Pere, and Hirini Te Kani, intended developing the block and selling a portion of it to a group of settlers from Belfast, who were immigrating to Turanga specifically for this purpose. Seven thousand acres of Pouawa were to be sold at £1 5s per acre to the immigrants, who were also to be offered 5000 acres to lease on easy terms. The remaining 6000 acres of the block were to be reserved for Maori, and for future leases.²²⁶ The difference between the price the new settlers would pay compared to the average price for memorial of ownership land at that time (around three to five shillings an acre if the Crown purchased or five to 10 shillings an acre if settler purchased) demonstrates why Maori were so enthusiastic about the concept. As well as receiving up to eight times the usual profit, they would retain a significant proportion of their land. While the possible benefits were enormous, the success of the scheme depended on the Maori owners being able to deliver a clear title to the Belfast settlers. Given that the Act was fixated on individualisation for sale, the Native Land Court doubted whether private trusts could be lawfully created over memorial of ownership lists. The court sought an opinion from the Supreme Court in respect of one such trust created for the owners of the Pouawa block. Chief Justice Prendergast found that it was illegal.²²⁷ The Act, according to the chief

222. Document A4, pp43, 46

223. Document F11, p43. Note: Macky's figure given here, from his table 1, replaces his figure on p42 of his report.

224. Document H14 (18), p55. The inquiry district comprises 748,558 acres.

225. Document F11, p43. The blocks vested in the Rees Pere Trusts between 22 June 1878 and 29 April 1880 were; Whataupoko (19,200 acres), Kaiparo (431 acres), Te Ahipipi (47 acres), Te Wairau (240 acres), Whauraurangi (147 acres), Whakawhitira (173 acres), Maraetaha 1 (13,798 acres), Pakowhai (4950 acres), Te Kuri (783 acres), Tangotete 1 and Tangotete 2 (77 acres), and Te Karaka (1000 acres). In addition, Matawhero 1 (1716 acres) and Okahuatui 1 (31,637 acres) were vested in the trusts in this period. Rees Pere also acquired minority interests in three other blocks in the inquiry district: Taruheru, Whenuakura, and Pukepapa.

226. CA de Lautour to Native Minister concerning the Pouawa block, 30 June 1883, AJHR, 1883, G-2A, pp1-2

227. *In Re Partition of Pouawa Block*, 8 February 1881 (doc F33, vol10, pp3416-3417)

justice, only provided for Maori title to be sold or leased. There was no provision for land to be vested in trust. Without express provision it could not be done.

The Belfast settlers waited in Turanga for three months for the situation to be resolved. The chief justice's decision, on 8 February 1881, clarified the position. The settlers finally left Turanga to settle elsewhere in the colony because the trust was invalid and clear title could not be given by the trustees. The loss of these settlers was a blow from which the scheme never really recovered. Rees and Pere never succeeded in attracting any other settler groups to Turanga for close settlement. That must have been, in part, because the market now (justifiably) doubted the ability of the schemes to deliver within the law.

Rees clearly had some idea, even before the *Pouawa* decision, that there may have been some legal difficulties with the use of the trust mechanism in respect of Maori customary land. In 1880, he promoted the East Coast Maori Land and Special Settlement Bill. The Bill was aimed at removing any doubts in the law. In what would have been a first for native land legislation, it provided for a sophisticated management structure and clear lines of accountability between elected district-wide boards, block committees, and owners.²²⁸ The management structure cleverly emulated traditional leadership forms. District-wide boards would involve leading rangatira of the district. Block committees would comprise hapu rangatira and whanau heads. They reflected the komiti in operation in the 1870s. Crucially, the committees and boards would effectively bypass the Native Land Court just as the komiti had sought to do.

The Bill was introduced in June 1880, with petitions of support from Turanga and East Coast Maori, but was defeated by Rees' political opponents. As a result, Rees and Pere had now to focus on the Crown granted Poverty Bay Commission lands. These blocks had not been caught by the 1873 Act and were therefore unaffected by the *Pouawa* decision of the Chief Justice because they had been Crown granted and were no longer customary land. For this reason, it was still possible to form valid trusts in respect of them. As we have said, the problem was that much of this land had been part sold. This was the flat, fertile Poverty Bay flats and had therefore been the first land to be sold. The cost of re-acquisition of these valuable blocks would ultimately prove as big an obstacle as the legal difficulty arising from the *Pouawa* case. For present purposes, it is sufficient to record that Rees and Pere were forced to focus on these lands because of the invalidity of the *Pouawa* trust.

Neither Rees nor Pere had sufficient capital to bankroll a reacquisition programme on the scale necessary for the scheme to succeed. This meant that the trusts needed to incur significant debt just to get started.²²⁹ This was done by mortgaging the trusts' land assets. Rees and Pere were then required to service these reacquisition mortgages well before the trusts

228. The East Coast Settlements Bill, 1880, p4 (doc A4(a), vol P, p29)

229. Document F11, pp63–64. The trusts dealings with James Woodbine Johnson, with regards Pakowhai, Maraetaha, Te Kuri, and Tangotete 1 and 2, give some insight into the complicated transactions that were common. Johnson was to give up his interests in Pakowhai, Tangotete 1 and 2, and part of Te Kuri and pay £3,000 in return for 10,700 acres of the Maraetaha and Te Kuri blocks. The trustees were then, within two years, to repurchase the lands they had sold to

8.5.2(7)(b)

had achieved cash flow, let alone profit. It was not long before the mortgages could not be serviced.

In 1880, the cornerstone 19,200-acre Whataupoko block on the Turanga flats was sold in a mortgagee sale. Rees believed that this block had the potential to resell for £100,000 if properly subdivided and in a healthy market.²³⁰ We do not know the price paid, but it was undoubtedly far less than this. Other sales followed. Pakowhai was also sold in 1880 for £10,000, and other sales of smaller acreages followed in Matawhero 1 and Te Karaka.²³¹ All sales were to meet repayment or other contractual obligations. With the loss of these lands, the entire close settlement scheme was obviously in difficulty.

(b) The New Zealand Native Land Settlement Company: By 1881, it was clear to Rees and Pere that not only did they need a new structure to manage the lands the trusts had acquired but they also needed access to more capital. Rees and Pere wound the trust up and formed a joint stock company. The New Zealand Native Land Settlement Company combined Pakeha investors' money with Maori land. It therefore represented at least a partial move from debt finance, to equity finance. The cash investors put up capital, expecting in return not only to be paid dividends but to be given a substantial say in the management of the company. The capital of the company was to be half a million pounds, in 100,000 £5 shares. Maori were to receive 70,000 fully paid shares, known as the 'original shares', and cash investors were to receive 30,000 shares, the 'capital shares'. Holders of 'capital shares' were to receive their dividend first, at 8 per cent on their paid-up capital. If there were sufficient profits, Maori would receive a preference dividend of up to 8 per cent. The 70,000 original shares could constitute either full or part payment for the land that Maori invested. Maori were offered a choice as to how they received their share of the profits. It seems that in most cases they were to be paid two-thirds of the profits on a particular block.²³² The management of the company was to be in settler hands, though four of the eight promoters of the company were East Coast Maori (Pere, Major Ropata Wahawaha, Henare Potae, and J A Jury from the Wairarapa). The foundation board of directors consisted of a separate group of eight, again including Pere and Wahawaha.²³³

Footnote 229 continued

Johnson, for £40,000 . . . By these means, Rees and Pere effectively partitioned 29,482 acres from the total 74,199 acres of land repurchased by the trust within the inquiry district. The partitioned land was then transferred back to the settlers, as the price for their co-operation. With the repurchase of the remaining interests, the trust was left with 44,717 acres. The 29,482 acres conceded to Europeans included 12,000 acres in Okahuatui. Okahuatui was category 2 customary Maori land, vested in a memorial of ownership by the Native Land Court.

230. Document F11, p56

231. Ibid, p72

232. Ibid, p96

233. Ibid, pp94–95. Rees was not one of the foundation directors, and appears never to have been an officer of the company, though he clearly remained associated with it in some capacity.

Turanga Maori continued to support Rees and Pere in the promotion of this new vehicle, even though the introduction of Pakeha capital diluted the degree of Maori control. The company, like the trusts, promised close settlement of the region, with small farms, residential sections, and public works. Rongowhakaata vested the 4,950 Pakowai block, along with two smaller blocks, into the company. Ngai Tamanuhiri vested Maraetaha 2 in 1882. Te Aitanga a Mahaki vested approximately 200,000 acres into the Settlement company, which included the lease of 90,000 acres of Mangatu 1. Te Whanau a Kai vested the 20,000-acre Okahuatua 2.

In an interesting sequel to the Pouawa trust story, the New Zealand Native Land Settlement Company acquired the land from the owners in 1882 after the failure of the Belfast settlers scheme. By 1883, the solicitor De Lautour described the company's efforts at subdivision and sale of Pouawa in these terms:

The company has sold, in areas from 160 to 800 acres about 5000 acres of Pouawa at £2.5s per acre. It has in hand 7000 acres, worth £2 per acre . . . It has also the Coast block, 5986 acres, worth at least £2.10s per acre, which it is not prepared to recommend the Natives to deal with at present.²³⁴

Thus, Pouawa did eventually succeed and at better prices than those offered by the Belfast settlers to the Rees Pere trusts. But this was the last significant asset sold by the company and unlike the trust model, in order to secure these true market prices, the original Maori owners were required to relinquish their title to the company and give up any control over decision making within it.²³⁵

The company also ran into both legal and financial difficulties. These were to have long-term impacts for both its Maori and its settler investors, and we discuss them further in chapter 9. The company, like the trusts, incurred large debts, this time to buy back lands sold by the trusts when they were wound up. It too failed to secure the passage of legislation, which would have provided for a statutory community management scheme. It would also have removed the necessity to construct a 'sale' to the company in order for its title to be valid. In the end the company was overtaken by circumstances beyond its control. The international economic downturn bit into the company's profitability in 1885, sales of company lands dried up, and it went into receivership in 1888.

The Bank of New Zealand Estates Company (a receiving division of the bank) stepped in and announced an auction of lands over which the bank held security on 16 October 1891. By a series of legal manoeuvres, to be discussed in chapter 9, Rees sabotaged the auction, so that less than 40 per cent of the land offered was sold. Both Maori landowners and settler investors

234. Cecil de Lautour to the Native Minister, 30 June 1883, AJHR, G-2A, 1883, p2 (cited in doc A4(a) volJ p5)

235. *Wi Te Ruke and Others v the New Zealand Native Land Settlement Company* [1884] 2 NZLR 378 (doc F33, vol10, pp3429-3432)

lost heavily however: 36,300 acres of East Coast Maori land was sold in part recovery of the bank's debt.²³⁶

(c) The Carroll Pere trust and the East Coast Native Trust Lands Board: In 1892, yet another trust was formed, by agreement with the Bank of New Zealand Estates Company, under the trusteeship of Wi Pere and James Carroll, member of the House of Representatives for Eastern Maori. The new East Coast Trust took over the lands held by the estates company, and a new mortgage to the company to cover its remaining debt. The trust struggled on through the 1890s, amassing more debt through interest charges and exceptionally high legal costs attributable to the unprecedented level of litigation over trust lands in the Native Land, Validation, and Supreme Courts. (We discuss these aspects further in chapter 9.) Eventually, the Government intervened, passing the East Coast Native Trust Lands Board Act 1902, which vested the Carroll Pere trust lands (98,299 acres) in the new East Coast Native Trust Lands Board.

We set out the story of the next 50 years of the East Coast trust lands in chapter 9. It is sufficient for present purposes to record that all of the lands held by the Carroll Pere trust, came ultimately to be vested in the East Coast Native Trust Lands Board, administered by a commissioner, and taken out of Maori control. Thus, the experiments with trusts and settler joint ventures, and the attempts to develop statutory management systems, all failed for one or more of four reasons: the economic downturn of the 1880s, under-capitalisation, legislation which enabled the erosion of titles through individual sales and the lack of political will to support community land management mechanisms. That is, all experiments failed but one. We turn now to consider the establishment of the Mangatu Incorporation.

(d) The Mangatu Incorporation: In 1881, Wi Pere took the large Mangatu block to the Native Land Court for determination as to title. The judges awarded Mangatu 1 (100,000) acres to 106 owners. Mangatu 3 (3680 acres) to 67 owners, and Mangatu 4 (6000 acres) to 98 owners.²³⁷ All three blocks were made inalienable, except by lease for up to 21 years. We address questions relating to the title investigation itself in chapter 14. Here, we deal only with the creation and operation of the incorporation mechanism itself.

At court, Wi Pere requested that the block be vested in 12 trustees who would manage the land for all the owners. This time, the judges, Heale and O'Brien, were sympathetic.²³⁸ In their view, titles that had long ownership lists were 'destroying the value of the lands of all of this district'.²³⁹ Since as we have said, the law provided no statutory management structure, the

236. Document F11, pp174–175

237. Document A26, p154

238. We note that this is the same time that the Legislature had thrown out Rees' Bill. This indicates that some judges at least were sympathetic to the idea of community management.

239. Gisborne minute book 7, pp 257–262 (doc A17, p 412)

court could not immediately vest the land in a trust. Instead they gave Pere time to go through the laborious task of collecting the signatures of all 106 owners, on a voluntary deed of trust. Even then, as the *Pouawa* case showed, the position of the true owners was precarious. They relied upon the ‘trustees’ adhering to the moral if not legal obligation of their trusteeship. The judges, aware that the system in place was working against the interests of Maori owners, were prepared to support the creation of a community management system by turning a judicial blind eye to the existence of the 106 real owners of the land. But Judges Heale and O’Brien were also very aware of the dangers. They warned the owners that if the inalienability clauses on the Mangatu titles were removed, ‘the estate would then absolutely belong to the 12’, freed, in law, of any trust obligation.²⁴⁰

The situation was clearly anomalous. Since the 12 were formally recorded on the title as owners, later judges refused to recognise any other interest holders for any purposes. There could for example be no successions to the interests of the other 106 ‘owners’. Thus, Mangatu faced precisely the same problem that the Rees Pere trusts had faced. Without some sort of statutory intervention to ratify it, the ‘trust’ would not survive. Pere who was now a member of the House of Representatives, adopted a novel strategy. Instead of pursuing a change to the law having wide application – a strategy that had failed in 1880 – he promoted a private member’s Bill applying to Mangatu only, and on a one-off basis. The Bill, if passed, would allow all the owners to hold the land in common. The owners could then elect a block committee of seven to manage the block.²⁴¹ Despite opposition, the strategy worked. The Bill was passed on the assurance that Mangatu was an exceptional case. The passage of the Mangatu No 1 Empowering Act 1893 therefore created the first Maori incorporation officially sanctioned by law.²⁴²

In 1894, the Mangatu Incorporation vested 80,222 acres of Mangatu 1 in three trustees, one of whom was Henry Jackson, the Hawke’s Bay commissioner for Crown lands. The inclusion of the commissioner as trustee gave the corporation an advantage. He was legally able to borrow money for survey and subdivision while the incorporation, being a Maori entity, could not. It was presumably believed that only borrowing under the tutelage of a Government official should be allowed. A mortgage of £50,000 was duly obtained. Mangatu 3 and 4 (3680 acres and 6000 acres respectively) were added to the incorporation in September 1899 and the trust one year later. Mangatu 1, 3, and 4 were effectively managed as one entity from this date.²⁴³

By 1908, the Mangatu block was almost entirely intact and being administered as a single commercial entity. Having been vested as a trust immediately, and having a precise statutory

240. Heale and O’Brien, Gisborne minute book, 7, pp 257–262 (doc A18 (a), vol10, pp6361–6390, pp6383– 6387) as cited in doc A17, p413; see also doc A26, pp151–156

241. This provision survived in section 4 of the Mangatu No 1 Empowering Act 1893.

242. The bill was a private one, sponsored by Pere, Rees and Carroll, and introduced by Parata, MHR for Southern Maori.

243. Document A18, p158

framework within which to operate, it suffered none of the problems of the Carroll Pere trust or its predecessors.

8.5.3 A summary of phase 1

Looking back to the story of land alienation and retention, during the period 1869 to 1908, a number of clear themes emerge:

- ▶ Two-thirds of the Maori land in the district had been purchased by the Crown or settlers by the end of the period.
- ▶ The bulk of that land had been acquired piecemeal under memorials of ownership at relatively low prices with purchase being spread over a number of years in most cases.
- ▶ Many Turanga owners vested their lands in trusts in an attempt to control the sale and retention process.
- ▶ Some of the land had been sold by the trusts or the New Zealand Native Land Settlement Company because excessive debt, due to the cost of land repurchase, low market credibility, or poor market conditions forced them to sell off strategic assets to survive.
- ▶ Even with these problems, a relatively large area of land remained in Maori ownership under the trusts when compared with land retention elsewhere in the country, but that came to be lost in two large debt recovery sales. The first was in 1891, the second in 1904 to 1905.
- ▶ Even though the Mangatu statutory incorporation was introduced on a one-off basis, in hindsight, it represented a sea change in Maori land administration. While Mangatu was relatively young at the end of this period, it exhibited none of the problems faced by other collective alienation and retention strategies. Nor was the cohesion of the collective being undermined by piecemeal purchase from outside. Unlike memorial of ownership interests in land, individual shares in the incorporation could not be sold.

8.5.4 The second phase: control of land in Turanga, 1908–69

(1) *Themes*

Three themes characterise this phase in Turanga. First, the introduction of State-controlled alienation through the district Maori land boards. Secondly, the strange phenomenon of uncontrolled land retention. That is, the fragmentation and fractionation of remaining individualised land holdings to such an extent that effective control of titles was no longer possible, turning the land in some cases in to a liability rather than an asset. Here we look to various Government policy approaches to the problem, culminating in the Manutuke consolidation scheme. The third theme is that of controlled land retention either by, or on behalf of, Turanga Maori. That is, the development of Maori incorporations, and the operation of the

East Coast Trust which managed both the lands vested in it by the Carroll Pere trust and, from 1917, the Mangatu Trust lands.

We begin our survey of this period with a summary of the important review of Maori landholdings by the Stout–Ngata commission as they relate to the East Coast. Their reports give us a benchmark for assessing the position in Turanga at the start of the century.

(2) *The Stout–Ngata commission*

In 1907, a commission comprising Chief Justice Sir Robert Stout and junior Maori member of Parliament Apirana Ngata was appointed to inquire into the ownership and occupation of all Maori land in the North Island, to determine which lands should be set aside for Maori and for their descendants, and which might be set aside for European settlement. Its ‘fundamental purpose’, as Dr Loveridge has observed, was in fact to ‘identify with precision which Maori lands were available for settlement by Europeans’.²⁴⁴ Only 7,465,000 acres remained in Maori hands nationwide by this time.²⁴⁵ The Crown had returned to an active policy of Maori land purchase in that year and the commission was to provide guidance to the Government in pursuit of this new policy. The commissioners visited different parts of the country, holding a total of 48 hearings with landowners from which they assembled data on Maori land ownership.²⁴⁶ They produced a general report, which identified at a national scale, the acreage that might be available for settlement by sale or lease and the area that ought to be retained by Maori for their own purposes. By December 1909, the commissioners had identified 943,521 acres as being suitable for general settlement nationally (that is for sale or lease) and 867,481 acres for Maori occupation.²⁴⁷

The national report was released in July 1907. A further 41 district reports were released over the next 20 months. The commission issued two reports on Cook County (an area much larger than the inquiry district but inclusive of it). The first was released in February 1908, the second at the end of that year.²⁴⁸ Claimant historian David Alexander noted that even with these two reports, the commissioners’ assessment of Maori-owned land was not complete. Over 50,000 acres was not reported on.²⁴⁹

The report for Cook County differed from most other reports in terms of its recommendations. On the question of the state of Maori land holdings in Turanga, the commissioners took the view that it was not appropriate for Cook County to follow the national trend. The

244. Donald Loveridge, *Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952*, Waitangi Tribunal Rangihaua Whanui Series, 1996, pp50–52 (doc A18, p200)

245. ‘Final Report of the Native Land Commission on ‘Native Lands and Native Land Tenure’, AJHR, 1909, G-1G, p3 (doc A11(a), p3041)

246. Ibid, p3041

247. Loveridge, *Maori Land Councils and Maori Land Boards*, pp59–60. Loveridge stated, that as far as can be determined, only 347,954 acres of Maori lands were vested in land boards under part 1 of the 1907 Act (which provided for sale or lease of land not ‘required’ by their owners) and its amendments.

248. Document A11, p8

249. Ibid, p8

8.5.4(3)

commissioners found that the Crown and settlers had already purchased 946,600 acres, or 71.7 per cent of the county. Maori owned land, on the other hand, comprised 372,400 acres, or just under a third of the total acreage. As much of this was leased to settlers, Stout and Ngata did not recommend that any further Maori land in Cook County be vested in the land board to be sold or leased. Approximately 30,000 acres was recommended to be vested for the purpose of Maori occupation. The commissioners expressed concern:

Farming by Maoris is not carried on the same scale and with the same heart as in the Waiapu County. It is not that the Maoris lack the capacity or desire to farm their lands, but they have been depressed by constant litigation, extending over twenty years, which resulted in their losing the control of nearly 400,000 acres of land. They seem to be dispirited and lacking in initiative. At Tolaga Bay, in the Puninga, Maraetaha, Mangatu and Waimata districts, may be seen the small beginnings of a pastoral industry, which should be fostered even at this late day.²⁵⁰

The work of the commission demonstrated some of the tensions present during the second period of Turanga's history. On the one hand, consistent settler demand for purchase and a growing resentment of Maori 'landlordism' continued. The Government responded to its voters by recommencing purchase operations. On the other hand, there was growing official unease at the development of two potential problems. First, the possibility that a significant proportion of Maori would be rendered landless in the process. Secondly, the possibility that retained lands would become unusable through title fractionation. Either way, the owners would become a burden on the state. Stout and Ngata were clearly concerned that this did not happen. They argued in addition that it was the job of the State to provide agricultural education in schools, and for 'selected Maori youths' in State experimental farms.²⁵¹ In their view, there was an 'urgent need of the services of a competent instructor in agriculture'.²⁵² The influence of Carroll and Ngata at the turn of the century and thereafter, saw the law finally accept community land management. But Maori access to finance was still tightly controlled, and development by whanau and incorporations remained difficult.

(3) *State-controlled alienation: the land councils and boards*

The Liberals' Maori land purchase programme of the 1890s, which resulted in the alienation of 2.7 million acres in fewer than 10 years, led to Maori disquiet throughout the North Island. The Maori Parliament's petition to Queen Victoria in 1897 sought legislation to ensure a complete halt to Crown and private purchase, and recognition that Maori should retain and use their remaining lands.²⁵³ A compromise was eventually reached between the Government

250. AJHR, 1908, G-iii, p 6 (doc A11(a), p 3015)

251. AJHR, 1907, G-1C, p 22

252. AJHR, 1908, G-iii, p 6 (doc A11(a), p 3015)

253. Loveridge, p 12

and Maori leaders which led to a brief respite in the Crown's purchase programme. From 1900 the Crown made provision for the control of alienation (particularly leasing) through new statutory boards. First it established Maori land councils then, when the councils met with only a partial response from Maori, Maori land boards. In both cases, Maori participation was limited.

In 1900, the Crown passed the Maori Land Administration Act. The councils it created were to consist of between five and seven members, at least three of whom had to be Maori. The councils were concerned solely with leasing Maori land. They were authorised to lease or mortgage the lands vested in them and could supervise the lease process. They could also issue papakainga certificates for lands deemed essential for Maori owners' future needs. They could not, however, sell.²⁵⁴ The Native Land Court retained authority over sale.

It took a while for the scheme to get started. Five districts were established relatively quickly, but they did not become fully operational until 1903. There were two reasons for this. First, they were not adequately funded. Secondly, Maori generally chose not to vest their land in them, but rather used the councils 'as an agent for private dealings'.²⁵⁵ By December 1905, for example, 1621 acres of Te Aitanga a Mahaki land had been vested in the Tairāwhiti Maori Land Council and leased to settlers. Of these, approximately 824 acres from Hangaroa Matawai B2, Hauomatuku 2A, 2B, 8A, 9B, and 9C were part of the inquiry district.

The Maori Land Settlement Act 1905 introduced significant changes. First, the councils were replaced by land boards. The number of members was reduced to three, with Maori participation being similarly reduced. One out of the three members was now required to be Maori, although that requirement was abolished in 1913. The Tairāwhiti Maori Land Board, with jurisdiction over Turanga, was established in 1906. Colonel Porter was appointed president, and Alex Keefer and Otene Pitau members. The *Poverty Bay Herald* was enthusiastic. Examples were not wanting, it said, of success stories among Maori farmers. What was needed was for Maori to 'obtain from the Government cheap monetary assistance in the same manner and on somewhat similar terms to European property holders'.²⁵⁶

The board effectively managed leasing in the district. Tairāwhiti was one of two land districts selected to test the 'efficacy' of compulsory vesting of Maori land in the board. The quid pro quo was that these two districts were exempted from the resumption of Crown purchasing until 1 January 1908. Over the next four years (1906 to 1909), 85,185 acres were vested in the Tairāwhiti Maori Land Board.²⁵⁷ By 1907, the board had arranged 70 leases (18,219 acres) of Te Aitanga a Mahaki land.²⁵⁸ A further 90 leases of 10,919 acres were added the

254. Loveridge, pp 21–27

255. Colonel Thomas Porter, cited in RJ Martin, 'Aspects of Maori Affairs in the Liberal Period', MA thesis, Victoria University of Wellington, 1956 (doc A18, p196)

256. *Poverty Bay Herald*, 26 June 1906, Archives NZ, MA1 1906/251 (doc A18, p232)

257. Loveridge, pp 44–5

258. Document A18, p 234

following year.²⁵⁹ This was a very high proportion of Te Aitanga a Mahaki lands. Porter reported in 1907, that the board had approved 238 leases in its district.²⁶⁰ The board was, he considered, a success. There were fewer complaints from Maori and less litigation.

Leasing enabled Maori to retain their land while at the same time paying the rates and getting rent. The amount each individual received was not large. It depended on the class of land (rents were less for steep hill country) and the number of owners. The average annual rent has been assessed, on a national basis, at five shillings per acre. However, many owners in Turanga received considerably less than that. The owners of Whareongaonga c4 and c5, for example received 2s 9d and 2s 4d respectively, in 1935 and 1936.²⁶¹ The annual rental of the 548-acre block Puninga 1 was £82. Each of the five owners received approximately £16 8s. The nine owners of Puninga 6 received, on average, £19 15s per annum for their lease.²⁶² Even though most owners had interests in several blocks, the income they received was not large.²⁶³

The overwhelming majority of Turanga lands were leased to Pakeha farmers. But some were leased to Maori. A number of Ngai Tamanuhiri individuals for instance applied to the land board; Arawhita Pohatu leased Puninga 12 (608 acres), Tu Rewi leased 250 acres of Puninga 11; they cleared land and ran sheep.²⁶⁴

The land boards' role changed under the Maori Land Laws Amendment Act 1908. Supervision of land sales was transferred from the Native Land Court to the boards (s7). Then, under the Native Lands Act 1909, all existing restrictions on the alienation of Maori freehold land, whether imposed by a Crown grant, certificate of title, or court order, were invalidated (s207). Instead, a new set of statutory restrictions were laid down.²⁶⁵ The boards were then required to check proposed alienations in very much the same way as the trust commissioner had in the previous century. They had to ensure that the instrument of alienation had been properly executed, that it was not contrary to good faith and equity, that the owners would not be rendered landless as a result of the sale, that payment was adequate and had been paid (s220).

The difference was that as with leases, the boards acted as compulsory agents for the owners in all alienations, if blocks had more than four owners. They did not just supervise the transactions, they stood in the shoes of the owners, even though, as we have said, only one of the board members was Maori and that person was not chosen by the landowners in the particular transaction. Under section 227 of the Act, no lease could be for more than 50 years.

259. Document A18, p238

260. Ibid, p235

261. Ibid, p113

262. Ibid, p113

263. Document A26, pp501–504. Rupi Wawatai (a widow with four children) wrote a series of letters to the Native Minister between December 1927 and February 1932, which show the struggle one family had to survive on an inadequate income and a small section of land. Mrs Wawatai's rents from 10 blocks amounted to only £19 5s a year, plus £16 which she received from her shares in Mangatu. Because of her land interests, her pension was reduced from £130 to £49, hence her appeals to the Native Minister.

264. Document A35, p120

265. Loveridge, pp82–83

This included any term of renewal. While this ensured ongoing income without loss of title, it meant in practice that owners lost control over and access to their lands for nearly two generations. A lease entered into in 1908 and then renewed might not revert to the owners until 1958.

By then, post-Second World War, the position for both lessors and lessees was very different. Land values were rising. Maori owners wished to resume control of their lands. Tenants began to neglect maintenance as it was clear that leases would not be renewed. A survey in 1966 found that only 6 per cent of leased land was being well farmed; 70 per cent was poorly farmed and 24 per cent had reverted to scrub. Thus, owners faced immediate costs when they resumed leased farms to catch up with maintenance and return them to production.

Maori landowners were also grappling in the first half of the twentieth century with the problems associated with the lands they were actually occupying. Maintaining control of these lands was the major challenge facing Maori communities. We turn now to the problems they confronted as titles atomised and as they sought to utilise the now legally sanctioned trusts and incorporation mechanisms.

(4) Uncontrolled retention: fragmentation, fractionation and consolidation

(a) Purchase and partition: Despite the various attempts to regulate the sale and lease of Maori land, land holdings were increasingly subdivided. Each partition created its own list of individual owners who could alienate, but always in respect of ever decreasing acreages. Years of uncoordinated sales of undivided interests rapidly produced a patchwork of small blocks as buyers (whether the Crown or settlers) went to the court to have their interests defined and partitioned out. We have already mentioned the purchasing activities of James Cattell in Turanga. Cattell bought interests in four blocks: Rangiohinehau, Tarewauru, Tiraotane, and Ranginui, in the 1880s. Of the 11,000 acres contained in these blocks, Cattell acquired close to 9000 acres worth of individual interests. He bought small numbers of interests at a time (anything from two to 12) and partitioned as he bought. At the end of the 1880s, the land he had acquired had been partitioned seven times. By the mid-nineties, it had been divided approximately 20 times and by the 1920s, the blocks had been divided into 45 sections. This pattern was repeated through the district as a result of both Crown and private purchase.

The land was subdivided mostly in response to sale. The fractionation of undivided interests within titles, however, was the result of individualised succession.

(b) Succession: The Native Land Court was responsible for determining succession to Maori land. In the vast majority of cases, Maori owners died intestate, leaving the court with some discretion as to who should succeed. At a very early stage, Chief Judge Fenton, in the *Papakura* case, established the principle that all children were to inherit equally the shares of both their parents.²⁶⁶ The equality rule meant that as subsequent generations succeeded,

266. Tom Bennion and Judy Boyd, *Succession to Maori Land, 1900–52*, Waitangi Tribunal Rangahaua Whanui Series, 1997, p5

8.5.4(4)(b)

land interests became increasingly fractionated. Once successions commenced, interests had necessarily to be reduced to a fraction of a share.²⁶⁷ The trend continued into the twentieth century. Okahuatū 1A2, for example, was a 42-acre block that belonged to 69 owners, most of whom owned one share. By 1992, there were 928 owners, most of whom owned less than a hundredth of a share.²⁶⁸

Chief Judge Fenton's principle was not consistent with tikanga Māori. By tikanga any right to land required occupation in order to take effect. Descent was insufficient on its own. By this means, tikanga prevented the fractionating effect of devolution by descent alone. By the 1880s, however, Māori had themselves come to adopt the equality principle as their own. The result was a steady increase in the number of individual interests in Māori titles.

The problem was compounded by the fact that, in the twentieth century, the Māori population began to increase rapidly. Consistently higher birth rates and a gradual decline in mortality had a dramatic effect. As the numbers of owners multiplied in successive generations, their shares fractionated proportionately. At the same time, the land continued to be partitioned. FL Broderick, a member of the Tairāwhiti Māori Land Board, wrote of the impact partition had on East Coast Māori, in 1914:

The great bar to practical settlement is the partition of the land . . . This has the effect of allocating perfectly useless sections of land to each Native or group of Natives. Many of these are several miles long and only a few chains wide. The mere survey of them costs more than the land is worth, and the Natives cannot let or sell them for anything like the price that their share of the block should produce. This provides the chance for the Native land speculator who, having secured a narrow strip or two across nice blocks and thus spoilt them for anyone else, can gradually acquire intervening areas at a price depreciated below its true value and afterwards sell the block at a goodwill . . . The result is the Native owns an area of land of such a shape and generally without access that it is nearly valueless to him either for sale or settlement.²⁶⁹

The combination of these two forces – the fractionation of undivided interests in smaller and smaller shares, and the decreasing acreage of titles due to partition – made the management and control of Māori land increasingly difficult. Small blocks were marooned without legal access. Sale or lease, as Broderick indicated, was unviable, nor was there any prospect of farming single allotments. Individual owners held small and scattered interests in residual blocks partitioned out from earlier sales. The only solution was to attempt to reconstruct viable titles out of these scattered remnants. This solution came to be known as consolidation.

267. Gisborne minute book 25, 1896, pp 212–3

268. Document A26, p 382

269. Broderick to Under-Secretary of Lands, Archives NZ, AWBN7611 W5021 1913.231 (doc 18(a), vol 12, pp 8145 – 8161 (cited in doc A18, p 348))

(c) The Manutuke consolidation: Consolidation was pioneered by Apirana Ngata on the east coast at Waiapu. The purpose was to encourage owners to exchange their uneconomic small interests held in numerous scattered blocks and consolidate them into a larger whanau holding that could be developed productively.

Consolidation schemes were provided for under part 18 of the Maori Affairs Act 1953. They were, however, implemented in only a few districts. In Turanga, a consolidation scheme was implemented in Manutuke.

The Manutuke consolidation scheme involved both Ngai Tamanuhiri and Rongowhakaata. It was initiated by Judge Smith in 1958, at a meeting of the people of Manutuke, was approved by the Minister in 1959, and was signed off 10 years later. In 1957, in his judgment on the Poho 1B block, the judge strongly indicated the need for change. The land, he said:

Is in a district where there is a large acreage of Maori land in blocks of various shapes and sizes in which the Maori owners have interests scattered in various places all over the locality. In my opinion there is no locality in this Maori Land Court district where a scheme of consolidation or repatriation is more necessary . . . so that Maori owners may make profitable and economic use of the lands for housing, cropping and other purposes.²⁷⁰

Initially, the scheme involved 62 blocks, containing 543 subdivisions (12,588 acres), but more were added. The final scheme was prodigious. It covered 22,345 acres, held in 539 titles made up of 16,838 separate individual interests.²⁷¹

In the first few years of the consolidation, project data about titles was collected, outstanding charges such as survey liens summarised, people were 'sorted' into family groups, spokespeople were appointed, successions arranged so they were up to date, and more meetings held. Finally, the work of shifting owners, on paper, from one block to another could begin. Each person's shareholding was given a monetary value for the purpose of the exchange.²⁷²

The scheme covered Paokahu 1 and 539 blocks south of Gisborne near the Waipaoa River, extending southwards to Manutuke and nearby districts. Ngai Tamanuhiri lands which were involved in the scheme were grouped into nine new blocks. One of these, Whareongaonga 5 (4832 acres), included some 47 Whareongaonga subdivisions and 12 Puninga subdivisions.²⁷³ The scheme also included Maraetaha 1D; Maraetaha 2, sections 3 and 6; Rangiohinehau and Tarewauru; Pakowhai 1; Te Kuri 1A; Te Kuri X71; Wherowhero; and Maraetaha 795.²⁷⁴

Though the scheme could not proceed without community support, for some Ngai Tamanuhiri, and their Rongowhakaata kin, the lengthy process of consolidation at Manutuke

270. Judgment on Te Poho 1B (doc A31 (a) p171–172)

271. Document A11, p 44

272. Ibid, p 46

273. Document A35, pp145–8

274. Ibid, pp146–8

8.5.4(5)

was distressing.²⁷⁵ Almost inevitably, people with strong whakapapa associations to particular lands lost their interests there, while others with less strong links found their interests transferred in. A number of Ngai Tamanuhiri, for example were moved out of Muriwai, as their interests were concentrated in other blocks, while some Rongowhakaata gained shares there.²⁷⁶ Arai Matawai, the only block awarded collectively to Rongowhakaata in the 1870s, was also affected. Consolidation for this block saw 806 owners (1502.802 shares; 18.2 per cent) moved out and relocated in other incorporated blocks, or family blocks. The people believed that this was the price which had to be paid to repair disintegrated titles and make them useful again. Ironically, though the root cause of the problem was the individualised title system introduced by the Crown, Turanga Maori communities had to provide their own solution. There was no question of Government-sponsored purchase of replacement lands to alleviate the problem.

As well as consolidation, the Government tried other methods of control. For example, partitions into interests worth less than £25 were banned under the Maori Land Act 1953. Secondly, a scheme of compulsory acquisition of uneconomic interests (variously defined over the years as valued £10, £20, and then £50) was introduced. In the end they suffered from the same conceptual flaw that beset the consolidation experiment. After all the pain and suffering created by reconstructing titles and restructuring communities, the problem returned once the next generation of successions had been processed. There simply was not enough land and there were too many people. No matter how the cake was cut, there was not going to be enough to go around. As Professor Murton demonstrates so effectively in his report on the economic and social experience of Te Aitanga a Mahaki, by the Second World War, Turanga Maori had no choice but to transit from tangata whenua to urban wage labourers in Turanga and elsewhere.²⁷⁷ Remaining on the land was, for most, no longer an option.

(5) *Controlled retention: the incorporations and trusts*

In the early part of the twentieth century, some Turanga land remained in direct Maori control. By far the greater amount however passed into the control of various statutory authorities which administered the land on behalf of Maori. The Maori land boards, the East Coast Native Lands Trust, and (from 1917) the Mangatu trust were all administered largely by Pakeha. Owners' committees played a limited role in respect of the trusts but the financial difficulties which beset the predecessors to the East Coast Native Trust meant that for the first 50 years, lands which remained in Maori ownership were effectively in statutory receivership.

(a) Incorporations: The Native Land Court Act 1894 made general provision for Maori incorporations for the first time. However, Maori did not take advantage of this provision

275. Document A35, p166

276. Ibid, p162

277. Document A26, p433

until the early twentieth century. Given that the new incorporations were not empowered to raise finance, there was little incentive to do so. The situation changed in the first few years of the new century. In 1903, the Native Land Laws Amendment Act enabled Maori to borrow against livestock, chattels and land.²⁷⁸ In 1905, the Maori Land Settlement Act allowed public sources such as the State Advances Office to provide Maori with 10-year loans at 5 per cent interest, secured on a third of the unimproved value of the land (s18). At the same time, Maori land was protected from foreclosure. If the loan could not be repaid, the State Advances Office or the Public Trustee would lease the lands, collecting rents until the loan was paid off.²⁷⁹

From this time, a number of incorporations were formed in Turanga. Between 1900 and 1910, 48 Te Aitanga a Mahaaki incorporations were established, containing a total of 26,807 acres.²⁸⁰ Most of the blocks involved were not currently being utilised: clearly the owners saw incorporations as the best way of securing economic benefit from their lands. WL Rees took most of the early applications to incorporate before the court. Thirty-three of these were under lease by 1907, with the Tai Rawhiti Land Board administering most of them. Most were not big blocks. Rangatira 3A3B, for example (just outside the inquiry district), was incorporated in 1916. It contained 393 acres.²⁸¹ Hauomatuku 53B was incorporated in 1919, contained 47 acres.

Despite the legislative changes, access to finance remained problematic. Applications had to be processed through the land board, and loans administered by it. Alternatively, incorporated owners could seek the removal of restrictions so that they could apply to the Advances to Settlers Office or the Public Trust. Some owners did this. Although legally able to borrow, many incorporations still found the process difficult. This was particularly the case with small incorporations, which most were. In 1906, for example, Turanga solicitor William Sievwright wrote:

I am daily urged by Maori land owners in this District to help them to get legislation passed under which Blocks held in common may be farmed and managed by committees, after incorporation. The desire on their part is to turn their land to better account by their own efforts and labor, and the proper expenditure of borrowed money on improvements . . . I know of no good reason why duly elected Committees should not have all powers necessary, just as Directors under the Companies Act have, to arrange, subject of course to all needed safeguards as to accounting and paying periodically. They will never learn to do so until they get the opportunity.²⁸²

278. Ibid, p140

279. Document A26, p140

280. Document A18, pp 371–373. Note that these include blocks outside the inquiry district.

281. Document A18, p374

282. MA1 1906/598 (doc A18, pp 219–220)

8.5.4(5)(b)

The Waihirere and Waihirere No 2 Incorporation illustrates the difficulties that incorporations faced. The incorporation was formed in 1913 from the 1750-acre Waihirere and 370-acre Waihirere 2 blocks. A committee was elected consisting of Matenga Taihuka, Wi Pere, Te Kani Pere, Pera Haronga, Manu Tawhiorangi, and Te Owaina Marangi. The committee sought a loan from the Tairawhiti Land Board for £5000 to help it develop the block. The board approved the loan. The New Zealand State Guaranteed Advances Office, however, said that it could lend only £750. Its normal criteria specified a maximum of £3000 to 'any one borrower'. The Public Trust Office finally arranged a mortgage in 1914, but only after the Governor gave his consent to it by an Order in Council. According to the regulations, the loan was required to be paid to and administered by the Maori Land Board rather than the incorporation. The incorporation's lawyer, HC Jackson, was critical of the complication: 'I was not aware of this provision, nor do I pretend to understand the many Laws affecting Native Lands, as some fresh peculiarity crops up each day, and I am informed that such is the law.'²⁸³ A new Order in Council was issued that allowed the loan to be paid directly to the committee and was duly gazetted.

The Waihirere Incorporation began now to operate effectively. Manu Terekia, in his evidence before the 1941 committee of inquiry held in Gisborne said: 'When these lands were incorporated it began to move and take shape and to improve very much and we saw it as young people.'²⁸⁴ By 1941, the property ran 5314 sheep and 380 cattle. Profits for the year amounted to £976 or 10 shillings per acre. The 178 owners received dividends every year.

The Waihirere Incorporation was successful because of two factors – it administered a comparatively large block and it had leaders with experience on the committee. Most of the committee members were also involved in the Mangatu Incorporation.

Incorporations without these advantages found it more difficult to negotiate the legislative requirements. Fourteen of the incorporations had sold their lands by 1932, though non-sellers retained some parts of the blocks.²⁸⁵ Of the 48 original Te Aitanga a Mahaki incorporations, only three were not subject to sale or lease during the first half of the twentieth century. It is unlikely that these were being developed. There is no record of an application for a mortgage over these lands. What is more likely is that they were isolated, uneconomic and their owners lacked the management skills required for success. By mid-century, the incorporations remained largely dormant. The lands of most of them were under lease. Between 1954 and 1970, nine were sold and 12 were wound up, and the lands of two revested in their owners.

(b) East Coast Native Trust Lands Board: As we noted previously, the Government intervened in the Carroll Pere trust in 1902, and vested the land (over 120,000 acres) in the East

283. MA1 1915/3000 (doc A18 (a), vol13, pp 8434–8502)

284. Testimony of Manu Terekia in 'Testimony', 1941 Committee, MA13/33A p 64 (doc A26, p390)

285. Document A18, p 373

Coast Native Trust Lands Board.²⁸⁶ The primary purpose of the empowering Act was to postpone the mortgagee sale of the former trust lands, and to redeem the mortgage with the Bank of New Zealand.²⁸⁷ The board of ‘three fit persons’ established to accomplish these objectives, was initially given until 31 August 1904 to do so.²⁸⁸ By 23 August 1904, they had reduced the debt from £159,029 to £76,500. They sought an extension, which was granted, and by 31 March 1905 had repaid the debt through a combination of sale of land, stock, and the acquisition of new mortgages.²⁸⁹ A total of 31,118 acres were sold.²⁹⁰

The most pressing problem, that of the unpaid debt to the bank, had therefore been resolved. The solution, however, had created a further problem. The land sales had effectively created an internal debt as blocks were sold to discharge the debts of the entire operation: ‘There still remains to be accomplished the adjustment of accounts as between the various interests of the estate, the settlement of large outstanding claims, and, probably, further realisation for these purposes.’²⁹¹ From 1906, these lands were administered by the East Coast Commissioner.

The commissioner began to farm the trust lands from 1908. Some block committees made up of owner representatives continued to function as advisory committees to the commissioner, but their influence was minimal. An East Coast Maori Trust Council was established in the late 1940s. This was the first substantial role that Maori had had with respect to the trust lands since 1902.

During the first half of the twentieth century, the commissioner developed some 16 stations on trust lands. In 1953, 13,741 acres within the inquiry district were returned to their beneficial owners. We discuss these lands in greater detail in chapter 9.

(c) Mangatu: The experience of the smaller, more marginal incorporations discussed above is to be contrasted with that of Mangatu. As we have seen, the Mangatu 1 incorporation was conveyed to a trust in 1899. Mangatu 3 and 4 were also incorporated and then conveyed to trusts. The same trustees (the Hawke’s Bay Commissioner, Wi Pere and Henry Cheetham Jackson) were appointed for all the blocks, which effectively operated as a single entity.²⁹² The pastoral development of the Mangatu lands began. Leases were sold by public auction (for a

286. While this is pre-1908, the East Coast Trust was basically a phase 2 phenomena.

287. We deal with the East Coast Commissioner in more detail in chapter 9.

288. East Coast Native Trust Lands Act 1902, s3

289. Although the board was granted a two-year extension, the Bank of New Zealand offered substantial incentives if the debt were repaid before 31 March 1905. This, the board did.

290. Report, Balance Sheet and Statement of Accounts of the East Coast Native Trust Lands Board, 24 August 1905, AJHR, 1905, G-9, pp1–2. The proceeds from the sale of land, and the loans obtained on new mortgages amounted to £126,772 3s 3d, of which the board paid the bank £117,416 12s 8d. The sale of stock, profits from those blocks that were working sheep and cattle stations, and the rebates for early payment made up the remainder.

291. East Coast Native Trust Lands Board, ‘Annual Report to Parliament for the Year Ended 13 March 1905’, AJHR, 1905 (doc F11, p262)

292. Document A26, pp159–160

21-year term, with right of renewal).²⁹³ By 1908, 47,276 acres were being leased for £2,377 1s 5d per annum.²⁹⁴ Four years later, 59,845 acres were under lease.

The trusts were empowered to borrow money through the commissioner for Crown lands, and did so to pay survey and subdivision costs. From 1907, however, section 11 of the Native Land Claims Adjustment and Laws Amendment Act enabled trust estates to borrow directly to farm the land.²⁹⁵ The Mangatu Trust began to farm a large block itself, which came to be called Waitangirua station.²⁹⁶ Beneficiaries began to receive dividends, which were paid on several occasions between 1903 and 1917, and administration costs began to accrue.

Wi Pere and his family had a considerable influence on the management of the trusts. Not all the owners, however, agreed with the way the trusts were managed. In 1908, for example, Himiona Katipa and 20 other owners presented a petition to the Stout–Ngata commission, protesting at the way in which the trust was administered and objecting in particular to the mortgages that had been taken out.²⁹⁷ After Pere's death, in 1915, some owners voiced their concerns about share allocation and the trustees' financial management more forcefully and they petitioned parliament.

In terms of its income and expenditure, the trust was doing reasonably well. The income from the rental of Mangatu 1 and Mangatu 3 for the period 1901 to 1917, for example, amounted to approximately £35,749.²⁹⁸ The expenditure for the same period was £34,880.

Assuming that the rent remained constant, and that there are no other expense items, the trust was £869 in the black.²⁹⁹ While the trust was in the clear in terms of its profit and loss account, however, it had borrowed approximately £61,600 from the Public Trustee (£50,000), the Bank of Australasia (£10,000) and the Foster Trust Board (£1600).³⁰⁰

The level of borrowing concerned some of the owners, as well as the lack of financial reporting. There is no record of interest repayments being made, for example, or any indication of

293. Document A26, p160. 'The original lease terms were all for 21 years (the maximum permitted by law) with a covenant to pay the value of improvements (not exceeding £2 15s 0d per acre), at the end of the term or, alternatively, to give a right of renewal of lease for a further term of 21 years at a rental amounting to the current rate of interest at that time on the value of the land, less the amount of improvements (not exceeding £2 15s 0d per acre)'.

294. Document A26, p160

295. Ibid, p161

296. Ibid, pp164–168

297. Ibid, A26, p164

298. Ibid, p160. The income 1901–1908 amounted to £14,356. Professor Murton listed a number of expenditure items which amount to £34,880. However, this list includes expenses that were incurred up to 1917. In order, therefore, to bring the ensure that both parameters are being measured for the same period of time, an additional nine years of income must be added to the income stream. Using Murton's assessment of £2377 rent per annum, the adjusted income for the period 1901 to 1917 amounts to £35,749. We note that Murton states on page 168 of his report that the total rent paid till 1908 equaled £2377 for Mangatu 1. However, the Stout Ngata report states the amount of £2377 to be the amount per annum. The figure therefore needed to be multiplied by the numbers of years which each of the blocks was leased.

299. It should be noted that this calculation does not include the £2187 moved from Mangatu 1 to Mangatu 3. As this was an internal transaction it would not impact on the trust's profitability, as long as it was not spent. If it was, there is no record.

300. Document A26, p166

how they would be, but overall the Mangatu trusts were in good shape. None the less, the powers of the two remaining trustees were suspended and transferred to the East Coast Commissioner. A commission was appointed to enquire into the trust's management practices. Its 1918 report tackled both discontent over share allocation in the blocks (which now began to be heard in the Native Land Court – see chapter 14) and management practices. But the Crown chose not to follow the commission's recommendations that new trustees be appointed and new committees be elected for each block under new legislation.

Instead, the management of Mangatu remained in the hands of the East Coast Commissioner. From 1917 to 1947, Mangatu was administered separately from the East Coast Native Trust lands, though in practice the same policies were applied, and the same staff and farm supervisor were involved. Te Aitanga a Mahaki thus lost the kind of control over the Mangatu lands which they had exercised formerly. An owners' advisory committee was maintained, however, and over time became more involved in the trust's activities.³⁰¹

The commissioner's initial policy was to make the Mangatu lands debt free and to return them as productive enterprises to their owners. Leasing was considered the best way to achieve this, and there was initial optimism that the debts on the land would be quickly cleared. But in the economically difficult years of the 1920s and 1930s this optimism faded. Lessees elected to take compensation for their improvements rather than renew. As a result, the commissioner took over farming more lands directly. He borrowed to pay compensation and to develop and stock the land, and the original debt of £50,000 quadrupled.³⁰² At different times, the trust was also seriously hit by Government measures. From 1917 to 1922, it had to pay a new graduated land tax amounting to £18,187 (at a time when rents brought in £26,002).³⁰³ During the Depression, legislation reduced rentals and wrote off arrears, which cost Mangatu £4579 a year in rental income in the early 1930s.

By 1941, three stations (Mangatahu, Wairere and Puketarewa) were showing a good profit, and the owners' committee was determined not to jeopardise farming operations by scaling them back. Henare Ruru, the chairman, replied to questions on this matter by saying: 'That is our deliberate intention and wish – that the lands be farmed by the people.'³⁰⁴ Dividends were kept at a modest rate of one shilling per share during the late 1930s and early 1940s, while

301. Ibid, pp171–4

302. Ibid, pp176–182. The Mangatu Trust also reached an agreement with the trustees of the Wi Pere Trust estate to transfer 20,000 acres of Mangatu lands back to the Mangatu No1 Trust. Some £24,000 was paid to the Wi Pere estate, terminating the Wi Pere family interest in Mangatu 1, and the East Coast Commissioner assumed a share of mortgage of the Wi Pere estate to the Public Trustee, amounting to £30,000.

303. Document A26, pp192–4. By 1922, the Inland Revenue Department admitted that it had made a mistake in interpreting the provisions of the new Finance Act 1917 relating to a graduated land tax on Maori land, but no refunds were made on amounts paid before then. In 1926 however the tax on leased blocks was reduced to one-tenth of the revenue.

304. Mr Ruru, Testimony, 'Proceedings of Committee Appointed by the Honourable Native Minister to Enquire into Certain Matters and Questions Affecting the East Coast Trust Lands', Gisborne, 26 May 1941, Archives NZ, MA13/33A p59 (doc A26, pp181–2)

most of the profits were put in a reserve to provide for future compensation payments to lessees and for further improvement of the land.

By 1947, the position of the Mangatu Trust looked secure. There were 14 stations operating, with 85,730 sheep and 10,201 cattle.³⁰⁵ Mangatu 1 consisted of 81,388 acres farmed as stations, 2884 acres of leased land, 409 acres of land occupied by owners, and 14,554 acres of undeveloped land.³⁰⁶ Mangatu 3 consisted of 3680 acres farmed by Mangatu 1; Mangatu 4 was undeveloped. The debt on the lands stood at £165,000 by 1946. But the stations' profits had increased from £23,000 in 1946 to £50,963 in 1947.

In 1947, the Prime Minister, Peter Fraser, decided that control and management of the Mangatu lands should be returned to their owners. The owners were now united into a single body corporate, with the stations to be run by an elected management committee. This was provided for in part 3 of the Maori Purposes Act 1947. Profits continued to increase, and the new incorporation was finally able to clear its debts in August 1950.³⁰⁷

When it was handed back, Mangatu 1, 3, and 4 Blocks Incorporation was the largest Maori farming enterprise in New Zealand.³⁰⁸ Today, it has diversified from farming (sheep, cattle, and wool) into forestry, viticulture, commercial property, and retail. It is one of the largest and most successful tribal enterprises in the country.

The experience of Mangatu thus provides an important and welcome contrast to the experience both of multiply owned land without formal management structures and of the Rees Pere trusts. Mangatu had the advantage of both collective management from the outset and size. Together, these two factors allowed the land owning hapu to plan for the long term and to tough out the lean times when smaller or unmanaged blocks were lost to sale. Even so, Mangatu had to overcome significant difficulties – divided hapu and a lack of commercial management skill – in the early days that led to the land being effectively in receivership for 30 years. We will pick up these issues in our analysis.

(6) A summary of phase 2: 1908–69

At the commencement of our discussion on phase 2, we said that land alienation and retention over this period could be accurately described in three distinct themes. First, the introduction of state controlled alienation through the district land boards. Secondly, the phenomenon of uncontrolled retention – that is the fragmentation and fractionation of remaining individualised land holdings to such an extent that owners could no longer control or effectively manage their lands. Thirdly, controlled retention of land either by Turanga Maori themselves through incorporations or on their behalf through the compulsory agency of the East Coast Trust Commissioner. To summarise, then:

305. Document A26, p182, table 2, p183

306. Document A4, p270

307. Ibid, p271

308. Document A26, p221

- ▶ Land sales no longer dominated Turanga as they had in the latter part of the nineteenth century, although some land was purchased by both the Crown and private purchasers as they had in the latter part.
- ▶ In the first half of the twentieth century, the great majority of Turanga Maori lands were tied up in leases, either through the Tairāwhiti Maori Land Board, or through the East Coast Commissioner.
- ▶ The main exception in the shift from sale to lease was the sell-off of 42,474 acres by the East Coast Commissioner.³⁰⁹ This land was sold in order to retire the debts of the East Coast Native Trust inherited from the New Zealand Native Land Settlement Company and the Carroll Pere trust. Lands remaining unsold by the 1940s were ultimately returned to their owners between 1947 and 1954.
- ▶ A handful of small incorporations were able to develop their lands, once they were able to access finance during the first half of the century. Many were wound up because they were not viable farming units, or because the owners lacked the commercial skills for their success.
- ▶ By the 1950s, fragmentation of title and fractionation of shares (the latter due almost entirely to the land court's equal succession rule) meant that the great majority of Turanga Maori owned tiny, uneconomic shares in scattered blocks.
- ▶ The Manutuke consolidation scheme (1959 to 1969) represented the major attempt in the inquiry district to produce usable whānau holdings for Ngāi Tāmānuhiri and Rongowhakaata owners.

8.5.5 A starting point for analysis

Before we commence our analysis, it is necessary to recapitulate some earlier conclusions and to summarise some of our factual findings in relation to land alienation and retention from 1869 to 1969.

In earlier sections, we concluded that the weight of Maori opinion favoured internal resolution of the issues which came to be dealt with by the Native Land Court under the 1873 Native Lands Act. We concluded that Maori land tenure was community based and that there was no significant mood among Maori, either nationally or in Turanga, to change that to an individual system. We also found that the 1873 Act: (a) opened Maori customary land to commerce, but only by alienation; and (b) individualised the process of alienation. In addition to that key conclusion, we found that this individualised system was complex, inefficient, and contradictory. Significantly, the effect of the system was to render ineffective attempts by Maori to engage in commerce on a collective basis.

309. Document F11, pp 325–332. We note that this amount includes 13,530 acres in Tahora 2C2 and Tahora 2C3, both of which are being dealt with in the Urewera inquiry. We note further that £26,487 was paid in compensation to the owners of Mangatu 5 and 6 for the 26,534 acres that was sold of those blocks.

As to land alienation in Turanga in the period between 1869 and 1908, we concluded:

- ▶ In addition to earlier losses such as the Patutahi confiscation, at least 70 per cent of the district had been purchased by the Crown or settlers by the end of the period.
- ▶ Most of that had been acquired piecemeal under memorials of ownership at low prices per individual share.
- ▶ The rest had been sold by the Rees Pere trust, the New Zealand Native Land Settlement Company to prevent liquidation, or the Bank of New Zealand Estates Company.
- ▶ Even so, the trust lands remained relatively substantial but (despite two compulsory sell-offs) they were finally vested in the East Coast Native Trust in 1902. They were at least sufficient for the board to commission a significant programme of development.
- ▶ The single exception to this grim story is the creation and operation of the Mangatu 1 Trust in 1881, and its successor, the Mangatu Incorporation in 1893. The incorporation retained all of its land asset and remained profitable throughout the period

As to alienation and retention in phase two, we concluded that Maori lost direct control of substantially their entire remaining land base in the first half of the twentieth century, either by alienation (mostly by land board lease) or by compulsory statutory management. Once the leases terminated and the statutory management regimes were rescinded, the Maori lands under collective management regimes came to be profitable. By contrast, the lands not subject to collective management were characterised by unsustainable levels of title fragmentation. This led to the consolidation scheme of the 1950s.

We begin our analysis of this complicated factual matrix by restating the questions posed at the beginning of this section. They were:

- ▶ 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?

As we said in our introductory comments, these questions lie at the heart of the entire debate about the operation of the native land regime in the nineteenth and early twentieth centuries. We have taken some time therefore, to set out the relevant facts as we have distilled them from the evidence of the parties before us.

It is not possible to answer questions as important and difficult as these without establishing a point of reference from which to view the facts. We start with a series of propositions that speak to the way in which we think people, functioning as communities based on kinship, would respond to new pressures created by the exposure of their assets to market forces for the first time. That is, after all, what the Native Lands Acts did. Our starting propositions are as follows:

- ▶ Land selling, in and of itself, was not necessarily damaging to Maori communities. In fact, sales, if controlled, could benefit communities in the new economy;

- Communities, if left to themselves, might have been expected to make strategic sales to meet a range of requirements: providing cash flow (given that there were few alternatives to producing this from their land) and injecting funds for development;
- Having said that, no rational community bound by kinship, would choose to sell land to a level that threatened the continued existence or well-being of that community, if there were reasonable alternatives. In other words, no community would choose to sell land to the point of self-destruction;
- If, on the facts, land sales occurred at a level that undermined community existence or well-being, then this cannot have been the result of rational community choice. The explanation for divestment on this scale must lie elsewhere.

It is clear that for most communities in Turanga, sales reached this critical level relatively quickly. For Rongowhakaata, that point was reached by the 1890s. They had lost most of their best land through the operation of the Poverty Bay Commission and much of the remainder in the Patutahi take. As early as 1877, 200 Rongowhakaata were defined as landless.³¹⁰ By 1882, Te Whanau a Kai were clearly in a similar position. We know this because Pere sought the grant of extra land for Te Whanau a Kai in that year, 'his tribe being landless'. The court clearly accepted that this was the case because it granted Pere's application (see sec 6.4.1(16)). Ngai Tamanuhiri retained only a third of their land by the time of the Stout Ngata survey in 1908, and they lost their two remaining cornerstone blocks shortly after in the East Coast Native Trust debt restructuring. The fortunes of Te Aitanga a Mahaki and Ngariki Kaiputahi were bound up in the Rees Pere trusts (and their successors) and the Mangatu blocks. Even though these two groups managed to retain proportionately more land, most of it in Mangatu, the overall level of sales was still extremely high.

The words of the Stout–Ngata commission will be recalled. The Crown and settlers had already purchased 946,600 acres, or 71.7 per cent of Cook County. Maori-owned land, on the other hand, comprised 372,400 acres, or just under a third of the total acreage, but much of that was leased to settlers. Turanga Maori, the commissioners said, were dispirited after 20 years of litigation that had caused the loss of nearly 400,000 acres. They hoped, none the less, that it was not too late 'even at this late day', to provide support for the small pockets of farming that remained.³¹¹ It will be recalled also that by 1914, Broderick, of the Tairāwhiti Maori Land Board was complaining that titles that remained in Maori ownership were becoming unusable due to partition.³¹² By the 1950s, the draconian Manutuke consolidation scheme was acknowledged by all to be necessary to reconstruct residual titles atomised by constant partition.

310. Document A31, p78

311. 'Interim Report of Native Land Commission on Native Land in the Counties of Cook, Waiapu, Wairoa and Opotiki', AJHR, 1908, G-iii, p6 (doc A11(a), vol 4, p3015)

312. Document A18, p348

This level of land alienation, when combined with the fragmentation of the land retained, profoundly affected the structure and viability of Turanga communities. Rongowhakaata, for instance, had five major settlements in 1881, despite its landlessness problems: Oweta, Tapatahi, Pakirikiri, Whaurangi, and Manutuke.³¹³ By the mid-twentieth century, only Manutuke remained.³¹⁴ At the same time, blocks which had been occupied were gradually tied up in leases and rendered unavailable for continued occupation.³¹⁵ In 1881, Te Aitanga a Mahaki, Ngariki Kaiputahi, and Whanau a Kai were living in at least 10 communities: Tarere, Toroa, Waerenga a Hika, Parihimanihi, Rakaiketeroa, Waituhi, Kaitara, Tapuihikitia, Taihamuti, and Mangatu.³¹⁶ Only five small communities now remain.³¹⁷

Demographic decline on this scale reflected two distinct but related cataclysms for Turanga Maori. The first was the impact of conflict. That is, the battle of Waerenga a Hika, the assault on Matawhero and Oweta, and the battle of Ngatapa. The lives lost in these conflicts must have severely affected Te Aitanga a Mahaki, Te Whanau a Kai, Ngariki and Rongowhakaata communities in particular. Among other impacts they lost many leaders, at a time when leadership was crucial. The second significant impact was the large land alienations of the 1870s and 1880s, which we have discussed above. The continued effect of these two elements must have been the critical causes for the shrinkage in communities so evident in Turanga in the generation which followed these events. As to the land which remained in Maori ownership, the Manutuke consolidation of the 1950s demonstrates the extreme measures owners had to take in order to render their residual titles useable under the individualised Maori land regime. All things considered, the rapid transition of Turanga Maori in the post-Second World War period to urban wage labourers was a predictable consequence of these factors. That is not to say that the pull of cities and economic work was not strong in the 1950s and 1960s. It clearly was. Maori would have been attracted to the opportunities of the towns and cities to some extent anyway. But landlessness and unusable residual titles meant that Maori were pushed out of their homes at least as much as they were drawn to the cities. That is why the level of Maori urbanisation was so high and the rate so rapid. Just as importantly, the Maori who moved to the cities were overwhelmingly poor and unskilled. They did not have the support of landed wealth which might have assisted the transition into the urban middle classes of those who wanted to migrate to the cities.

It is certainly obvious that many Turanga Maori communities did alienate to the point of extinction and with a rapidity which suggests rational choices were not being made by these communities. We turn now to assess why this occurred.

313. Document A31, p80

314. Ibid, p123

315. Ibid, pp91–93

316. Document A26, pp 522–525

317. Parihimanihi, Waituhi, Mangatu (now located at Whatatutu), Kaitara, and Tapuihikitia.

8.5.6 Individualised sale process avoids communities

The evidence demonstrates that the reason land was so rapidly alienated beyond critical mass for the survival and well-being of the communities that owned it, was that the communities did not in fact control the alienation decision at all. Instead, individuals or small groups of individuals could now decide to alienate without reference to the community. The evidence demonstrates that almost all alienation decisions in Turanga after 1873 were made at this level. On occasion, the anger of Turanga leadership at the circumventing of the community was forcefully expressed. In 1873, a petition signed by 371 Maori from Hawke's Bay, Wairarapa, Wairoa, and Turanganui stated:

That the Europeans are allowed to go to the men whose names are on the grant one by one and make bargains with them, which are unknown to the other grantees, whereas all the grantees should be called together, and unless all consented the land should not be sold.

E tukua noatia ana nga pakeha ki te hoko i te wahi kotahi o ia tangata o ia tangata e mohio i te whakaritenga a tetahi engari, me hui hui tonu nga tangata i te karaati ki te kore ratou e e noho tahi, me kati rawa te hoko i te whenua.³¹⁸

In 1876, Wi Pere exclaimed:

If any Government officer dare to offer money as an advance for the purchase of any block of land, before the whole of the people shall have agreed to sell such a block of land. Let such case be cast into the seal of silence to be lost forever, and who shall regret such an act.³¹⁹

Rakuraku said, at the 1889 hearing of Tahora 2:

We are at a loss to understand how in deference to application of two or three persons as against the view of a large body of people, the Court can't take into consideration the application of the people . . . There are chiefs amongst us, but it is almost impossible to control the actions of the whole people.³²⁰

The words of Crown purchase officer Wheeler in Turanga at the height of the purchase period, will be recalled:

The owners . . . *must be dealt with individually*, as the majority of them, if assembled in public meeting, would be filled with righteous indignation, of the thought of parting with their birthright for a mess of pottage; but within 24 hours, the same persons would gladly sell, if they could do so unobserved by their fellows. [Emphasis in original.]³²¹

³¹⁸. Petition of 371 Maori of Hawke's Bay, Wairarapa, Wairoa, and Turanganui, AJHR, 1983, 17, p1 (cited in doc A18(a), vol9, pp5536, 5538)

³¹⁹. *Te Wananga*, 6 July 1876 (doc A17, p214)

³²⁰. Document A18, p147

³²¹. AD103/17 (doc A24, p139)

In other words, land buyers knew that individuals in Turanga were prepared to sell to a level that their communities would never sanction. Even Crown purchase officer Wilson, one of the more principled officials, purchased progressively from small groups at sub-community level. The fact that his purchases all took years to complete demonstrates two things. First, that in no case was the decision to sell a single decision made by the entire land owning community acting together. Secondly, a community could not, even informally, develop a single strategy in response to purchaser interest. It was too easy, as Wheeler said, to pick off willing individuals. The record demonstrates that that is exactly how it was done in every post-1873 land transaction in Turanga of which we are aware, except for the mortgagee sales of the land settlement company.

If the foregoing was true of Crown purchase activity, it was doubly so of private purchases in Turanga. Purchasers such as Read and Tiffen clearly acquired individual interests over a number of years, as and when they were able to. After the removal of the rule requiring majority support for partition in 1878, settler purchasers just subdivided as they went. The memorial of ownership provided purchasers with a list of identifiable individuals to target. This and the owners' desire for money ensured acquisition eventually.

8.5.7 Why did individuals sell?

There is no question then that the native land regime was destructive of community decision making in respect of alienation and land development. This removed the ability of communities to develop their own sale and retention strategies and it made it impossible for community leaders to rally their people around community planning. As we have said, the chiefs complained constantly of this. Serious though this was, it could have been mitigated if individualisation had produced better results than community action for those now free to act individually. That is, it might not have been so bad if sales had enabled individuals to pursue alternative investment or development strategies for themselves. The evidence demonstrates that for the vast majority, alternative investment was simply not possible. This can be gleaned partly from our survey of average price per owner in the 1870s to the 1890s. For a few (usually the chiefs such as Panapa Waihopi in Puhatikotiko), individual sales could realise hundreds of pounds. This was clearly sufficient to support an investment strategy if the owner wished it. Trade by Ripera Kahutia and Wi Pere in their own shares demonstrates that some could benefit individually from the process. The fact that both established family trusts and administered their own interests shows this. For the rest, sales would net no more than £20 and, in most cases, £10 or less. This simply did not amount to a capital sum sufficiently useful to allow for effective investment in alternative assets. Nor would it have been enough to fund the development of retained lands, assuming they were not scattered throughout the district. Even the sale of interests in four or five blocks would not have rendered a sufficiently useful amount.

It should also be remembered that often the proceeds were not paid to each owner in one lump sum. Instead it was usual, at least for the Crown, to give the owner a deposit, and pay the rest closer to the time when the purchaser was ready to apply for partition. Similarly, land in Turanga was often leased by purchasers and then bought outright during the term of the lease. De Lautour described this as a standard purchase technique of speculators. The purchase price would be the agreed sum minus the value of the lease. In effect this meant the purchase price was split into two or more payments. Multiple payments of smaller sums further reduced the utility of the purchase price to the seller in immediate cash flow terms.

In the 1870s and early 1880s, any land development was likely to have been for wool growing. A sheep farmer needed at least 500 to 1000 acres for a wool growing operation to be viable. To purchase such an area would have cost about £1 per acre.³²² To stock it would have added a further £400 to £1000.³²³ Fencing might add further substantial costs.³²⁴ None but the rangatira would have held sufficient shares to partition and commute title to a block this size, while retaining enough spare land to sell in order to fund the partition and then purchase stock.

By the second generation of owners the problem was worse. The land base was decreasing and the number of owners, static or increasing. The fragmenting effect of this meant that from the 1890s, even the larger owners were without enough land to exchange for a sum sufficient to pursue sustained individual investment or development strategies, even if the land was in one title. In reality, it never was. Owners had to contend with small fragmented interests scattered over a tribal rohe. To put this in perspective, in the 1890s, an average payment on land sales of between £10 and £20 would have been the equivalent of five to 10 weeks' wages for a farm labourer.³²⁵ A draught horse without equipment would cost up to £45, a cow £6 10s, and a lamb seven shillings sixpence, and £10 to £20 would not, therefore, have gone far in purchasing productive assets.³²⁶ Thus, the data available on the limited payouts received per average individual owner are sufficient to discount alternative capital investment

322. It is difficult to generalise about the amount of land needed for viable wool growing, which was affected by various factors such as quality of the land, whether sheep farming could be combined with cropping, size of the local community, and ease of access to markets. Under the Land Act 1877, blocks of from 500 to 5000 acres might be set aside for pastoral farming, to be sold at public auction at an upset price of not less than 20 shillings per acre. Country land was also available at auction, for instance in Auckland province, at an upset price of 10 shillings an acre: Julius Vogel, ed, *Land and Farming in New Zealand Information Respecting the Mode of Acquiring Land in New Zealand* (London: Waterlow and Sons, 1879), p118; Julius Vogel, ed, *The Official Handbook of New Zealand: A Collection of Papers by Experienced Colonists on the Colony as a Whole and on the Several Provinces* (London: Wyman and Sons, 1875), p257.

323. The average size of flocks in Cook County (where most farmers were listed in Gisborne or Ormond) in 1882 was about 2000 sheep. About a quarter of the farmers had under 500 sheep. The price of sheep is given as nine shillings in Hawke's Bay, and between six and 16 shillings in Wellington province. Again, sheep prices varied depending on season, region, fatness, and quality of the wool: AJHR, 1883, H-19, pp7, 11; Vogel, *Land and Farming in New Zealand*, p61; Vogel, *The Official Handbook of New Zealand*, p211.

324. An 1878 account gives the cost of fencing in Hawke's Bay as between 20 and 25 shillings per chain of 65 feet (a cost shared by farmers where they had a common boundary): Vogel, *Land and Farming in New Zealand*, p59.

325. In the mid-1890s, farm labouring wages were around 20 shillings per week in Hawke's Bay, Poverty Bay: *New Zealand Official Year book 1893*.

326. *New Zealand Official Year book 1893*, pp 225, 229

as a motive for land selling in most cases, except sale by chiefs. The average price provides powerful contextual evidence in this respect. In our view, the prices were insufficient to be used for anything other than consumption (either to meet immediate needs or to purchase relatively small assets that assisted employment: that is, dogs, shearing equipment, and the like), or to meet debt arising out of past consumption on credit.

Turanga Maori did not often record why they wanted to sell land, any more than they do today, but the direct evidence we have supports the conclusion that some Turanga Maori sold land to repay past debt. Maaka Topia, for example, sold 'one piece of land, Tuahu by name' to pay for his brother's debts.³²⁷ While the amount of land sold to repay debt cannot be quantified, as Wheeler informs us, legal debt recovery processes were also used to encourage sale. He said in 1895: 'One of the owners of *Waikohu Matawai No 1*, has a judgment summons against him but the warrant for his commitment is held over for a few days longer to enable him to sell his shares in the above named block' (emphasis in original).³²⁸ Debts owed by a few owners could even trigger the sale of a whole block. For example, according to Rapata Whakapuhia, the whole of the Tauwharetoi block was sold to meet the debt of a subgroup of owners.³²⁹

Two other cases enable us to probe more deeply. Hera Hokokao, for example, applied in 1899, to have the restriction on the 75-acre Mangaoe 1D block removed so she could sell to repay her debt.³³⁰ Similarly, the owner of the nine-acre Waituhi 1D block stated that she needed to sell her interest: 'to pay my debts for I am in trouble'.³³¹ In both cases, the acreage was small. It is therefore extremely unlikely that the debts involved related to capital expenditure. Rather, the owners were selling land to pay for day-to-day needs purchased on credit probably from the local storekeeper.

Sources from the 1860s and 1870s confirm that this was an old pattern. George Read, a well-known Turanga storekeeper, unquestionably operated his business on a credit basis. Resident Magistrate Gudgeon (later a Native Land Court judge) recorded that Read was one 'to whom it is notorious that all of Poverty Bay is indebted'.³³² To the extent that the debtors were Maori, the evidence is clear that they paid in land. This is certainly true of the rangatira. In 1869, for example, Rahuruhi Rukupo and a number of other owners, mortgaged their interests in Whataupoko (a Poverty Bay Commission block) to pay a debt to Read of £1817 10s. Four years later, the *Poverty Bay Herald* recorded Henare Ruru's deathbed declaration, that he had given his interest in Whataupoko to Read in payment of his debts.³³³

327. Maaka Topia, Whakato to Native Minister Sheehan, 7 January 1878, MA-MLP1 1902/12 (doc A24, p117)

328. Document A18, p135

329. Rapata Whakapuhia et al to Ormond, Napier, 28 April 1877, MA-MLP1 1902/12 (doc A24, p117)

330. Document A26, p367

331. Document A18, p254

332. Gudgeon to Native Under-Secretary, 16 May 1878, AD103/8, pp 678–683 (doc A24, p 64)

333. Document A24, p66

Evidence from the trust commissioner's minute books confirms that Read offered Maori credit for consumption goods and sought to redeem the debt in land. In 1871, Read's application to the commissioner for approval to acquire Matawhero B from Riperata Kahutia and 21 others, was declined on the basis that he had supplied them with alcohol in part payment. In his statement, Read 'admitted that he had a running account with Riperata for goods supplied'. The implication is that the account was for the benefit of all and therefore able to be redeemed against all their interests. He sought to reduce the £232 18s 1d account by the purchase price of £199 15s.³³⁴ The price would have amounted to no more than a few pounds for most owners. Had the debt not involved alcohol, it would have been substantially discharged in exchange for the land. These debts were clearly incurred for day to day consumption.

Indeed, Gudgeon confirmed that land selling in Turanga was consumption driven. In 1879, he wrote: 'I am convinced there would be no difficulty in completing most of these negotiations that have been entered into as the Maoris are in want of money consequent on the total failure of their crops.'³³⁵ The story was not, however, entirely grim. Some proportion of the large cash sums being acquired by the few rangatira with large land interests, was used by them to fund a remarkable flowering of the traditional art of carving ornate wharehenui or meeting houses in the 1880s and 1890s. In all, seven such houses were built during this period.³³⁶ These were community projects. Communities contributed their labour in various ways: building and painting the house, feeding the carvers and weavers, and providing the timber and other materials. The construction of wharehenui demonstrates two things. First, rangatira could construct them without borrowing money as Rees and Pere had to, and without raising the kind of mortgages that were needed for farm development. Secondly, these projects were statements of persistent community cohesion at a time when individual land sales were at their peak.

The late nineteenth century, as we have said, was a period of intensive land sales. By the end of that period, the big blocks of land had been broken up. Any comments we have made concerning the prices that Maori received for their land in the nineteenth century are, we believe, even more apt, in the twentieth century. The partitioning off of interests that had been sold, the accelerating fractionation that resulted from succession, and the rapidly growing population, combined to increase the economic pressures on remaining owners. By the twentieth century owners would sell because there seemed no point in retaining shares in a block that were far too small to produce any return – let alone allow them to occupy. Turanga Maori followed the national trend in the second half of the twentieth century. Unable to live on the land, they moved rapidly and in large numbers to the towns and cities.

334. Hanson Turton to the Native Minister, 21 February 1872 (cited in doc A18 (a), vol 4, p2391)

335. WS Gudgeon, Resident Magistrate to Native Under-Secretary, 17 January 1879, AD103/9, Archives NZ (doc A24, p115)

336. Roger Neich, *Painted Histories: Early Maori Figurative Painting*, 2nd ed (Auckland: Auckland University Press, 1994), pp189–190, 274–278

8.5.8 Why were prices so low?**(1) *The deduction of court and survey costs***

Why was it that payments were, generally speaking, so modest? The first reason is suggested by Porter in his advice to the Native Under-Secretary in respect of the recovery of survey costs. Porter indicated that the costs of survey had to be deducted from the proceeds. In some cases, this happened immediately. Awapuni A2, for example, was awarded to 14 owners on 11 October 1886. Four years later, John Henry Balneavis claimed £13 19s 6d for surveying the block prior to it being partitioned into eight separate blocks. The partition went through the court in 1896.³³⁷ This would invariably reduce net payments. In some of the larger hinterland blocks where survey was more difficult, the deduction could be significant.

The Crown argued before us that while court and survey costs were a burden on Turanga Maori, the extent of that burden has been overstated. As we have noted court cases in Turanga were, in general, shorter than cases held elsewhere in the country. As a result of the way in which Turanga Maori organised lists of owners outside the court, it is likely that court charges (£1 per diem for investigating the title; two-shillings for giving evidence, and five-shillings for the creation of each order³³⁸) were reduced. Survey charges are more difficult to assess, the charges not being standardised. Mr Hayes evidence indicated that survey costs ranged from a modest penny per acre to a more substantial one shilling per acre for Te Paokahu. Duncan McKay, we note, charged the owners of Waiwhakaata one shilling sixpence per acre.³³⁹

Court-imposed liens to secure unpaid survey costs provide further evidence of the proportion of the price which sums represented. A £5 lien was charged against the 10-acre Whatatuna 5 block, for example, which was sold by the two owners for £58. The lien equates to roughly 9 per cent of the purchase price. The 18 owners of Whakawhitira, however, paid only £9 4s 6d for the survey of their 173-acre block, though the owners received £263 9s 6d when it was sold. The price indicates the type of land the block was – flat and easy to survey.³⁴⁰ The cost of survey was therefore, approximately 4.5 per cent of the purchase price. Thus, survey costs in Turanga ranged from 5 to 10 per cent for land on the flats to between 10 and 20 per cent for more difficult terrain. This is in accord with results from other inquiry districts. In Hauraki, for example, the evidence was that for 29 per cent of blocks in that relatively mountainous district, survey costs were between 11 and 20 per cent of the final price.³⁴¹ Deductions of this size were plainly significant. In 1867, Theophilus Heale, the inspector of surveys and later a land court judge, summed up the situation, we think, very well. He wrote: ‘The Native owner is . . . placed at very great disadvantage in getting his land surveyed: rarely possessing

337. Gisborne minute book 17, p159 (this is from the Rongowhakaata database, p38)

338. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p141

339. Rongowhakaata database, p331

340. Ibid, p345

341. See, for example, the Crown's closing submissions in the Hauraki inquiry, paras 548–574, where based on the evidence of David Alexander for the Wai 100 claimants, the data suggested that for around 29 per cent of the blocks investigated, the survey cost amounted to between 11 and 20 per cent of the purchase price.

ready money, he is obliged to find some one to survey his land on credit, and so often pays double what it cost a European.³⁴² Not only were costs high, they were higher than the rest of the market was required to pay.

(2) *Unwieldy legislation governing alienation*

The cost of title transformation was one factor. The second was the dampening effect of unwieldy legislation governing alienation without affecting the status of the land as customary land. Thus, Maori owners got the worst of both worlds. Customary title was perceived by the market as second rate, and the special provisions which enabled its alienation were clumsy. Section 87 of the 1873 Act deemed purchases to be void until the subject of a confirmation order of the court. This meant that private purchasers wishing to buy up individual interests risked their capital until the transactions were affirmed first by the trust commissioner and then by a judge. Affirmation would usually occur long after the money had been paid. Cases such as *Seymour v MacDonald* demonstrated that the risk could be a real one. Given this risk to capital, the market simply discounted the price accordingly. In short, the price purchasers would have been willing to pay for unenforceable contracts to purchase multiple undivided interests in Maori customary land was a fraction of the amount they would have paid for a Crown-granted title able to be acquired in a single transaction without bureaucratic or judicial interference. The process was so much slower and the risks so much greater.

Though the Crown was unaffected by section 87, it still had to wait for piecemeal purchases to transform into separate titles by partition order of the court. Capital could be tied up for a long time before the Crown secured a partition order. Thus, Wheeler, for example, when negotiating for Waikohu Matawai, was confident that he could beat down the price specifically because the interests were undivided and the purchase therefore not immediately realisable: 'There is no lease as far as I can ascertain . . . It adjoins Crown land and is rated at 13/4 per acre. It would be safe to buy at 5/- per acre though I fear natives will not sell as a body under 7/6. As the shares are undefined I propose to offer only 5/-.'³⁴³ Even without the risk to capital faced by private purchasers under section 87, the Crown still discounted the price by about 60 per cent of its fully rateable value.

For all purchasers, the Act introduced a drawn out process, the necessity for multiple transactions and legal uncertainty. Ironically, the downstream effect for Maori of this complex set of processes was not the security of a system which protected them against unfair, unwanted or unwise sales. If it had achieved that outcome, its unwieldy nature might have been tolerable. But, as the *Assets Co* cases demonstrate, it did not have that effect at all. The practical effect for Maori was only that they were squeezed at both ends. In the process of transforming title into a saleable asset, Maori paid between 5 and 20 per cent of the price of the land in surveys and more for Court fees. Even the non-sellers had to bear their share of the burden

342. Mr Heale, 'Report on Surveys under the Native Lands Act', AJHR, 1867, A-10B, p5, cited in doc A24, p97

343. MA-MLP1 1896/195 (doc A18, p135)

despite the fact that the process would produce no cash for them.³⁴⁴ At the other end, sale prices were massively discounted because purchase was such an unwieldy and risky process for the buyer. In Turanga, average quality land held under memorial of ownership under the 1873 Act would fetch between three and five shillings per acre in the 1880s. High quality land could fetch much better prices, but most of that land was Crown granted Poverty Bay Commission land which had been sold at low prices a decade earlier. It has been difficult to pin down a larger sample of prices received by settler buyers when they on-sold land of equivalent quality in the 1880s because systematic collation of this data did not begin until the 1890s. But there is enough information to confirm what one would predict given the complex nature of the transactions under the 1873 Act and the quality of titles Maori could provide. We have, for example, the onsale prices expected or achieved by the Rees Pere trusts and the New Zealand Native Land Settlement Company both of which were in the same position as settler purchasers. The difference in market prices (to which we have already referred) is very significant.

In 1881, it will be recalled that the owners of Pouawa had vested their lands in trusts. The trustees (Hirini Te Kani, Rees, and Pere) had secured a conditional agreement to sell 7000 acres of the block for approximately £1 5s per acre to Irish immigrants. That is up to eight times the average for memorial of ownership lands. When the New Zealand Native Land Settlement Company took over the collapsed scheme in 1882 it onsold freehold subdivided titles over 5000 acres of the block at between £2 and £2 5s per acre. It will be recalled that, according to De Lautour, the remaining 12,000 acres of the block were valued at between £2 and £2 10s per acre. All of this was solely because the Company could give a clear title in a single transaction – no other improvements had been made to the land.³⁴⁵ In addition, the 4950-acre Pakowhai block was onsold at just over £2 per acre. Tangihanga 1C (a block of 4502 acres) sold in 1892 for £1 2s per acre.

Ten years later, another raft of sections were sold. In 1891, the New Zealand Native Land Settlement Company sold a number of sections of blocks in a mortgagee auction, the reasons for which are set out in chapter 9.³⁴⁶ Bidding was brisk. The prices that these sections fetched confirm our thesis. Most of the sections sold for between £1 and £2 per acre. The parts of Whataupoko that were sold that day (most of the sections did not reach the reserve price) fetched between £1 5s and £2, and this was for a block that was close to Turanga. Waimata (land in the hinterland and outside our inquiry district) sold for £1 3s in the more northern

344. Document A18, p123. For example, when Tahora 2, a block just outside our inquiry district, was sold to the Crown, the non sellers had to pay £786 as their proportion of the survey cost. They paid in land, at a rate of 2s 6d per acre and so had to hand over 6291 acres, even though they opposed the sale.

345. It will be recalled that this was the last transaction completed by the Company before it succumbed to debt servicing difficulties and was forced to divest its key blocks to meet the demands of creditors. It is important also to note that the company did not act as trustee or agent on behalf of the Maori owners as with the first Pouawa scheme. The company was a mere purchaser from the original Maori owners.

346. *Poverty Bay Herald*, 26 October 1891 (cited in doc A2(a), vol 0, p6

parts of the block, and up to £2 5s for land closer to the coast. A section of Tangihanga, a block largely in the hills behind Turanga, sold for £1 2s 6d (the upset price). Some land did sell for considerably more. Nelson Brothers bought sections of Te Hapara, land near the freezing works, for between £6 and £24 per acre. Similarly, a section of Matawhero sold for £20 per acre. Again, this was flat land close to Turanga. These figures confirm that despite the land being sold at mortgagee sale rates (buyers would therefore have expected to get land for bargain prices), the price per acre for these freeholded titles was still considerably more than Maori got for their undivided interests sold individually.

Outside the district, the prices for large blocks of variable quality were still consistently higher than prices received by Maori. For example, the 30,000-acre Mangatoro block in southern Hawke's Bay was valued in 1888 by a lending bank at £214 per acre.

As we have said elsewhere, sale or lease was the only means by which Maori could apply their only capital asset to earn profits. The foregoing figures demonstrate that the new title system did not allow Maori to secure a reasonable share of the capital value of this asset when they did so. The lack of a trust or corporate ownership mechanism prevented community control of alienation and the lack of community control meant there was no means by which Maori could force a better deal in the way that Rees and Pere had done in the Pouawa example. In a kind of catch 22, the low prices forced more sales by individuals to fund ongoing consumption.

For Maori, the cost of transferring title was high and the market value of that title was low.

8.5.9 Landlessness and poverty becomes inevitable

We are left to conclude that Maori communities could not have withstood the introduction of an aggressive land purchase market if armed only with the land tenure system provided under the 1873 Act. In fact, no population could have. The whole idea of individualised purchase, the complexity and contradiction of the legal regime and the cost of the process and subsistence prices were, together, capable of producing only landlessness and poverty.

In 1940, 100 years after the Treaty was signed, Horace Belshaw, Professor of Economics at Auckland University College, considered the outlook for rural Maori in stark terms. If all the existing Maori freehold land were developed, about 5000 farms would be established supporting, he suggested, 20,000 people, or a quarter of the present population. This would leave 60,000 people not provided for by farming, even if the population did not increase. It is true that Board of Native Affairs figures showed that 1774 farms were currently supporting (a term he put in quotation marks) considerably over 21,600 people. But he suggested that it would be 'an optimistic misreading of the position' to suggest that farms could in future provide for any greater number of people than his figures provided for. In his view, the high numbers of Maori dependent on farming had to be attributed to causes that gave little room for complacency:



Fig 16: Sheepdipping at Barker's holding, Whataupoko, 1895.

Photographer unknown. Reproduced courtesy of the Tairāwhiti Museum, Gisborne, New Zealand (1895-A137).

The large number of dependants on the farms developed is the symptom of the lack of adequate alternative employment opportunities, as well as evidence of the capacity of the Polynesian family to shelter the needy. If the official figures be interpreted literally, they afford evidence of a disparity in material standards between European and Maori which is inconsistent with the concept of economic self sufficiency . . . as being a necessary basis for permanent adjustment and reconciliation of cultures. . . . There is the danger that the economic, as well as the social significance of the Polynesian family may be unduly romanticised, condoning a poverty which not only has no merit of itself, but impairs the capacity of the people to adjust, select and develop.³⁴⁷

Professor Belshaw concluded that:

there is an unambiguous picture of a people whose land resources are inadequate, so that a great and increasing majority must find other means of livelihood. . . . No tribe has sufficient land to support all its people. The position of some communities is very serious when account is taken of the lack of suitable work of other kinds.³⁴⁸

347. Horace Belshaw, 'Maori Economic Circumstances', in *The Maori People Today: A General Survey*, edited by ILG Sutherland (Christchurch: Whitcombe and Tombs, 1940), pp191–192

348. Ibid, p192

Having reviewed the evidence presented to us at the hearings, we can only endorse Professor Belshaw's view. Despite the occasional individual success story, we can see no way by which the 1873 Act could have produced an overall history of stronger Maori communities or wealthier Maori individuals. In this, we are in complete accord with the 1891 Native Land Laws Commission, speaking not in hindsight as we must, but as these events were unfolding:

Thus the Legislature, by the Act of 1873 and all the amendments, repeals, and alterations thereto – and their name is Legion, for they are so many – has with one exception – the Administration Act of 1886 – for many years striven to establish, contrary to Native custom, a system of individual title to tribal lands.

The first effort made by the Government to establish individual title, as pointed out by Judge Fenton, led to a long and bloody war. The last has given rise to confusion, loss, demoralisation, and litigation without precedent. Several witnesses used the same term – 'The result is chaos'.

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Of all the purchase money paid for the millions of acres sold by the Maoris not one sixpence is left. Their remaining lands are rapidly passing away. A few more years of the Native Land Court under the present system, and a few amended laws for free-trade in Native lands, and the Maoris will be a landless people.³⁴⁹

As we have seen, Rees, Pere, Carroll, and most of the leading Turanga chiefs sought to establish mechanisms which evaded the enervating effect of the 1873 Act. They did this both to achieve better prices for the sales they did want and to better secure the lands they wished to retain. We turn now to assess the effectiveness of these alternative mechanisms.

8.5.10 Collective strategies – Native Land Act avoidance schemes

As we have seen, Maori constructed elaborate schemes to escape the strictures of the 1873 Act much in the way that tax lawyers of the twentieth century worked to avoid tax legislation. The Rees Pere trusts were really Native Land Act avoidance schemes. The essential problem that Rees and Pere faced was, as Chief Justice Prendergast in the *Pouawa* case confirmed, the legislation did not expressly provide for community management systems. The beneficial owners of memorial of ownership land could not transfer their title to trustees to act on their behalf without breaching the alienation provisions in the Act. The Act only recognised transfers by way of sale or lease. This meant that the land could be sold or leased in individual interests, but there was no sanction for leaders to organise their communities as community representatives. Even lands granted by the Poverty Bay Commission lacked a specific community management mechanism. Whether the land was held in a memorial of ownership or a Crown

349. W L Rees and James Carroll, 'Report of the Commission on Native Lands', AJHR, 1891, sess 2, G-1, p x

grant, it was held in individualised tenure. This meant that as soon as awards were made, trade commenced – and was intended to commence. By the time that Rees and Pere had implemented their trust scheme, a large number of individual interests in strategic blocks had already passed out of Maori ownership. It was the debt incurred in reacquiring those interests which proved the trusts' undoing.

Clearly, Rees and Pere made some questionable commercial decisions for which they alone must be held responsible. The acquisition of Barker's interests in Whataupoko for £47,500 in 1879 appears excessive.³⁵⁰ Barker had purchased from Curtis and while we do not know what the former had paid, we know that Curtis purchased the asset from Read in a complicated transaction worth just £6000. To be fair to Rees and Pere, £20,000 of the purchase price was taken up in a notional sale of 2500 acres back to Barker.³⁵¹ No cash changed hands. The transaction was entirely funded by debt. The remainder – £27,000 – was the sum secured by the mortgage, but that was still a mark up of 550 per cent on Curtis's price.

Though the price seems high, even foolishly so, that was not the root of the problem. If there had been specific provision for community management of land at the outset – that is, at the point the land is formally awarded – whether by the Poverty Bay Commission or the land court – there would have been no need to engage in a land reacquisition programme at all. The land could not have been part sold by individuals acting alone and without the benefit of a community-wide strategy. The sale of individual shares would, as with Mangatu, have been prohibited from the start except by community agreement. Crucially, there would have been no need to borrow to get started. The trust would unquestionably have needed money for other purposes, such as capital works, but it would not have needed to borrow substantial sums to reconstruct titles eroded by early individual sales.

Though it is difficult to isolate a single global figure, the debt faced by the trusts when they collapsed after *Pouawa* in 1881, was well in excess of £100,000. Much of that was the cost of reacquisition. If it had not been incurred, the trusts would have had a better chance of surviving even through the downturn of the 1880s.

What might have happened if Chief Justice Prendergast had found that the *Pouawa* trust was valid or if enabling legislation had been passed? Clearly, the 20 Irish tenant farmers and their families would have stayed. On the evidence, they waited in Turanga for three months to see if they could acquire clear titles, such was their enthusiasm. They would have paid £8750 for the 7000 acres they purchased. This sum was greatly in excess of what the Maori owners might have expected to receive in the sale of undivided interests. Rees advised the Native Minister, when seeking support for his enabling legislation, that there were another 100 tenant farmers 'each possessed of capital varying from five hundred to several thousands of pounds'. In short, the scheme could have worked. It would have got off to a solid start and would have established all-important market credibility. Maori communities wishing, as communities, to

350. Document F11, p 61. Barker had purchased 28 out of 48 shares.

351. Document G21, p 2

sell land, could have gained from those sales the true value of the land. They could also have planned, as communities, for the retention of lands necessary in the new pastoral economy for their survival and well-being. It is, as we have posited, unthinkable that they would have chosen to self-destruct.

The only case in Turanga, indeed in the country, where community management was introduced *at the point of award* in the Native Land Court was Mangatu in 1881. This was quickly followed by ratifying legislation, before sales could erode titles or debts reduce management options. The Mangatu Incorporation did well enough on leasing to the end of the nineteenth century, survived debilitating internal conflict in the first half of the twentieth century and went on to become one of the great success stories of the Maori economy in the second half.

Legal support for community management did not, of course, guarantee business success. Leadership, skill, finance, and critical mass were also necessary. Communities, and particularly their leaders, had to shoulder enormous responsibilities, even if the legal tools were available to them, in order to make the best of their opportunities and extract proper value from their lands. Mistakes were made and failures did occur. Although Maori incorporations were eventually provided for by law in 1894, many of the incorporations established in Turanga in the early twentieth century did not survive. Some struggled because they (initially) could not borrow. Most were established too late and were too small to be viable (most of the community land having been sold in the nineteenth century). Only the big incorporations like Mangatu and Waihirere were large enough to tough out the more difficult farming times. Many committees lacked skill and effective leadership in a commercial context. Some, however, did survive and prosper as finance became available and commercial skills were progressively acquired.

What is crystal clear, however, is that, without a legally secure community management regime applicable from the outset, the retention and control of Maori land by Maori communities was not even possible. The system dictated that the land would inevitably be sold by individuals for small sums, and that the land owning community would become non-viable. Communities would be forced to shrink or relocate. Sometimes they would just cease to exist at all. It was simply a question of time.

With the bulk of Maori land in Turanga having passed out of Maori hands by the turn of the century – the concern expressed by Stout and Ngata in 1908 about the state of Turanga titles will be recalled – the 1894 provision for community title was too little, too late.

At its heart, therefore, Maori landlessness in Turanga was not caused by Maori profligacy, as the Crown implied in submissions in our inquiry. A decent system would have allowed Maori communities to protect themselves against individual recklessness. It would have contained the potential for at least some communities to thrive through successful engagement with the colonial economy even if, inevitably, some would have failed. Though Turanga did not lack for enterprising hapu and leaders with vigour, we can find no example of a community which was strengthened, made wealthier or generally better off as a result of the new

system of native title in Turanga. It was not Maori choices which caused this. The cause was structural. It was to be found in the design of the system. The designers refused to provide for Maori communities to manage their assets *as communities*. That is, until it was too late.

8.5.11 Did the Crown intend Maori landlessness?

The Crown and claimants were generally agreed that at some point in the late nineteenth or early twentieth centuries, Turanga Maori had alienated more land than was consistent with their best interests. While there was some disagreement about when that point was reached, no one doubted that it had been. The real debate was about whether the Crown intended that result when it designed the system.

Crown counsel argued that, notwithstanding the result for Maori, the legislation merely provided a conveyancing code to regulate transactions in Maori land. The early native land laws did not actively encourage alienation.³⁵² While under the regime Turanga Maori were free to deal in their lands as they saw fit, it was argued that: ‘There is no evidence to support the view that the vesting of the freedom of contract in a people [Turanga Maori] with limited market experience was bound to end in failure and ultimately suit only the designer of the system.’³⁵³

Crown historian Dr Loveridge argued that far from designing a system to separate Maori from their land, politicians were taken by surprise at the enthusiasm with which Maori used the court and sold land.³⁵⁴ It is important therefore, the Crown argued, to distinguish between the design of the system and the outcome it produced over time. Thus, the Crown acknowledged that the outcome was excessive land sales, but it did not follow that this was its purpose.

As we noted in our introduction, the distinction between design and outcome is crucial. If the Crown is right, then its obligation could only have been to intervene at some point, to protect Maori from their own enthusiasm for sale. If, on the other hand, the system was designed to strip Maori of as much land as possible by denying them effective alternatives to alienation, and if this was done without regard to whether the result was landlessness, then this really was, as the claimants argued, merely *raupatu* by another name. We turn now to assess these arguments.

At the outset, it is clear that the purpose of the system was to ensure that the bulk of the Maori land base passed out of Maori ownership. The Crown acknowledged that this was the case. Dr Loveridge, in analysing the first Native Lands Acts, for example, said: ‘The idea that Maori should be encouraged to retain most of their lands, or might want to maintain a separate identity, was not one which British settlers, missionaries and officials in the mid Nineteenth century could readily grasp.’³⁵⁵

352. Document H14(12), p6

353. Ibid, p7

354. Document A74, p236

355. Ibid, p232

It is also clear that settlers were indeed surprised at how successful the system was in achieving that end. If the Crown must bear some responsibility for Maori landlessness, the fact that the system exceeded expectations hardly absolves the designers. It is true that at least some settlers were surprised at the speed with which Maori land was sold. But that does not, as Loveridge sought to imply, indicate that Maori were merely choosing from a range of reasonable alternatives available to them. It certainly does not indicate that the speed with which Maori land was sold proves Maori were authors of their own downfall. It does not show one way or the other whether the system was designed to achieve the outcome that was achieved. The fact is that if any of the Native Lands Acts had failed to ensure large scale Maori land alienation, in accordance with their design, the Legislature would have tried something else. It is to be remembered that the Acts themselves (introducing as they did an open market in individual interests), were a response to the failure of Crown pre-emption to produce lands for settlement in sufficient volumes to meet demand. As Dr Loveridge quite fairly accepted:

Had the pre-emption purchase system continued to provide land in adequate quantities and in suitable locations, it seems unlikely that there would have been quite as much pressure exerted on the Crown by settlers to abandon its pre-emptive right and authorise a different approach.³⁵⁶

The next question is, if Maori wished to participate in the opportunities presented by British settlement, what were the alternatives available to them to do that? A related and equally important question is, who got to make the choices? On the first question we have already concluded that from 1873 until the turn of the century, access to opportunity required alienation. The law provided no other mechanism. One of the problems in the entire thinking underlying the Native Lands Act 1873, was that it did not change the limitations of customary title except for alienation. According to settler ideology and legal theory, customary Maori title was beyond the reach of English law and commerce. As the Supreme Court in *Poaka v Ward* made clear, that remained the position for titles under the 1873 Act. Under that Act, Maori titles could be recognised for the purposes of sale or lease only. They remained invisible for all other purposes. So Hamiora Mangakahia was told by the Supreme Court in *Mangakahia v NZ Timber Co Ltd* that, although he was a customary owner of the land in question, he could not eject the defendant for trespass if he was not personally in occupation. Nor could this form of title be mortgaged. It followed that modern management systems could not be grafted onto this form of title. Indeed, to have made formal provision for tribal engagement in commerce in this way would have been unthinkable to most settler politicians.

On the second question, we have concluded that community rights were extinguished and the choice of whether to pursue the new opportunities or keep colonisation at arm's length was removed from community decision making. Instead, as we have said, even this extremely limited choice would now be made by individuals. There was, it should be said, one exception

³⁵⁶. Ibid, p233

to the otherwise complete absence of communal management mechanisms in the Act. Section 63 allowed for a single receiver of rents to be appointed by a community of owners where land was leased. But that exception was created to simplify the payment of rent for the benefit of settlers. It was not introduced for the benefit of the owners. That was ancillary to its primary purpose, which was to facilitate leases. Thus, the approach of the Act ensured that the title Maori received was unusable in the new economy for any purpose except alienation. In order to gain access to the management mechanisms provided by English law, such as trusts, Maori were required to first commute their customary titles to Crown grants. However, these Crown granted titles could have no more than 10 owners. The requirement was of course self-defeating. In order to introduce a valid community management system, the land had first to be completely detribalised. In the end, it was a cruel catch 22. The required process by its very nature destroyed any prospect of achieving community management.

A system which constrained choice and removed community decision making in this way was unquestionably designed to force sales. Having created these powerful incentives for alienation, settler politicians may well have been surprised at Maori inability to boycott the system. But it cannot be said that politicians were unaware of the risks which an open market presented to long-term Maori interests. JC Richmond (the brother of Justice CW Richmond) among others, in the earliest debates over the removal of pre-emption, warned that Maori would end up the losers. Maori, he said, might find the sudden acquisition of wealth ‘a Pandora’s box’. The 1862 Act would generate:

a perfect revolution among them . . . The whole race would be sifted; they would be purged with fire. Doubtless a remnant would emerge of men fit for any position in the colony . . . but as to the body of the Maori people he . . . could not but utter his grave doubts as to the result on them . . .³⁵⁷

According to Sewell: ‘The principal money power . . . drawing Bell on in this measure is the land-sharking interest of Auckland, who are looking out like birds of prey to pounce down upon Native Lands the instant the Bill passes.’³⁵⁸

For his part, James O’Neill, a member of Parliament, did not think speculators would buy up all the land, but even if they did, ‘he would rather see it in the hands of a few white men than of the Natives, as roads might, at all events, then be made through it’.³⁵⁹

We are left with the overall impression that the colonial Parliament was aware of the risks in exposing Maori, for the first time, to an open market in individual shares. It can hardly be said that it was not reasonably foreseeable that at least some Maori, acting as individuals

357. JC Richmond, NZPD, 26 August 1862, pp 630–631 (doc A74, p171)

358. Bell to Grey, 6 October 1862, APL GL NZ B15 (2) pp 26–28 (doc A74, p193). Loveridge suggests that this should not be taken seriously as Sewell had failed to secure a Cabinet position in contrast to Russell, who had been successful. We do not see how any political animosity reflected in the strength of the language used, necessarily discredits the comment.

359. NZPD, 25 August 1862, p 624 (doc A74, p172)

without community constraint, would sell all of their land without properly appreciating the consequences either to themselves or their communities. Indeed, JC Richmond feared that most would follow this path. This cannot have been a difficult conclusion for him to reach. It is unarguable that the title system was designed to encourage this.

With respect, the Crown's argument that an open market represented no inherent risk to a people inexperienced in such things is inconsistent even with the settler view of matters at the time. But the argument loses all credibility when the rules of the market so created are analysed:

- ▶ right-holders seeking economic opportunity must alienate to engage;
- ▶ the safety net of community decision making is removed; and
- ▶ prices are artificially depressed both through title disaggregation and through contractual uncertainty as a result of section 87.

In reality, it is obvious that any concerns that may have existed for Maori interests were completely subordinated to the primary purpose in the legislation; that is – as the Crown accepted – the need to provide enough land at a fast enough rate to meet the demands of settler immigration. It was known at the time that the level of immigration envisaged in the 1860s and 1870s would require Maori to give up the vast bulk of their lands. Yet, the risk that purchase in an open market would go too far – that is, the risk of Maori landlessness, while openly acknowledged, was not sufficiently important to ensure that effective safeguards against it featured in the system's initial design. Maori were to be free to deal in their land as they saw fit and this was to be seen (conveniently) as a benefit to them. But the rules for decision making would not be Maori rules. They would be rules based on the individualised system of the settlers. This too would be officially described as a benefit to Maori.

In our view, the evidence is quite clear. The system was designed to ensure that the bulk of Maori lands were sold. As we have said, had the system failed, it would have been changed to a system that succeeded. The risk of Maori landlessness was not a sufficiently important policy consideration to justify the introduction of a protection mechanism capable of compromising the primary objective.

Even if that conclusion is wrong, it cannot be credibly argued that the Crown did not apprehend the problem by 1873. The direct experience of the 1865 legislation demonstrated the risk of the system to Maori. On 11 July 1867, Chief Judge Fenton (of the Native Land Court) delivered to JC Richmond [Native Minister] his 'Report on the Working of the Native Lands Act 1865'. He suggested that the court was dividing Maori into two classes, 'one component of well to do farmers and the other of intemperate landlords'. In passing it should be noted that he was, of course, speaking only of those Maori actually awarded titles under the 10-owner system. Most Maori under that system would be neither landlords nor farmers. As to the 'intemperate' owners, he wrote:

It is not part of our duty to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, nor can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.³⁶⁰

In other words, many Maori were ill-equipped to cope with the new market, but the losses they would suffer were inevitable and unpreventable. The chief judge certainly saw no reason to advise the Crown to slow alienation down to protect Maori.

Three years later, in 1870, Justice Minister Sewell signalled that the problem was worsening. When presenting his Native Lands Frauds Prevention Bill, he outlined the vices he believed needed to be remedied:

in many parts of the country Native tribes were becoming pauperized; their lands were vested in trustees who were not faithfully discharging their trust, and were passing away into the hands of Europeans, who obtained them through inequitable bargains. He [Sewell] could conceive no greater danger to the Colony than for large masses of Natives to be denuded of their lands and pauperized.³⁶¹

By the time of the Richmond inquiry of 1873, landlessness was already a reality. In Hawke's Bay, the 10-owner rule had, according to Justice Richmond, divested 75 per cent of Maori adults of their lands. Of the 166,567 acres which had not yet passed through the court under the 1865 Act (a tiny fraction of the district), the bulk was held by central Hawke's Bay hapu.³⁶² It followed that a significant number of Maori from that province, whose lands were located north of central Hawke's Bay, were effectively landless. As Justice Richmond rather cruelly noted: 'True, the procedure of the Court has snapped the faggot-band, and has left the separate sticks to be broken one by one.'³⁶³

The Richmond report provided the basis for much of the content of the 1873 Act which regulated almost all of the transactions in Turanga. For present purposes, it identified two clear areas of concern. The first was the landlessness to which we have already referred. The second was the problem of fraudulent or unfair dealing. The Act contained provisions in respect of both, as we have described at some length. It is unnecessary to repeat that material in any detail here. It will be recalled, however, that section 24 of the Act made provision for district officers to establish reserves for Maori. The measure of sufficiency, such as it was, would be 50 acres per head for each man, woman, and child. There were initial attempts at implementing these provisions – it will be recalled that Samuel Locke was appointed to the

360. Report on the Working of the Native Lands Act, 1865, 11 July 1867 to JC Richmond (doc A74, p236, n 552)

361. NZPD, vol9, p361 (doc A75, p130)

362. JC Richmond, 'General Report by the Chairman on Hawke's Bay Native Lands Alienation Commission Act, 1872', AJHR, 1873, G-7, p7

363. AJHR, 1873, G-7, p7

office for the East Coast – but the idea had so failed to achieve its objective that the Native Land Laws Commission, in 1891, appeared to believe that it had never been implemented at all:

No district officers were appointed; no reports were made; no Domesday Book, founded on evidence fast dying out, was prepared; no reserves were set aside; no division of tribes in hapus before dealing was attended to: the desire to purchase Native estates overruled all other considerations.³⁶⁴

The fact that the 1873 Act included such provisions indicates that the Legislature knew by then of the real risk of Maori landlessness. It perhaps indicates that Parliament understood this to be a moral issue. It certainly suggests that politicians knew landlessness threatened to create an unwanted class of people substantially dependent on the state for their livelihood. Yet, as the Native Land Laws Commission so bluntly put it, the need for land outweighed all other considerations. Even Crown counsel accepted that ‘The focus of protection (in the 1873 Act) was upon protection in dealing rather than upon protection in retention of land.’³⁶⁵

Thus, the consuming purpose of all native land legislation, including the 1873 Act, was to satisfy settler demand for land. The system of individualised purchase was designed to achieve this while removing the worst excesses of fraudulent and unfair dealing so evident in Hawke’s Bay under the previous regime. Indeed, this system was introduced precisely because Crown purchase had failed to satisfy the demand. It must also follow that the Crown knew (or at least fervently hoped) that by adopting the different tack of going behind the tribe to its individual members, sales would be facilitated which would not otherwise be achieved. As Loveridge accepted, it would not have been launched otherwise. It is obvious therefore that it was designed to increase the speed of sales.

We conclude therefore that even if it cannot be unequivocally demonstrated that the system was designed to achieve Maori landlessness, the designers were reckless as to whether this would be its outcome. That is, they foresaw the risk but took no real steps to guard against it. It must come as no surprise that a system of purchase designed entirely by the purchaser would be unconcerned about the interests of the seller. There was a strong element of manifest racial destiny in the attitudes which gave rise to this studied indifference. Take, for example, this view expressed by Sewell:

In fulfilling the work of colonization we are fulfilling one of our appointed tasks . . . As a matter of abstract theory, I utterly deny that the land of these favoured Islands were meant by Providence to be retained in a state of waste – that a territory as large in extent and possessing as great natural advantages as the British Islands was to be rendered forever

364. W L Rees and James Carroll, ‘Report of the Commission on Native Lands’, AJHR, 1891, sess 2, G-1, p x

365. Document H14(12) p3

inaccessible to civilization and forbidden to the use of man by an imaginary title vested in fifty or sixty thousand semi barbarous inhabitants scattered thinly over the country in miserable villages in a few scarcely perceptible spots. I deny that, in the sense of any inherent right, this people can maintain their exclusive title to forests and plains which they never trod, and mountains, teeming probably with unlimited stores of wealth, which it may never have seen. Those who, in opposition to such imaginary rights, maintain and assert the rights and duties of colonization have to my mind great truths on their side. In conformity with these truths the work of colonization proceeds.³⁶⁶

With such attitudes in the ascendant, there can be no question but that the inherent conflict between satisfying settler demand and preventing Maori landlessness would always be resolved in favour of the settler. We find therefore that the Crown was well aware, at the time Crown pre-emption was dropped, and certainly by the time of the Native Lands Act 1873, that the new Native land system would lead to widespread Maori landlessness and through this the destruction of Maori communities. The Crown remained, at the least, indifferent to that likelihood. At worst, senior figures within successive administrations actually welcomed it.

Against this reckless indifference, there were continual efforts by Turanga leaders to reconstruct community management of their lands so as to control the process of sale and retention. It cannot have been an accident that the law failed to provide for community management *from the point of award*. It was not until 1894, long after the bulk of Turanga lands had been sold, that a mechanism was provided for. By then substantive control of sale and retention had already been lost in Turanga. The fact that Pere only achieved statutory ratification of the Mangatu Incorporation on a one-off basis in 1893 confirms that the Crown was actively opposed to Maori collectivisation. Dr Loveridge in his evidence for the Crown said as much.

We are left to conclude that:

- ▶ The 1873 Native Lands Act regime led Maori to sell lands individually which they would never have sold collectively because they were critical to community well being.
- ▶ The Crown knew that this was the effect of the Act and refused to make provision for community management for that reason.
- ▶ The system of land transfer was such that individual owners did not receive fair compensation for their land interests.
- ▶ The Crown was aware of the risks of landlessness and title fragmentation which the system presented and was recklessly indifferent to them.

366. Document A74, p185

8.6 CONCLUSIONS AND THE TREATY

8.6.1 Recap

As we said at the outset, it was not our purpose to assess individual transactions under the land court system for Treaty consistency. There were undoubtedly land sales that were fully consensual – that is, the sellers all individually agreed the price, understood the effect of sale, received the proceeds, and were satisfied with the outcome. There were others in which some or all of the owners either did not wish to sell or did not agree the price, yet were forced by circumstance or tricked by purchasers into joining the transfer. We saw evidence of both consensual and non-consensual sales in Turanga. There were certainly many, as the Assets Company litigation showed, in which safeguards were not effective. We are, however, far more interested in the system than individual transactions. Our focus is on whether the structures and processes for the administration and alienation of Maori land under the Native Lands Acts were consistent with Treaty principle. The questions we have posed reflect that focus.

It is best, then, to begin by recapping our main conclusions. In the first of our four sections, we considered the Native Land Court. We found that, although Maori were very interested in official ratification of their customary titles, most did not want to hand over the power to award such titles to a colonial court. They wished to adjudicate their own title questions. We found accordingly that the Native Lands Acts, in providing for the operation of the Native Land Court, expropriated from Maori the power of deciding questions of title.

In the second section, we considered Maori customary land tenure in the nineteenth century. We concluded that Maori land was the subject of a complex web of kin-based rights.

We found that:

- ▶ While some rights were held at whanau and even individual level, all rights existed on a substratum of tribal (that is hapu) title. Crucially, the decision to alienate belonged, in accordance with customary tenure, to the hapu.
- ▶ Despite this, the 1873 Native Lands Act introduced two significant changes to Maori land tenure. First, it allowed Maori customary land to be alienated, and secondly, it individualised that alienation process.
- ▶ The effect of these changes was to expropriate from communities both the community title itself and the community's right to control land sale and retention strategies.
- ▶ Maori on the whole, did not support the individualisation of titles.

In the third section, we considered the efficacy of the system of title allocation and land transfer under the Native Lands Acts. We found (as did political leaders at the time) that the system was complex, inefficient, and contradictory. In our view, this meant that such safeguards as were contained within the system to protect Maori against unfair and unwise land alienations were ineffective.

In the final section, we considered whether the native title system caused Maori to lose control over alienation and whether this was intended by its designers.

We found that:

- While alienation was the only means provided by law by which Maori could access the opportunities of the colonial economy, the system's defects artificially depressed the value of Maori lands when Maori did seek to sell or lease.
- The law both restrained the options available to Maori and reduced the benefits that they could receive when those limited options were taken. When these factors were combined with the circumvention of community decision making, it was beyond argument that Maori sold land as individuals that which they would never have sold as communities. The Crown designed the system to produce this effect.
- Maori very quickly lost control of the whole process of alienation as a result.

We finally found that the Crown was aware of these risks to Maori since they were inherent in the design of the system, but did not wish to compromise the pace of land sales by reducing those risks in any material way. By the time community titles were finally accepted in 1894, there was too little land remaining and titles were too eroded by individual sales.

We have said in this chapter that these factual conclusions have general application throughout most of the North Island in the last quarter of the nineteenth and early twentieth centuries. But they depict the Maori land alienation history of Turanga with particular accuracy.

8.6.2 Sovereignty, title, and control

That brings us to the words of the Treaty. There can be no doubt that the transfer to the Crown of 'absolute sovereignty' or 'te kawanatanga katoa' included the right to make laws for the regulation of Maori title including the transfer of that title. The specific reservation of Crown pre-emption in article 2 demonstrates the centrality of these issues to Crown–Maori relations at the time of the Treaty. But it is now unarguable that this right to make laws was not unfettered. By the terms of the second article, the Crown offered two crucial guarantees in the context of the native title system. The first was that Maori title would be respected. This was most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain. If the transfer of sovereignty was non-negotiable to Captain Hobson, then the promise to respect both title to and power over tribal lands was no less so for Maori. There would have been no Treaty at all, if the two sides had not been prepared to make these key concessions. It follows that the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.

On the Maori side, it had to be accepted that it was the Crown's role to develop and implement the native title system. Maori could be consulted over these matters, but they had given up the power to operate outside the Crown's laws.

In light of the explicit words of the Treaty, the imposition of the Native Land Court in a form which did not facilitate Maori control of title allocation questions, and against express Maori opposition, was in obvious breach of the article 2 control guarantee. Nor was it necessary if the Crown's only purpose was to ensure the peaceful settlement of title disputes. The Crown could have established a court comprising local tribal leaders (as the Native Lands Act 1862 provided) which did meet the Treaty standard. That option was specifically rejected in 1865, despite Maori calls for its retention. Alternatively, the Crown could have empowered tribal runanga and komiti to resolve their own title issues and in a way which did not compromise the Crown's sovereignty. Maori throughout the North Island and in Turanga requested this. The Crown refused to pursue either option because the strengthening of tribal infrastructure would have slowed sales and maintained tribal power.

Similarly, the expropriation of community title and control through the individualisation of sales, breached both the title and control guarantees in the Treaty. As we said in section 2, the control guarantee was made in respect of each right holding level in Maori society 'ki nga rangatira' (to the chiefs), 'ki nga hapu' (to the tribes or communities), 'ki nga tangata maori katoa' (and to all of the ordinary or Maori people). The title guarantee in the English text contained similarly comprehensive wording. It is no answer to say that community rights were adequately replaced by individual rights. They could not be. The Treaty guarantees were made at both levels. Most importantly, Maori, both in Turanga and nationally, consistently demonstrated that they wanted to retain community titles in the new economy. In our view, that aggravated the breach. The title guarantee was, after all, to hold good 'for as long as they wished to retain the same'. The expression of Maori preference in this respect was disregarded because it was inconvenient. It will be recalled that when the Mangatu Trust was ratified by statute in 1881, it was only on condition that it be a one-off measure.

As to the unwieldy and flawed nature of the system, we do accept the Crown's argument that it was experimental and that some teething problems were inevitable. The problems faced in the native title system were however of an altogether different order, as the Native Land Laws Commission confirmed so powerfully. The fact is that the English legal tradition at the time did not lack for mechanisms to give effect to Maori aspirations in respect of their lands, to simplify native land tenure and to produce greater benefits for owners. Rees and Pere tried to apply them. It may be that these mechanisms were not provided for in legislation because of the risks they presented to the Government's land purchase objectives, or it may be because no administration cared enough about the difficulties Maori faced to legislate for the resolution of them. It is difficult to tell which of these two options was the actual reason. Either way, it cannot have been consistent with the article 3 equal rights guarantee, or with the

principle of active protection, for the Crown to have created and maintained a system for so long, which was so defective and whose safeguards were so ineffective.

That brings us to the last and most important question. Did: (a) the refusal to allow Maori landowners to access development opportunities except through alienation; (b) the removal of the community from the alienation process; and (c) the artificial suppression of prices; in combination mean that the native title system was *raupatu* by another name, as the claimants argued? Does the fact that Maori individuals sold more land than their communities would have sanctioned, indicate that there was no practical alternative to sale, for individual interest holders separated from community constraint? It is clear that the 1873 Act and subsequent Native Lands Acts were expropriatory at two levels. First, rights traditionally vested in the community to decide matters of title were taken away and given to the Native Land Court. Secondly, community title, including crucially the right to control alienation, was extinguished. No compensation was paid for these takings. All of that certainly was *raupatu* in breach of both the property and control guarantees in article 2.

Beyond that, the powerful incentives drafted into the Acts to sell, and the lack of incentives to do anything other than sell, cannot be ignored. Nor can the fact that the suppression of prices meant owners had to sell more than they should have in order to achieve a reasonable return. In the end, as we have said, it in fact became easier for most landowners to sell up than it was for them to retain their lands. It may go too far to call this *raupatu*, but there cannot be any question that a system of this nature breached both the spirit and intent of the Treaty's title guarantees. The lands may not have been actually confiscated, but they were subjected to concerted, and for most ordinary Maori landowners, unbearable statutory pressure to sell. This pressure was inconsistent with the Crown's fiduciary obligation to Maori and its related obligation to actively protect the Maori interest. We find accordingly. The legislative context having been created in this way, it was sufficient to leave a market full of eager buyers to complete the job. And of course it is to be remembered that the Crown was by far the biggest single buyer in that market, even in Turanga.

The effect on the ground in Turanga of this system was that within 30 years, 70 per cent of the Maori land base had been sold at knock-down prices. At the end of the period, Maori, whether as individuals or communities, had almost nothing to show for that divestment because except for a few of the most wealthy chiefs, the proceeds had been too small to spend anything but consumption. Continual sales into the twentieth century, including those by the huge East Coast Native Trust, combined with ongoing fragmentation and fractionation of residual titles, almost completely marginalised Maori enterprises and Maori communities. We say almost, because the successes of the Mangatu Incorporation amongst a very few other, offered some relief from this negative pattern.

We are left to conclude therefore that the extremely high level of land alienation in Turanga and the equally low level of Maori participation in alternative capital investment, were effects of the system of tenure provided under the Native Lands Acts. We further conclude that these

efforts were clearly not the result of conscious choices made by Maori communities selecting from a range of reasonable alternatives. They were choices that Turanga Maori were pushed into by the structure and objectives of the native land system.

CHAPTER 9

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

Let us cease to sell land. And do not let us persist in it, lest our children become like those who have not any parents to feed and help them. But let us keep that portion of land we now possess for our offspring, who may sell it, when they have as much knowledge as the Europeans.

—*Te Wananga*, 9 June 1877

9.1 INTRODUCTION

In chapter 10, we outlined the first attempt by Turanga leader Wi Pere and his lawyer William L. Rees to provide for the community management of East Coast lands. In the absence of any such provision in the native land legislation, Pere and Rees promoted community trust structures to engage in schemes for Pakeha settlement and Maori development. Communities throughout the East Coast vested their land in trusts. Over 70,000 acres was vested by Turanga communities. As we have seen, however, Rees and Pere soon ran into legal and financial difficulties. As the best Turanga lands had already been sold, and had to be reacquired from their settler owners, the trusts started life with substantial debt. The failure of the Legislature and the courts to provide legal support for the trusts undermined public confidence in their East Coast settlement schemes.

Despite these setbacks, Pere and Rees persevered. They created a joint-stock company, the New Zealand Native Land Settlement Company. Despite an apparently strong beginning, this scheme also faltered, and in 1888 the company went into receivership. The lands had been mortgaged by the company to the Bank of New Zealand, and in 1891 the bank's estates company sold a number of blocks to repay part of the mortgage. Subsequently, a new trust was established, in which Pere was joined by Sir James Carroll as trustee. By an agreement of 17 February 1892, all blocks for which the estates company held complete titles were transferred to the trustees, and were remortgaged to the Bank of New Zealand.

Throughout the 1890s, the Carroll Pere trust struggled to survive. The 1892 agreement provided for additional former company blocks to be transferred to the trust once their titles

were completed. This incurred expensive legal costs which, along with high interest rates, rapidly increased the debt of the trust estate. The trustees were anxious to preserve the remaining lands, and sought enabling legislation. Finally in 1902, the Government intervened, and the remaining trust lands were vested in a new statutory body, the East Coast Native Trust Lands Board. Four years later, following the repayment of the external debt, the trust lands were vested in the East Coast Commissioner. The commissioner was to become a powerful economic force on the coast. From the point of view of the Maori owners of blocks vested in it, it has also been a controversial one.

In this chapter, we consider the following key questions:

- (a) Why did the Rees Pere trusts, the New Zealand Native Land Settlement Company and the Carroll Pere trust fail to produce significant benefits for Turanga Maori?
- (b) Was the Crown implicated in this failure?
- (c) Why did Turanga Maori effectively lose control of their lands from 1902 to 1955? Was the Crown implicated in this loss of control?
- (d) What was the long-term impact on Turanga iwi of the failure of successive Rees Pere initiatives?

9.2 THE HISTORY OF THE TRUSTS

The history of the Rees Pere trusts lands is a long and complex one. We attempt here to provide a succinct narrative of the successive phases. Since we have already commented in some detail on the early history of the trusts, which we considered important to our discussion of community initiatives in the Native Land Court chapter, we do no more than recapitulate this here. We turn then to outline the subsequent history of the trust lands.

9.2.1 The Rees Pere trusts, 1878–81

From 1878, Turanga leader Wi Pere and his lawyer WL Rees worked together to establish block trusts for East Coast Maori lands, including Turanga lands. Their purpose, as we have seen, was to reinstate a form of community decisionmaking over land retention and alienation (absent in the Native Lands Act 1873), and thus introduce an element of control over the pace of regional Pakeha settlement. Pere and Rees met at the time of the Hawke's Bay repudiation movement. Pere invited Rees to Gisborne, and Rees began promoting the trust schemes in the settler community.

Rees's move to Gisborne marked the beginning of a long partnership between the two men, and some comment should be made here on their respective political beliefs. Pere would have a long career as a parliamentarian from the time of his election to the Eastern Maori seat in 1884. He lost his seat to Carroll in 1887, but was returned in 1894 after Carroll



Fig 17: Maori leaders of Gisborne, circa 1908. Photographer unknown. Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (Peter Gordon collection, F- 44562-½). The group includes: *on floor, left to right*, Henare Te Raumoa Balneavis, Henare Ruru, Timoti Maitai; *seated*, Wi Pere (second left), Te Huinga (fourth left), Patoromu Ruru, Paora Kohu (first and second right); *standing*, Idie Ferris (second left), Take Kerekere (right).

decided to stand for the general (European) seat of Waiapu. He spoke for many years against the Native Land Court and against settler land hunger, as he perceived it. In the 1890s, he supported the Kotahitanga movement and the Paremata Maori (the Maori Parliament), though he finally also threw his weight behind Carroll's attempts to find a compromise solution between the Paremata and the Liberal Government. By the time he was appointed to the Legislative Council in 1907, Pere was an elder statesman in the Maori world.

William Rees began his career as a congregational minister, became a lawyer and land developer, and entered politics as a liberal. He became a member of the House between 1876 and 1879, and then again in the 1890s. His book *From Poverty to Plenty: Or the Labour Question Solved* (published in 1888) discussed joint-stock companies in the colonial context, as promoters of immigration, employment, economic, and community development.¹ He was, however, interested in small-scale settlement and argued that labourers should have a stake in such companies too. Rees developed an early interest in the nature of Maori

1. WL Rees *From Poverty to Plenty; or, The Labour Question Solved* (London: Wyman and Sons, 1888), ch12, esp pp 418–431. The Joint-stock Companies Act 1856 established the principle of limited liability, the principle exempting stockholders from liability for the debts of the company in English company law. It simplified the process of forming a company.

customary title and the work of the Native Land Court in the wake of the 1873 Act. He would argue for many years that Parliament must change the law and enable Maori to act tribally as they always had, and manage their own property in a way 'at once consistent with the genius of their customs and the public good'. It would be simple, he argued, to 'turn a tribe into a joint-stock company for the ownership of its estate'.² As we have seen, Rees sat on the Native Land Laws Commission in 1891. He remained in Gisborne all his life, and for many years worked with Maori for the development of their lands.

In 1878, the Rees Pere trusts schemes attracted strong Maori interest all along the East Coast, with at least 200,000 acres being vested in the trusts.³ Despite this, as we have discussed above, they soon faltered. The failure to secure the passage of legislation which would have provided for community management was a major blow. Chief Justice Prendergast's decision on the Pouawa block, which declared the Pouawa Trust unlawful, had a major impact on public confidence. As a result, Rees and Pere had to sell land for settlement to recover the costs of debt they had already incurred. In fact, they were to sell little.

From the outset, the Rees Pere trusts accrued debt. Rees and Pere lacked capital themselves, yet faced major costs acquiring the land they needed. Some land was vested in trust directly by the Maori owners, at very little cost. But the best land in Turanga had already been the subject of early transactions between Maori and settlers in the first years after the Poverty Bay Commission awards. Rees and Pere financed reacquisition of this land by agreement with settlers through a system of mortgages and land exchanges. The settlers asked high prices but, in cases where they had merely purchased undivided interests under the Poverty Bay Grants Act or the Native Lands Act 1873, they also gained a shortcut to freehold title of the parts of the blocks they chose to keep.

9.2.2 The New Zealand Native Land Settlement Company, 1881–88

In 1881, following the *Pouawa* decision, Rees and Pere decided on a new initiative to promote their close settlement philosophy. They formed a joint-stock company, the New Zealand Native Land Settlement Company, which combined Pakeha investors' capital with Maori land.⁴ Most of the blocks in the Rees Pere trusts were transferred directly to the company. The management of the company was to be in settler hands, though initially four of the eight promoters of the company were East Coast Maori.⁵ The capital of the company was to be half a

2. Memorandum on the Native Land Laws by Mr Rees, AJHR, 1884, sess 2, G-2, p 4

3. Document F11, pp 41–42. Macky noted that, although Rees said that 400,000 acres was vested in the trusts, it is more likely that the amount was not much more than 200,000 acres. We have accepted the more conservative figure.

4. Document F11, p 92; doc A4, p 30. Their first company was incorporated on 6 April 1881 as the East Coast Native Land Settlement Company, but the name had to be changed because there was already a company registered in that name. The New Zealand Native Land Settlement Company was reincorporated, with a larger share capital, on 10 October 1881.

5. Document F11, p 94. The Maori promoters were: Wi Pere, Major Rapata Wahawaha, Henare Potae, and JA Jury from the Wairarapa.

million pounds, in 100,000 £5 shares. Maori contributed the necessary land, and received 70,000 fully paid shares in return. Cash investors were to receive 30,000 shares, and would get their dividends first.⁶

The company was a larger operation than the trusts. Early in 1883, it extended its operations and shifted its headquarters to Auckland. The number of directors was increased to 17, and some very well known Auckland businessmen, including Thomas Russell (one of the founders of the Bank of New Zealand), James Williamson (the bank's first president), and Dr Daniel Pollen (a former Premier) came onto the board. From this time Pere was the only Maori director.⁷ The company acquired interests in 205,492 acres of land in the inquiry district, and many more thousands of acres outside our present district.⁸ Of this, 94,550 acres (including Mangatu 5 and 6, and Okahuatiu 1 and 2), was purchased directly from the Maori owners. The company also leased the massive Mangatu block, which it could not buy because of restrictions on the title.⁹

The New Zealand Native Land Settlement Company had the same goals as the trusts. It therefore needed the flat, fertile lands on the Waipaoa River plain, such as the Matawhero and Whataupoko blocks, in order to attract settlers. Whataupoko, which had just been sold by the trusts, was therefore repurchased.¹⁰

Within a few years the company, like its predecessor, ran into difficulties. It had inherited the original Rees Pere trusts debt. It faced the high costs of buying back the same quality lands. (It spent £58,151 in the inquiry district alone, repurchasing 19,273 acres sold by the Rees Pere trusts to settlers.¹¹) Then in May 1883, it agreed to take over the Auckland Native Land Colonisation Company.¹² The merger would fail, but it was the catalyst for the New Zealand Native Land Settlement Company securing an increase in its overdraft facility with the Bank of New Zealand (with Russell's assistance), from £25,000 to £60,000. By the end of the year its overdraft had grown to £58,000. With mortgages amounting to £58,284, its total debt was over £116,000.¹³ Despite assets of £275,901 estimated at the end of 1883, New Zealand Native Land Settlement Company paid no dividend. Its sales of land were also disappointing. In

6. Document F11, pp 93, 94, 95–96. These shares could constitute either full or part payment for the land Maori invested. Maori were offered a choice as to how they received their share of the profits. It seems that in most cases they were to be paid two-thirds of the profits on a particular block. The Paremata deed of purchase (from outside the inquiry district) is the only deed to have survived. It shows that the company agreed to pay Maori £9000. By a second deed, signed the following day, it was agreed that £8100 of this money would be reinvested in company shares. These shares would be surrendered for two-thirds of the net proceeds of disposal of the block as such proceeds arose. Maori were entitled only to receive an amount equal to the value of the shares.

7. Document F11, p 110

8. Document A4, p 38

9. Document F11, p 113

10. Ibid, pp 117–118

11. Ibid, pp 122–123. These blocks were Kaiparo, Matawhero 1 and 5, Te Karaka, Pakowhai, and Whataupoko.

12. Ibid, pp 132–133

13. Ibid, pp 142–143



Fig 18: Read's Quay Wharf, 1896. Photographer unknown.

Reproduced courtesy of the Tairāwhiti Museum, Gisborne, New Zealand (1896-111-2).

particular, it was unable to sell Whataupoko sections, which were priced out of the market. As the economic downturn of the 1880s intensified, the market was too flat for profitable sales.¹⁴

By 1885, the directors of the New Zealand Native Land Settlement Company decided to wind it up. However, because of the size of their overdraft with the Bank of New Zealand, agreement with the bank was not reached until 1888. The company went into 'voluntary' liquidation; the bank gave it little choice.¹⁵ Its debts to the bank amounted by then to around £92,000, and the bank was not the company's only creditor. On 23 May 1888, many of the Maori committees that had sold their land to the company signed an agreement authorising the company to take out a mortgage to the Bank of New Zealand for £135,000 over the land it owned.¹⁶

Rees and Pere were appointed agents for the company to sell land, and pay off the mortgage. Both men travelled to England to try and attract British interest. Rees, who had been anxious for some time to bring British labour and capital to New Zealand, circulated a provisional prospectus for a Co-operative Colonising Association Limited which would buy the New Zealand Native Land Settlement Company's lands, and attract several thousand

14. Document F11, p139

15. Ibid, pp148, 144–145, 148, 157–158, 162

16. Ibid, pp158, 162

labouring families to the East Coast and Wairoa. The British trip was initially successful, after Rees and Pere made contact with the Earl of Meath, president of the National Association for Promoting State-Aided Colonisation. However, when the House of Commons sought advice from the New Zealand Government as to the security of the scheme, it got a negative response. This had a marked effect on British enthusiasm for the scheme.¹⁷

The possibility of government acquisition of the company lands was first raised in 1889. Rees began negotiating with the Government and with the Bank of New Zealand in the hope of securing a Crown purchase of the Pakowhai and Paremata blocks. In this, he was unsuccessful. The Government offered to buy the entire company estate for £70,000. The liquidators, however, turned this down as 'wholly inadequate'.¹⁸ No agreement was reached on the valuation of the lands.

In 1891, the native affairs select committee (chaired by W Kelly, member for the East Coast) recommended that the Government take over the land on behalf of the Maori owners.¹⁹ It suggested the valuation of the lands be made under the Public Works Act. The committee had received petitions from both Maori and settlers at Turanga, and reported in September 1891. The Government did not act on this recommendation.²⁰

9.2.3 The Bank of New Zealand Estates Company mortgagee sale, 1891

In 1891, the Bank of New Zealand Estates Company (a receiving division of the bank which had taken over the New Zealand Native Land Settlement Company's mortgage), announced a mortgagee sale and auction of the lands. The New Zealand Native Land Settlement Company's debt to the bank had grown to £146,956; its mortgaged assets were valued at £113,956.²¹ Rees was unable to prevent the auction going ahead, but by the time it was held on 16 October 1891, he had registered caveats on 11 blocks (including seven within the inquiry district). This had the effect of driving many potential purchasers away.²² Yet both Maori landowners and settler shareholders sustained heavy losses. The shareholders lost over £86,000. Maori lost 36,300 acres before the auction was abandoned. The sale realised £59,700, or approximately £1 6s per acre sold.

17. Document A4, pp54–55. A telegram from Premier Atkinson was forwarded by the agent general to the Colonial Office in London, stating that the New Zealand Government was not responsible for the scheme and that some of the hopes held out were too enthusiastic. See also the discussion at footnote 76 below.

18. Bank of New Zealand board of directors minute book 8, 23 June 1890, p2332 (doc F11, pp169–170)

19. We note that this was a standing select committee and should not be confused with the Native Land Laws Commission of the same year.

20. Document A4, p58; doc F11, p170

21. Document F11, p172

22. That is to say, he entered notice that the purchases could not be completed until objectors' arguments had been heard in court.

9.2.4 The Carroll Pere trust, 1892–1902

In the wake of the mortgagee sale, a new trust, the Carroll Pere trust, was created, by an agreement with the estates company. By the terms of this agreement, dated 17 February 1892, the settler shareholders were released from further liability.²³

All former New Zealand Native Land Settlement Company lands with completed title held by the estates company, amounting to over 64,000 acres, were transferred to Carroll and Pere as trustees.²⁴

Provision was also made for blocks on which the New Zealand Native Land Settlement Company had spent money, but for which it had not obtained titles, to be transferred to the trust as soon as the titles were complete.²⁵ In practice this became the task of the Validation Court after its establishment in March 1894. These blocks would be liable for the remaining debt on trust lands. In this way the estates company would gain added security, and the burden of New Zealand Native Land Settlement Company debt would be spread widely over more blocks.

As a result of this agreement, 11 blocks in the inquiry district amounting to close to 65,000 acres were moved directly into the Carroll Pere trust.²⁶ Another 35,000 acres of inquiry district land was brought into the trust through the Validation Court. This included parts of four blocks in particular: Maraetaha 2, Maraetaha 2A, and Tahora 2C2 and 2C3. The court's decision in respect of these blocks would prove to be controversial. A total of nearly 100,000 acres of inquiry district lands were vested in the Carroll Pere trust.²⁷

During the 1890s, the debt owed by the Carroll Pere trust, doubled. In 1891, the debt the New Zealand Native Land Settlement Company lands owed the estates company had been reduced by the mortgagee sale, and the liquidation of the company, to £58,331.²⁸ This was covered by a new mortgage to the estates company. By agreement, the mortgage was not due until January 1897.²⁹ The agreement was modified in 1895. The trust's debt now totalled £85,778. The bank gave the trustees until 23 January 1901 to pay off this amount, at 6 per cent

23. Document A4, p58; doc F11, pp174–175. Settler shareholders were released from another £27,499 in calls owed.

24. Document F11, pp176, 186–189. These blocks later became known as the principal security blocks: they included parts of Whataupoko block, parts of Matawhero B or 5, parts of Pakowhai, Mangaokura 1, Motu 1, Okahuatui 2, Mangatu 5 and 6, and part of Matawhero 1. Macky noted that there were four exceptions to this: 'The Point', Makauri, Pukepapa, and Ngakoroa. These blocks were to be transferred directly to Pere for his 'own use and benefit'.

25. Document A4, p84; doc F11, p186

26. Document G13, p5. While we do not know the complete listing of blocks for the trust as a whole, the complete titles in the inquiry district comprised the following: Whataupoko (1519 acres), Pakowhai (5013 acres), Motu (2000 acres), Okahuatui (15,190 acres), Matawhero 5 (158 acres), Mangatu 5 (20,075 acres), Mangatu 6 (20,075 acres), Matawhero 1 (182 acres), Te Kuri (400 acres), Tangotete 1 (five acres), and Tangotete 2 (72 acres).

27. Document F11, pp201–210; doc G13, pp8, 17. A greater amount of land outside the inquiry district was brought into the trust through the Validation Court. According to Judge Batham, previous Judges Barton and Gudgeon had respectively vested 20,224 acres and over 152,000 acres in the trustees.

28. Document A4, p84; doc F11, pp186–187. At this point, Rees and Pere were also paid for some of their past work from the available proceeds.

29. Document A4, p84; doc F11, p198

compounding interest.³⁰ But the trust was able to sell very little land, and its debt (fuelled by interest and additional legal costs due to uncertain and conflicting titles) continued to grow. The estates company retained management of the trust lands.³¹

By the late 1890s, the matter of the trust lands on the East Coast was increasingly before Parliament's attention. Between 1896 and 1898, three Bills were introduced into the House, each offering a different solution to the problem of the trust lands. One was a private member's Bill (Pere's); the second, the outcome of an initiative by the citizens of Gisborne, working with Rees and Pere, was introduced as a Local Bill; the third was brought in as a Government Bill by Premier Seddon. For different reasons, all lapsed. The 1898 initiatives were taken after a Ngati Porou petition objected to the validation of New Zealand Native Land Settlement Company transactions and the placing of additional blocks in the Carroll Pere trust. This led to a native affairs committee hearing in 1897 at which very detailed evidence on the history of the trust lands was given. After the 1898 session however, the matter went quiet again.³²

In 1901, the Bank of New Zealand, which now held the mortgage itself, threatened foreclosure, and set a date for a mortgagee sale in January 1902. The trustees attempted to prevent the sale, and managed to delay it until later in the year. The date was finally set as 29 August 1902. At this point, Rees approached the bank to attempt a new arrangement. The bank's directors agreed that it would be in both their interests and those of Maori if the mortgagee sale did not go ahead and the trust could be traded out of debt, with blocks selling for their true value.³³

9.2.5 The management of the trust lands from 1902

In 1902, the Government intervened. The chairman of directors of the Bank of New Zealand, Frederick Malet, met with Sir Joseph Ward to discuss the trust shortly before the sale, and asked Ward to sponsor a Bill that would place the Carroll Pere trust estate in the hands of a responsible body.³⁴ In August 1902, the East Coast Native Trust Lands Act was passed,

30. Document A4, p 88. The date of this extension, in 1895, was hardly a coincidence. The Bank of New Zealand was still in difficulties, its very existence threatened by the estates company. According to P Colgate and DK Sheppard, the main cause was the Auckland Agricultural Company, a then wholly owned subsidiary of the estates company, which the bank had taken over 10 years before. By 1895, both the bank and the estates company faced liquidation, and a raft of rescue measures was needed, embodied in the Bank of New Zealand Banking Act 1895: see P Colgate, DK Sheppard, *A History of the Bank of New Zealand, 1862–1982, Part One, 1862–1934* (Wellington: Victoria University Money and Finance Association, 1990), p 17.

31. Document F11, pp 216–218, 224–225

32. Document F22, pp 228–235; doc A4, pp 107–112, 128–131

33. Document A4, pp 137–138; doc F11, pp 243–245

34. The Government had kept a close eye on the bank's affairs since the financial crises that had plagued the bank since the mid-1890s. As a result, the bank was bought into a 'virtual partnership' with the Government, which had two representatives on the board. The Government was well aware that the trust lands formed a substantial proportion of the unliquidated assets held by the bank; that is, £138,000 out of a total of £250,000: doc A4, p 149.

establishing the new East Coast Native Trust Lands Board. All the Carroll Pere trust lands, including those which had passed through the Validation Court, were vested in the new entity (s4). This amounted to 244,985 acres, which included 98,299 acres of inquiry district land.³⁵ The trust lands were to be managed by a board of three Pakeha businessmen (s3).³⁶ Their job was to prevent the mortgagee sale of the trust lands prior to 31 August 1904, and clear the debt (s4). The board sold about a third of this land (including 31,118 acres of inquiry district land), and paid off all the external debt, by 1905.

There was still a problem with trust lands debt, however: both external debt (money borrowed to finance development of the trust lands); and internal debt (that is, the spread of debt among the blocks vested in the trust).³⁷ Under the Maori Land Claims Adjustment and Laws Amendment Act 1906, the Validation Court was empowered to determine the proportion of the whole Bank of New Zealand debt and expenses which 'ought properly to have been borne by each block', and how this debt should in future be spread equitably among the blocks, both sold and retained (and their respective owners).³⁸

The board had completed its job by clearing the Bank of New Zealand debt. However, the internal debt problem of the trust remained. From 1906, the three-member board was replaced by a single East Coast commissioner, who was authorised to carry out the board's functions.³⁹ The commissioner was specifically empowered to borrow externally for development the trust lands, and to operate the trust lands as a single unit.⁴⁰ Successive commissioners – John Thomas Coleman, his son Thomas Alston Coleman, Judge Rawson, Chief Judge Jones, John Harvey, and James Jessep – managed the trust lands until 1955. They developed farms on the trust lands, made distributions to the beneficial owners every five years, and occasionally sold land.

Between 1921 and 1934, the trust lands came under the direct control of officers of the Native Department. Two Native Land Court judges (both based in Wellington) were successive commissioners, and the day-to-day administration was carried out for most of the period by John Harvey, registrar of the Native Land Court in Turanga, himself later a judge.⁴¹

35. Document A4, pp154–155

36. The board was appointed early in 1903. Its members were John McFarlane, who became chairman, John Harding, a businessman, and Walter Shrimpton, a local farmer active on local bodies in Hawke's Bay: doc A4, p154.

37. Those blocks which had been sold to pay off the Bank of New Zealand debt had paid more than their share of the external debt, while those that remained were in fact indebted to the blocks sold.

38. Maori Land Claims Adjustment and Claims Amendment Act 1906, s22(2)(b) (doc F11, pp268–269). The Validation Court gave its decision on 12 September 1908.

39. See the Maori Land Claims Adjustment and Laws Amendment Act 1906, s22

40. Document F11, pp262, 278–279, 283, 286–295, 301–305; doc A4, pp161, 186–195, ch5. Section 11 of the Maori Land Claims Adjustment and Laws Amendment Act 1907 stated that 'the Commissioner would have vested in him in fee simple in possession, all lands and property formerly vested in the Board'. The Act confirmed the commissioner's power to raise money, farm, and generally improve the lands vested in him... As with the East Coast Native Trust Lands Board, the commissioner 'managed' the lands on behalf of the trustees.

41. Document F11, pp279–283; doc A4, ch4

When all the debt on the blocks remaining in the trust had been cleared, in 1950, the trust was wound up. The next year, the beneficial trust owners agreed voluntarily to pay compensation of £96,751 to the owners of land sold between 1892 and 1902, that is, to the owners whose land loss at that time enabled the rest of the blocks in the trust to survive.⁴²

Between 1906 and 1952, the East Coast commissioner had sold 42,474 acres of inquiry district land, in addition to the 31,118 acres sold between 1902 and 1906: a total of 73,592 acres of land in the inquiry district was sold.

In 1955, 13,741 acres within the inquiry district were revested in their owners.⁴³ In addition, approximately 13,600 acres (Mangatu 5 and 6, farmed as Mangaotane station) were returned in 1974.⁴⁴ The total amount returned was thus around 27,000 acres out of the 98,299 acres of inquiry district land vested in the Carroll Pere trust.

9.3 CROWN AND CLAIMANT CASES

The Crown submitted eight key arguments regarding Wi Pere and William Rees's attempts at creating an alternative management structure. Counsel argued:

- ▶ That Rees and Pere established the trust mechanisms in order to facilitate economic development in Turanga, through the sale of a substantial amount of Maori land. The trust mechanism was not primarily intended to be a form of land ownership and management.⁴⁵ Rather, it was a means of alienating and developing land corporately. It was, therefore, an inherently risky scheme.⁴⁶
- ▶ That land awarded to Turanga Maori in the form of Crown grants could in fact be placed in a trust which, the Crown argued, Turanga Maori took advantage of. Furthermore, a memorial of ownership was a communal form of title, although the Crown acknowledged its limitations.⁴⁷
- ▶ That Pere and Rees's scheme of close settlement would have inevitably incurred development costs (surveying, subdivision and infrastructure). Even if they had not had to reacquire key blocks, the trusts would still have faced substantial financial obstacles.⁴⁸
- ▶ That the New Zealand Native Land Settlement Company had the potential to succeed, because it could access finance through its share capital. It failed largely because of the economic recession of the 1880s. Some unwise commercial decisions were also a contributing factor. Some of the blocks – for example, Mangatu 5 – were unsuitable for the

42. Document A4, pp 276, 285–286; doc F11, pp 326–332

43. Document F11, p 337

44. Ibid, pp 337, 344; doc A4, pp 307, 347; doc A27, pp 99, 106.

45. Document H14(20), p 6

46. Ibid, p 3

47. Ibid, p 8

48. Ibid, p 3

company's purposes, that is, close settlement. The Crown had no responsibility to interfere in private decisions such as these.⁴⁹

- ▶ That there is no validity in the claimants' claim that the Crown should have intervened earlier than it did in 1902. The Crown, counsel submitted, made an offer for the Paremata and Pakowhai blocks, which was refused. The fact that the Crown bailed out the Bank of New Zealand in 1894, did not mean that the Crown should have intervened more directly and sooner in the affairs of the Carroll Pere trust. The assistance provided to the Bank of New Zealand was both extraordinary and controversial.⁵⁰ It also enacted the Validation Court legislation, which allowed for inchoate titles to be perfected. Had the Crown not established the Validation Court for this purpose, counsel submitted, the additional lands could not have been vested in the Carroll Pere trust. It therefore would have had an insufficient land base with which to trade out of the inherited debt. The land transferred into the trust would, therefore, almost certainly have been lost in mortgagee sales.⁵¹
- ▶ Furthermore, counsel argued, the court had a supervisory role. It ensured that the Bank of New Zealand Estates Company could not sell the lands mortgaged to it, without the Validation Court's consent. In respect of the three blocks in the inquiry district transferred to the Carroll Pere trust by the Validation Court, counsel acknowledged that the transactions the court's decision was based on were of doubtful validity and that none of the transactions involved the sale of the blocks concerned. However, counsel noted that in at least two of the cases (Tahora and Maraetaha 2), the value of the land vested in the trust exceeded the amount spent on the blocks by the New Zealand Native Land Settlement Company. Furthermore, the owners consented to the transfer.⁵²
- ▶ That the East Coast native trust lands legislation of 1902 enabled the debt to be repaid while at the same time preserving as much of the land as possible.⁵³
- ▶ That the East Coast Native Trust Lands Board (and its successor, the East Coast Commissioner), succeeded in saving and developing land for Turanga Maori. Counsel therefore argued that the fact that Maori lost autonomy over those lands has to be balanced against their long-term success.⁵⁴

Claimant counsel submitted seven key arguments regarding Pere and Rees's attempts to provide a corporate structure for East Coast lands. Counsel argued:

- ▶ That the trusts and company were not simply a private initiative, but were enmeshed with national politics and government policy.⁵⁵ Some blocks, for example Mangatu 5 and

49. Document H14(20), pp3, 17

50. Ibid, p5

51. Ibid, pp4, 20; doc H14(21), pp5–6

52. Document H14(21), p6

53. Document H14(20), p4

54. Ibid, p5

55. Document H5, p65

6, were vested in the trusts as a means of preserving them from the Crown's purchasing policy.⁵⁶

- ▶ That although some land selling was always envisaged this was only as a means of getting development capital. Counsel noted that this was the only such avenue available to Turanga Maori.⁵⁷
- ▶ That Turanga Maori lost control of their lands through both the trusts and the New Zealand Native Land Settlement Company, and then through statutory bodies such as the East Coast Native Trust Lands Board and the East Coast Commissioner.⁵⁸
- ▶ That the Crown created a system that prevented Turanga Maori from using the trust mechanism as an alternative to the Native Land Court system. It should, therefore, have provided redress to the company, for the situation it had created.⁵⁹
- ▶ That had the Crown intervened when the company was wound up, more land would not have been brought into the Carroll Pere trust, and the increased debt burden could have been avoided.⁶⁰
- ▶ That when the Crown did intervene, it disempowered Turanga Maori in the process. The Crown did not consult with Turanga Maori, for example, over the implementation of the 1902 Act. Furthermore, the only power awarded to the beneficiaries was that they could claim an account of the board's activities. As a result, for over 50 years, owners had no say in the management of their land.⁶¹
- ▶ That Turanga Maori were not consulted when the administration of trust land was transferred to the East Coast Commissioner. Counsel argued that once again, the Crown failed to take advantage of an opportunity to involve Maori in the administration of their land. The commissioner was more accountable to the Native Land Court and Parliament, than to the landowners. This situation did not change until the passage of the Native Purposes Act 1935. Although block committees were established under the Act, they were advisory only.⁶²

9.4 TRIBUNAL ANALYSIS AND FINDINGS

We turn now to address our key questions, to establish why successive Rees Pere initiatives failed in their key aim of producing significant benefits for East Coast Maori, whether the Crown was implicated in their failure, and what the long-term impact of that failure was on

56. Ibid, p70

57. Ibid, p66

58. Document H2, p129

59. Ibid, p137

60. Ibid, p133

61. Ibid, p141

62. Ibid, pp140–141

those Maori who supported the ventures. Although these initiatives operated over the whole of the East Coast, we are concerned here only with the impact on Turanga Maori.

9.4.1 Why did the Rees Pere trusts, the land settlement company, and the Carroll Pere trust fail to produce significant benefits for Turanga Maori?

(1) *The failure of the Rees Pere trusts*

As we indicated in chapter 10, the Rees Pere trusts struggled from the outset because there was no legal provision for community trust structures under the provisions of the native land legislation. The 1873 Act individualised Maori title for the sole purpose of alienation. Because individuals could sell or lease their newly defined undivided interests, community decision-making was rendered irrelevant. Pere, who had been quick to see how this would impact on the relationship between chiefs and their hapu, tried to show how the system could work differently. If that relationship were institutionalised in block committees, the traditional leadership could manage tribal lands with the support of their communities, alienating land where this was seen to be beneficial.

The trust structure which Rees and Pere established between 1878 to 1880 was a good model. However, the trusts faced significant disadvantages. First, the new tenurial regime of both the Poverty Bay Commission and the Native Land Court had resulted in the widespread settler purchase of the first class Turanga land in a short space of time. We have already discussed the high costs the trusts incurred by reacquiring such lands. Secondly, Rees and Pere had hoped to create a buyer-friendly environment in Turanga by using block committees, working alongside the trustees, to provide secure title to lessees and purchasers. Chief Justice Prendergast's decision in the *Pouawa* case (that trusts involving memorial of ownership land were ineffective), and the failure of the 1880 legislation, had exactly the opposite effect. As a result, the reputation of the East Coast as a region of dodgy titles was confirmed.

(2) *The failure of the New Zealand Native Land Settlement Company*

On the face of it, the New Zealand Native Land Settlement Company started out in a much stronger position than its predecessor. It had substantial capital, more land to sell and, after it moved to Auckland, high profile directors and a national base. Yet, it had a brief career, and most of its Maori and Pakeha investors lost heavily. We now consider the reasons why the company failed to produce benefits for Turanga Maori: the ongoing problem of debt, company business decisions, and the commercial and political environment within which the company operated.

(a) The problem of debt: In 1881, the New Zealand Native Land Settlement Company started to acquire the Rees Pere trusts blocks. It also acquired their debts. The company then proceeded to buy new blocks from their Maori owners (totally 96,550 acres), and to repurchase

blocks that had previously been sold by Rees and Pere. The repurchased blocks were largely good quality land, with secure title, and close to Turanga. These blocks were central to the company's policy of close settlement, and it was prepared to spend heavily to secure them. It spent £58,151 in the inquiry district alone on acquiring 19,273 acres (that is, approximately £3 per acre). Of the 19,273 acres, 17,768 acres had been sold by the Rees Pere trusts or conceded to settlers in the course of mutually acceptable arrangements.⁶³ More than 90,000 acres were purchased directly from Maori. In total, the company purchased from Maori and settlers over 110,000 acres. The company also leased Mangatu 1. In all, it dealt with just over 200,000 acres in the inquiry district.⁶⁴

By the end of 1883, the directors valued the total assets of the company at £275,901, an increase of £108,008 on the previous year.⁶⁵ We note that no dividend was paid to shareholders that year, though a dividend of £1444 was paid at the end of the previous year.⁶⁶ Delays in getting land subdivided in the Native Land Court had, according to the chairman Dr Daniel Pollen, resulted in delay in the sale process.⁶⁷ Given that the company had spent more than £100,000 on purchasing land, it is possible that the directors had decided to simply plough the profits back into the company.

By the end of 1883, the company's debt had also increased to over £116,000.⁶⁸ Again, we note that this is not necessarily an indication of financial difficulty, particularly in light of a substantial increase in the company's assets in this period.⁶⁹

The company's debt per se was not particularly problematic, at least in 1883. Debt was, and is, a normal part of business practice. For an explanation of why the company failed to provide its investors, both Maori and Pakeha, with a profitable return, we need to consider other factors.

(b) Company business decisions: Having considered the evidence, it is apparent to us that, as with the Rees Pere trusts, some of the commercial decisions made by the New Zealand Native Land Settlement Company were unwise.

First, it bought Whataupoko at what appears to have been simply too high a price (£38,000).⁷⁰ When Whataupoko sections were offered for sale, on 29 November 1882, only 300 acres sold. This, despite the quality of the land and its location near Gisborne. The prices

63. Document F11, pp122–123, 130

64. Ibid, pp12, 112–116, 120–122. We note that table 5 (p 116) provides a list of the blocks in total that were purchased by the company. These blocks include the 19,273 acres that were purchased from Europeans, which are listed in table 6 (p 122).

65. Document F11, pp139–140

66. The lack of a dividend payout in 1883 does not necessarily indicate that the company was in difficulty. The company had made a profit that year of £42,952, an increase of nearly £20,000 on the previous financial year.

67. *Poverty Bay Herald*, 7 November 1883 (doc A4(a), sec O, p16); see also doc A3, pp38–39

68. Document F11, p143. The debt consisted of a combination of an overdraft to the bank and mortgages.

69. Document A4, p38

70. Document F11, p122

averaged £15 per acre. The *New Zealand Herald* reported that 500 people attended the sale. It added, moreover, that 'A number of intending purchasers remain here till the 8th of December for the Government land sale, when some valuable blocks near Gisborne will be offered'.⁷¹ We note that the company also offered sections in the Pouawa block at an average of 42s 6d per acre. There was, therefore, clearly a market for land, but buyers were not prepared to pay the asking price for Whataupoko sections, particularly when other, cheaper land was available.

Secondly, the decision to take over the assets of the Auckland Native Land Colonisation Company in May 1883 backfired. The recently established Auckland company appeared to have similar aims to the settlement company, it held a substantial amount of land, and had a field of operations which extended over the whole of the North Island. But, though the Auckland company's shareholders were given shares rather than cash, the transaction resulted in the New Zealand Native Land Settlement Company acquiring an additional debt of £30,000. It was debt, as it turned out, that the company could ill afford. The transaction seems also to have had a significant impact on the Bank of New Zealand's decision to grant the New Zealand Native Land Settlement Company an extension of its overdraft from £25,000 to £60,000. Within six months the company's overdraft had grown to over £58,000.⁷²

(c) The commercial environment: Had the economy remained stable, the New Zealand Native Land Settlement Company may well have been able to trade its way out of debt. Similarly, the company would have had a sufficient margin to absorb the cost of repurchasing Whataupoko. In the early 1880s, however, the world economy went into recession.

In retrospect, the 1880s was an inauspicious time to launch a land development and settlement venture. But this was not apparent to contemporaries at the beginning of the decade. Though the trigger for the local economic downturn (the collapse of the Bank of Glasgow) occurred in late 1878, it took time for its effects to be felt both in Britain and in New Zealand. According to business historian Professor Stone, Auckland enjoyed a company boom in the first few years of the decade. There was plenty of loan capital. Lending policies encouraged both investors and directors. There was widespread belief in the early 1880s in the importance of economic growth, even in promoting such growth as a public duty. As a result, from mid 1881 through to 1884, the 'rage' for new companies continued.⁷³

The companies floated at this time spanned a wide range of activities. The most interesting, in terms of our analysis of the New Zealand Native Land Settlement Company, were several limited liability companies: the Waikato Land Association (1879), the Auckland Agricultural Company (1882), the New Zealand Thames Valley Land Company (1882), and

71. *New Zealand Herald*, 29 November 1882, p5 (doc A4 (a), sec o, p12); doc A4, p34; doc F11, pp122, 154

72. Document F11, pp140–143

73. RCJ Stone, *Makers of Fortune: A Colonial Business Community and its Fall* (Auckland: Auckland University Press, 1973), pp56–62

the New Zealand Land Mortgage Company (1883). Speculative in nature, they sought to buy Maori land cheaply and sell it to English capitalist farmers wishing to emigrate. Although these companies were formed in Britain between 1879 and 1883, Auckland business interests quickly became prominent. Thomas Russell, the Auckland entrepreneur who became involved with the New Zealand Native Land Settlement Company, promoted three of these four companies.

Rees and Pere did not, therefore, take an unnecessary risk when they formed the New Zealand Native Land Settlement Company, or when they shifted its operations to Auckland. It was their misfortune that they did so, just before New Zealand was hit by an economic downturn of international proportions.

(d) The political environment: It is clear that in the 1880s, Rees and Pere did not enjoy widespread political support. In 1883, despite the support of powerful Auckland businessmen, the company failed to secure the passage of the New Zealand Native Land Settlement Company (Limited) Empowering Bill, which would have conferred additional powers on it.⁷⁴ Then, at the end of the decade, political opposition to their scheme and the company adversely affected Rees and Pere's visit to England. Rees, as noted above, was very hopeful of being able to attract several thousand British labouring families to New Zealand. In Britain, the Marquis of Lorne chaired the meeting at which Rees's colonising committee was appointed, and Rees began negotiations with the British Government for a guarantee of £300,000 of 3 per cent debentures.

The visit was initially successful. However, when an inquiry was raised by the House of Commons, Premier Harry Atkinson cast doubt on both the quality of the land available and the security of land titles. Furthermore, he disclaimed any responsibility on the part of the New Zealand Government. The advice received was widely published in the British press.⁷⁵ Atkinson later told Pere that he had not expected his wire to have such an impact. He made various offers to repair the damage, but it was by then too late.⁷⁶

(e) The failure of the New Zealand Native Land Settlement Company to benefit Turanga Maori: We conclude that the New Zealand Native Land Settlement Company failed to produce benefits for its Maori investors for the following reasons:

- The company began its operations with too much debt inherited from the trusts. This debt, as we have shown, was ultimately a product of two factors: Maori inability to

74. Document A4, pp35–36; doc F11, pp134–139. There was some dramatic opposition to it in Gisborne, as well as a strongly worded petition from some Turanga Maori; Macky suggested that it may have been inspired by a Napier land-purchasing syndicate which was opposed to the company: doc F11, p139.

75. *Journal of the Legislative Council*, 1900 (doc A4(a), sec K, pp1–9)

76. Atkinson sent a letter of regret to Rees and, after Pere made strong representations to Atkinson on his return home, offered to cable Rees in England and ask him to continue negotiations. However, Rees had already left for home: AJHR, 1897, 1–3A, p12. See also footnote 17 above.

exercise community control over land sales; and Pere and Rees's attempts to retrieve the situation by buying back the land which had already passed into settler hands.

- As the trusts had to sell their best land, the company then paid the price of repurchase a second time. In a questionable business decision, it paid too much for Whataupoko and, to recoup its outlay, then tried to sell the land at prices which the market would not bear.
- The New Zealand Native Land Settlement Company's purchase of the Auckland Native Land Colonisation Company was, as it turned out, a mistake. It led to a huge increase in the New Zealand Native Land Settlement Company's debt to the Bank of New Zealand. At the time, however, it seemed a sensible move. It was hardly surprising that such a commercial alliance should have taken place, once Rees and Pere ventured into the larger waters of Auckland business networks and overlapping directorships. But in a period of economic downturn, such alliances became a liability rather than a strength.
- The depression, finally, was a blow from which the company could not recover, given the size of its mortgages and its debt. It was already struggling to sell land, and the depression put paid to its hopes of increasing sales, reducing debt, and developing land. There are no figures for 1884, but in 1885 the directors reported that they had made only £4700 in sales. By the end of 1886, the directors noted that in the past year: 'there were no buyers to be found for the company's properties, and no demand for land either in the East Coast district, or, indeed, in any other part of the colony'.⁷⁷ By 1887, only 37,560 acres in total had been sold out of the 205,492 acres of inquiry district lands in which the company claimed interests.⁷⁸

(f) Can the Crown be implicated in the New Zealand Native Land Settlement Company's failure to benefit Maori? It is self-evident that the Crown cannot be held responsible for the questionable business decisions the New Zealand Native Land Settlement Company made, or for the very difficult economic conditions of the 1880s.

To the extent that the debt which finally sank the company was attributable to the company paying too much for land, acquiring unproductive debt from the Auckland Native Land Colonisation Company, or to the flat market for land of the 1880s, the company must be held responsible for its own losses.

The effect of Premier Atkinson's intervention on behalf of the Government in New Zealand ought also to be weighed in the balance. It undermined public confidence in a proposed colonising venture, which had until then aroused considerable interest. That venture had the potential to break the local deadlock in respect of sales and leases and assist in the development of East Coast lands. It seems to us that this was a politically motivated intervention. If, however, it was based on a real concern about the security of titles, this problem should

77. *New Zealand Herald*, 11 November 1886, p3 (doc A4(a), sec O, p23; doc F11, p144)

78. Document F11, p151

be laid at the door of the Crown. Thus, the Crown must carry all the responsibility for the uncertain titles which followed from agreements made between the owners and the company, which would lead to great cost and delay in the Validation Court. We deal with this shortly in the context of the Carroll Pere trust.

In the end, we conclude that the promoters of the company must bear their fair share of the blame for its failure. We acknowledge also that the Crown must bear some responsibility for the state of the titles on the East Coast, but this became more apparent in the period of the Carroll Pere trust. We deal with this in the next section.

There is also a second level of Crown responsibility. The problems of the New Zealand Native Land Settlement Company were partly attributable to the lingering debt of the Rees Pere trusts tainting the start-up of the company. To the extent that this debt was attributable to the erosion of titles through the sale of individual interests which had to be bought back, and the failure of the Crown to allow for community titles, the responsibility belongs with the Crown.

(3) *The failure of the Carroll Pere trust*

On the face of it, the Carroll Pere trust was vulnerable from the outset. The trust was essentially a rescue package put together in 1892 by the Bank of New Zealand Estates Company (aiming to secure the repayment of the Bank of New Zealand's debt), Rees, and trustees Pere and Carroll. A substantial amount of land vested by Maori in the New Zealand Native Land Settlement Company had just been sold off. The Government had not responded with any acceptable solution to suggestions that it should assist the Maori investors, or resolve the position of the East Coast lands. As early as July 1892, the estates company manager had told the board that ' . . . I consider it doubtful the Natives will ever be in a position to redeem the lands at present pledged to us'.⁷⁹ Perhaps it was not surprising, therefore, that the trust initially failed to produce significant benefits for Maori. But why did the trust make so little headway over the next 10 years?

The key difficulties faced by the trust, it seems to us, were:

- ▶ the insecure and incomplete titles to land vested in it, and the costs this gave rise to;
- ▶ the lack of an effective management scheme;
- ▶ the barriers to development of the land (notably the inability of the trustees to borrow);
- and
- ▶ the rapidly increasing debt.

As we will see, during the 1890s the trustees made various attempts to overcome these difficulties, with notable lack of success.

79. Bank of New Zealand Estates Company minute book 2, 28 July 1892, p 2 (doc F11, p 218)

(a) Insecure and incomplete titles: A key problem the trust faced was the insecure and incomplete titles of East Coast lands.⁸⁰ The trustees were to take over all the properties from the estates company effectively in two stages. Those with perfect titles (the principle security blocks) were to be immediately transferred. Those blocks whose titles were imperfect (the specific security blocks), were to first go through the Validation Court. Then, provided the court's criteria were met, they were to be transferred to the Carroll Pere trust.⁸¹

The imperfect titles originated in transactions conducted between Maori land owners and the company in the 1880s. Some of these transactions were complicated. The owners of Paremata (a block outside the inquiry district) sold the land to the company, were partially paid in shares, and thus became shareholders in the company.⁸² The title of the company to some other blocks, as we shall see, was less clearly founded, or was quite suspect.

The process of title completion affected a majority of the trust's lands, and was both lengthy and expensive. The Validation Court did not begin operating till March 1894. By 1897, many of the blocks which the trustees had applied to have adjudicated by the Validation Court were still waiting to be processed. These blocks, extending over the whole of the East Coast, amounted to 279,825 acres. Another 157,000 acres had passed through the court.⁸³ For much of the 1890s, the trust lands were locked in an unhappy legal triangle between the trustees, the estates company, and the Validation Court. This was hardly a recipe for sound development planning or for public confidence.

As an outcome of the title problems, the legal fees in respect of Validation Court cases quickly mounted. The debt had mounted, according to Foster, not because the parties were 'fighting', but because they were 'endeavouring to perfect the titles'.⁸⁴ Judge Batham of the Validation Court also described the legal expenses as 'very heavy indeed'.⁸⁵ Jackson gave the figure accruing between 1894 and 1897 as £14,000.⁸⁶

80. Document A4, pp114–119; doc F11, pp211–213. The problem was highlighted in the legal challenge brought by the Ngamoe owners, spearheaded by their lawyer, the young Apirana Ngata. The matter of Ngati Porou lands involved in the Rees Pere trusts and the New Zealand Native Land Settlement Company is not commented on here in any detail, since Ngati Porou claims have yet to be heard by the Tribunal.

81. Document A4(a), sec B, pp96–97. Schedules to the 1892 agreement listed both New Zealand Native Land Settlement Company lands (unsold) with good title, amounting to 66,331 acres (£54,954), and those with 'imperfect, doubtful or bad' titles, amounting to an approximate value of £65,000, with an annotation that it was not clear whether all such blocks were listed.

82. Document A4, pp86–95; doc F11, pp192–196

83. Evidence of Mr HC Jackson, 14 December 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A pp19–20 (doc A4(a), sec J, pp128–129). In his evidence, Jackson said that, of a total of 222,094 acres held by the trust throughout the East Coast in 1897, only 64,833 acres were held under land transfer titles. The amount held under decrees of the Validation Court, subject to a defined portion of the debt, was 62,261 acres. The blocks held under court decrees on which the amount due by the trustees had not yet been determined was 95,000 acres.

84. Evidence of WG Foster, 14 December 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A, p18 (doc A4(a), sec J, p127)

85. Evidence of Judge Batham, 23 November 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A, p13 (doc A4(a), sec J, p122)

86. Evidence of HC Jackson, 7 December 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A, p14 (doc A4(a), sec J, p123). We note that there is a difference between the figures as reported in the AJHR, and the figures as presented in the statement of accounts.

A further outcome of insecure titles, or titles perceived to be insecure, was the high cost of interest. Judge Batham explained to the 1897 native affairs committee that the debt to the estates company had for many years ‘carried interest at the rate of 9 per cent’, though it had recently been reduced to 6 or 6½ per cent.⁸⁷ The interest was calculated half-yearly and was compounded. Jackson, the receiver, told the committee that if the titles were ‘made unassailable’, it would be much easier to secure finance at a moderate rate.⁸⁸

The uncertain titles, finally, inhibited the estates company, which managed the lands, from attracting syndicate or English money for development. It also delayed spending on development itself.

(b) Lack of an effective management scheme: From the outset, there were also difficulties with management. First, the management of the blocks was split. As we have noted, blocks with perfected titles were transferred directly to the trust.⁸⁹ Blocks with imperfect titles were transferred to the trustees via the Validation Court. The trust was empowered to manage these lands, selling as it could, and developing the rest, in order to repay the mortgage. The trustees therefore received rents and returns from land sales, and paid administration and legal expenses.

The estates company, which was responsible for ensuring the debt owed to the bank was repaid, managed the trust’s properties on the ground.⁹⁰ Its accounts recorded the wages of people employed, the amount of land grassed, the number of stock bought, as well as any income from the farms on the blocks concerned: money made by the selling of wool or meat.

It is clear that there was something of a tussle between the estates company and the trustees on the one hand, and the estates company and the Validation Court on the other. In particular, the company wanted to keep the court out of any role in respect of lands with completed titles.⁹¹ The Validation Court disagreed. Judge Barton wanted the entire estate to come under the oversight of the court: ‘I must insist upon that or some other scheme by which the property shall all come under the Court and the trusts be administered as a whole for the benefit of all the natives of all the properties by Carroll and Wi Pere’.⁹² If some parts of the trust were administered outside the court and without its knowledge, he argued, ‘the matter could not

87. Evidence of Judge Batham, 23 November 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A, p13 (doc A4(a), sec J, p122)

88. Evidence of HC Jackson, 7 December 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1-3A, p15 (doc A4(a), sec J, p124)

89. Document F11, pp186–187. As we have noted there were four exceptions to this: ‘The Point’, Makauri, Pukepapa, and Ngakoroa. These blocks were to be transferred directly to Pere for his ‘own use and benefit’.

90. Document F11, p217. Carroll and Pere agreed to this in 1892.

91. Document A4, pp87–88. Dispute erupted over the court’s validation of the agreement of 17 February 1892, the estates company arguing that only the section relating to incomplete titles had to be validated, while the section relating to completed titles did not.

92. Validation Court minute book 1, 26 June 1894, p87 (doc A4, p88)

9.4.1(3)(c)

be managed in any reasonable way'.⁹³ Evidently the judge was already contemplating the need to be able to adjust accounts among all owners whose lands were involved in the trust.⁹⁴

The Validation Court sought to vest management in receivers, and on 25 June 1895 appointed Carroll, Pere, and HC Jackson as receivers for the Paremata block, the first trust block to go through the court.⁹⁵ The receivers were to manage the Paremata lands and all other lands whose titles the court validated subsequently 'in conjunction with the said Estates Company or otherwise but subject to the orders of this Court'.⁹⁶ But the company – perhaps reasonably (objected to this, insisting that they retain management until the bank's debt was paid off. Subsequently in 1896, when the court issued an order requiring the company to hand over management to the receivers, the company agreed, but then ignored the order.⁹⁷ The Bank of New Zealand, clearly, had nothing to fear from the Validation Court.

Carroll and Pere, as was later admitted, had little time to give to the management of a large estate. Jackson's competence had also been questioned. Furthermore, the estates company itself was slow to begin developing the land. Much of the income from the estate as a whole (69 per cent) between 1892 and 1895 came from sales, which totalled £5236.⁹⁸ By 1897, the bank was spending on surveys, fencing and stocking of some blocks (Pakowhai, Paremata, Whataupoko, Okahuatiu, Te Aroha and Te Kopua), and had begun to consider extending surveys and felling forest to prepare more trust lands for farming.⁹⁹ But between 1895 and 1903, the trust received only £3000 in rent. Jackson put the receipts from the total estate in 1896 at about £3900, most of which came from wool.¹⁰⁰ The company did not supply the receivers with accounts, and in 1902, when the Supreme Court asked the bank to produce accounts for each of the blocks in the trust, it could not.

(c) Barriers to the development of trust lands: Though management difficulties played a role in the limited development of trust lands, the greatest problem was clearly the inability of the trustees to borrow for development. This was a structural problem, as there was no provision for them to borrow for such purposes.¹⁰¹ In any case, this was Maori land on the East Coast, with notoriously insecure titles. The estates company found it hard to raise finance. This was despite the fact that the trust lands, as Foster explained to a select committee, included 'some very good property', which might be valued at between £5 and £6 per

93. Ibid (doc F11, p197)

94. Document F11, p197

95. Document A4(a), sec B, p99

96. Document A4, pp93–94

97. Document F11, p217

98. Ibid, p22

99. Evidence of WG Foster, 14 December 1897, Minutes of Evidence, AJHR, 1897, sess 2, I-3A, p17 (doc A4(a), sec J, p126)

100. Document A4, p126

101. Evidence of Judge Batham, 23 November 1897, Minutes of Evidence, AJHR, 1897, sess 2, I-3A, p13 (doc A4(a), sec J, p122)

acre, as well as lesser lands. But development of the land was crucial if it was to be leased.¹⁰² The trustees did attempt, in 1896, to interest the Public Trustee in taking over the debt and developing the land at a lower rate. The Public Trustee would have offered an interest rate of 5 per cent. However, while initially interested, the Public Trustee withdrew from the discussions when he discovered how fast the trust's debt was growing.¹⁰³

(d) Rapidly increasing debt: Despite the scarcity of development finance, the trust's total debt continued to increase throughout the 1890s. In 1892 it stood at £58,000. By 1897, it had increased to roughly £120,000.¹⁰⁴ In 1902, the debt was estimated at £156,383.¹⁰⁵ The debt, as indicated above, was the product of a range of factors. First, the trust's income was small. The first year in which it made a profit was 1896 (£392). By 1900, the profit had grown to only £6043.¹⁰⁶ This meant that the debt could not be retired. Secondly, the interest rate, as noted above, was high. The estates company did not require the trust to pay the annual interest. Rather, it added the interest to the total debt. The state of the trust's titles gave rise to the third factor. The trustees had to spend a disproportionately high amount on legal costs. These arose out of the time and effort spent in the Validation Court, Native Land Court and the Supreme Court. Between 1892 and 1895, over half the trust's expenditure was on interest (£12,382) and legal costs (£6254).¹⁰⁷ In 1897, Jackson told the native affairs committee that, by then, interest charges amounted to approximately £24,396, and £17,000 had been spent on legal costs. This totalled £41,000, or more than 75 per cent of the total increase in debt for the period between 1892 and 1897.¹⁰⁸

By 1902, the debt had increased again, to £156,383.¹⁰⁹ There is little evidence that this increased debt was expended in any material way on the development of the trust's land.

(e) Can the Crown be implicated in the failure of the Carroll Pere trust to benefit Turanga Maori? The Carroll Pere trust, like its predecessors, failed. We turn here to assess the timing

102. Document F11, pp198–199. By terms of the revised agreement of 1895, the estates company could not sell principal security blocks before 1901. Blocks like Paremata could be sold in accordance with conditions set by the Validation Court.

103. Ibid, pp 225–226

104. Evidence of Judge Batham, 23 November 1897, Minutes of Evidence, AJHR, 1897, sess 2, 1–3A, p13 (doc A4(a), p122). Different figures are given for the debt at this time. Judge Batham put it at £130,000, though he also pointed out that the mortgagor did not accept some figures, and that it was not easy to establish them. We have followed the Bank of New Zealand Mortgage Account figures, which show the East Coast lands net liability at 31 March 1898 as £110,678 4s 5d. There was however a separate stock mortgage of some £9000. This seems to confirm the figures that Jackson gave to the 1897 committee, which led the committee to take a round figure of £120,000. We note that Macky stated that the trust owed the estates company alone £101,000 in 1897 (doc G13, p18).

105. Document G13, p18. We do not have the trust accounts for the years 1897 to 1900.

106. Document F11, p221

107. The accounts show that a number of legal firms submitted accounts to the trust. Rees's own costs were not insignificant. Trust Estate Receipts: doc A4(a), sec 1, p315.

108. Document F11, p225

109. Ibid, p224

of the Crown's intervention and the extent to which the failure of the Carroll Pere trust can be attributed to the Crown.

(f) The nature and timing of Crown intervention: The passage of the East Coast Native Trust Lands Act 1902 (as a result of direct Crown intervention), led to the sale of a large amount of land, the subsequent repayment of the Bank of New Zealand debt, and the management of the remaining lands by successive East Coast commissioners. The Government's decision to intervene, therefore undoubtedly saved at least some of the trust lands for their owners. However, Crown intervention was sought, and considered, earlier than 1902. We therefore ask first whether the Crown should have intervened earlier, and secondly, whether its delay contributed to the failure of the Carroll Pere trust to benefit Turanga Maori.¹¹⁰

During the 1890s, there were six major attempts by Maori and Pakeha politicians and businessmen to address the issues raised by the Carroll Pere trust. The native affairs committee noted on three occasions that the lands of the Maori owners were in serious danger.¹¹¹ Pere introduced one Bill (the East Coast Native Land Board Bill 1896) and he and Rees advised a group of Turanga businessmen on another (the East Coast Native Land Board Bill 1898).¹¹² Neither Bill was passed. A Validation Court judge, Judge Batham, also entered the debate. In his view, there was a real risk that the trust's liabilities would exceed its assets, and that Turanga Maori would lose all, not just part of their land. Finally, the Government proposed its own Bill, after being urged to do so by the native affairs committee.¹¹³ It was allowed to lapse.

These attempts enable us to draw several conclusions. First, there was considerable awareness of the East Coast problems at Government level. Politicians, officials, and judges knew what the issues were. Secondly there was recognition that the Carroll Pere trust represented a unique situation. It may be remembered that the Government had recently enacted legislation for another unique East Coast land issue: the Mangatu Empowering Act 1893. Thirdly, there was a growing recognition that the situation was serious and that the Government had a responsibility to act. As the native affairs committee reported in 1897, 'the petition and evidence reveal a state of things on the East Coast . . . [which] certainly ought not to be allowed to continue. It is injurious to all parties concerned'.¹¹⁴ It was also accepted that the cause was

110. Given the focus of this district inquiry, we ask the question in this report specifically in respect of Turanga Maori. It is, of course, a question which might be asked in respect of all Maori from the East Coast to Mahia whose lands were vested in the Carroll Pere Trust.

111. The committee comprised 11 members: four were Maori members, seven were Pakeha. It was chaired by W Kelly, the member for East Coast. The first report was in response to the petition from Hemi Waaka and others in respect of Rees and Pere's actions affecting the Pakowhai lands and other lands in Muriwai. The second report was in response to two petitions from settlers relating to company lands, AJHR, 1891, I-3A, pp1-21.

112. Both Bills addressed the key issues facing the trust (providing for the proposed boards to borrow on debentures so that interest rates would be substantially reduced, and giving them wide powers so they could develop and farm the land.

113. The East Coast Native Land Administration Bill 1898 shadowed the 1902 solution, but it was allowed to lapse.

114. 'The Native Affairs Committee report on the petition, no 108, of Wiremu Pokiha and 653 others', 16 December 1891, AJHR, 1897, I-3A, p1 (doc A4(a), sec J, p110)

the system, not the competence of the trustees. The committee pointed explicitly to the legislation and the Native Land Court as the prime causes for the problem. The question was how to respond to the problem. Pere advocated the Government lending the trust money in order for it to develop the lands and open them up for settlement. He and Carroll made strong pleas for the consideration of Maori owners and saving all the land. The Government disagreed. It proposed the sale of sufficient lands to pay off the debt, then an active management regime for the lands that were left.

In our view, the Crown should have acted once the problems of the trust lands became apparent. The rapidly mounting debt figures presented to the 1897 native affairs committee were a call to action, and the Government evidently recognised this. It produced a Bill of its own. However, while some politicians recognised the danger East Coast Maori faced in respect of their lands, the Government failed to follow through, even though the consequences of inaction were clear. Ultimately, there was a lack of political will at that time to tackle a difficult problem.

In 1902, the Government finally passed legislation. We note that the underlying issues in that year were no different from what they had been in 1898. The outcome of the East Coast lands was presented in the lengthy parliamentary debate of 1902 as a public issue. This was because it was recognised that the bank had to be repaid, yet the bank argued that if there was a quick sale (such as it was entitled to hold), this would depress prices and might even prevent it recovering its debt. The uncertainty of East Coast land titles was such that it was considered necessary to include a statutory guarantee of those titles, even though by then those titles were indefeasible.

Maori lands vested in the trust were to be protected as far as possible; the bank's chairman himself told a parliamentary committee that the bank did not wish to be seen to force a sale of Maori land, because it was important to the bank to 'preserve the rights of the Natives'.¹¹⁵

All these issues had been raised in the late 1890s. It seems to us that only one key factor was different in 1902: the forthcoming bank sale of the trust lands, set for 15 January 1902 but later adjourned.¹¹⁶ In 1902, the Government was well aware that the trust lands formed a substantial proportion of the unliquidated assets held by the bank (£138,000 of a total of £250,000).¹¹⁷ As we have noted, the chairman of the bank, Frederick de Carteret Malet, then approached the Acting Premier, Sir Joseph Ward (with whom he had established a relationship when Ward was Colonial Treasurer), and the Government finally found the political will to act.

115. 'Evidence of Frederick de Carteret Malet, 26 August 1902, Minutes of Evidence, The East Coast Native Trust Lands Bill Committee', AJHR, 1902, I-14, p 6 (doc A4(a), sec J, p131)

116. Document F11, p 243; doc A4, p137. Carroll and Pere sought a Supreme Court injunction to restrain the sales, but on 24 April 1902 the application for injunction was dismissed, with judgment given for the Bank of New Zealand.

117. Document A4, p149; doc F11, pp 277-281

(g) Crown responsibility: We return now to our original question: can the Crown be implicated in the failure of the Carroll Pere trust to benefit Turanga Maori? One of the problems we have had in dealing with the various mechanisms Rees and Pere experimented with is that the trusts and the company covered a far greater area than just our inquiry district. It is therefore difficult to make a conclusive finding based on solely on the evidence we heard. We therefore leave it to future tribunal inquiries to make a more definitive finding.

We can, however, be certain of two points. The first is one we have noted before. However, it is of such fundamental importance that we state it again. The Crown created the regime that underpinned all land transactions, and as such was directly responsible for the absence of an easily accessible effective communal title. This despite the fact that such a title was requested both by Turanga Maori and numerous politicians and commentators at the time.

Secondly, the Crown was responsible for the creation of the complicated, inefficient and contradictory system of individual share transfer that rendered the trust's titles so defective and created the need for the Validation Court in order to clean up the mess. The knock-on effect in legal costs and in preventing land development are obvious. In addition, the Validation Court itself was a mixed bag. On the one hand, it helped to ensure that the trustees and the estates company met their obligations to the owners and provided a foil against imprudent management between either of them against the interests of the owners. On the other hand, the court clearly drew into the trust's net, lands that should not have been drawn in. We identify a number of these blocks below. It did this to spread the debt burden more widely and increase the chances of survival among some of the overburdened lands. Though an understandable strategy, it can provide little comfort to those who, through no fault of their own, lost their lands in the process. While the court was not itself the Crown, the system that both necessitated and established it clearly was the Crown's system.

We are left to find that responsibility for the failure of the Carroll Pere trust (and the subsequent loss of lands which ought not to have been lost), lies substantially with the Crown. It was the Crown's system of land transfer that made the trust's task impossible, and it was the Crown's mechanism for fixing the problem that ultimately caused the loss of lands which ought not have been in the trust in the first place.

(4) *Turanga Maori loose control of their lands, 1902–55*

In 1902, as we have noted, the Government instigated a rescue package in the form of the East Coast Native Trust Lands Board. Despite being established by a statute (the East Coast Native Trust Lands Act), nowhere was the nature of the trust, or trusts, it was to administer, precisely defined.¹¹⁸

Once the East Coast Native Trust Lands Board took over the operation of the Carroll Pere trust, Maori were excluded from participation in the management of their lands. The

¹¹⁸. Document A4, p150

board could sell land without consultation with the owners in order to repay the debt, the Validation Court controlled the scheme for adjusting internal debt between the blocks, and no general forum existed through which the views of the owners could be solicited on any of these matters.

(a) The ongoing debt issue: While the external debt to the Bank of New Zealand had been discharged, the question of the internal debt on the blocks (that arose largely in the course of repaying the bank's debt) remained. The trust lands were managed as a single economic unit, so that profitable blocks could support those that were less profitable. When the East Coast Native Trust Lands Board sold blocks to meet the bank's debt, the owners of those blocks bore the full brunt of the debt.¹¹⁹ After 1906, the commissioner needed to establish in some equitable manner which blocks had paid proportionally more than their share of the overall debt, and which had not. In other words, the commissioner ultimately had to meet its obligations to the owners of each of the blocks in the trust. It had to ensure that each block contributed no more and no less than the share of the debt for which it was owed.

In 1908, the Validation Court proposed its solution to the problem of spreading that debt fairly and equitably among the owners of all the blocks. Following a rather complicated accounting formula, blocks were termed 'creditor' or 'debtor' blocks. Ten blocks were found to be 'creditor' blocks (that is, they had been sold and the proceeds helped reduce the overall trust debt.¹²⁰ The controlling authority, now the East Coast commissioner, therefore owed money back to the owners of those blocks. The debtor blocks, on the other hand, owed money to the commissioner.¹²¹

In theory, 'debtor' blocks might have been sold at once to repay their share of the debt to the commissioner, and the commissioner might have repaid the owners of creditor blocks. But this was felt to be unfair. It was largely a matter of chance that some blocks had emerged as creditor blocks. It was hoped that more land might ultimately be saved if debtor blocks were given the chance of paying off what they owed to the creditor blocks, rather than being sold in their turn.

In general terms, the Validation Court strategy for spreading the debt among the blocks was a sensible one, and certainly one devised in good faith. We consider it most unfortunate that there were problems with arrangements for the repayment of debt. Debtor blocks were charged compound interest until 1922, when it had been accepted that this had been a mistake. Furthermore, provisions for the payment of the principal security debt were not made

119. Most of these blocks were principal security blocks, blocks which had secure title in 1902, and were designated as liable for the whole of the original Bank of New Zealand debt.

120. Most of the principal security blocks which had been sold were credited their sale price.

121. These included both unsold principal security blocks, and the specific security blocks, which had been brought into the trust through the Validation Court. They were liable only for the specific debts they had incurred, as well as a share of the overall management expenses.

9.4.1(4)(b)

until the late 1920s.¹²² Together these factors prolonged the time it took to repay the debt. We do acknowledge, however, the role of the Crown in rectifying the problem. It was during the period of direct Crown supervision of the commission that both these matters were addressed.

(b) Maori representation: When the Crown established successive management structures, there was no provision for Maori representation. Turanga Maori were not represented on the three-person East Coast Native Trust Lands Board established in 1902. There was no provision for the beneficial owners to even suggest who might be on the board. This, despite the fact that the first draft of the Bill provided for the trust lands to be vested in the new Tai-Rawhiti District Maori Land Council constituted under the Maori Lands Administration Act 1900.¹²³ Furthermore, not only did the final Bill remove a role for the council, it also failed to provide a mechanism through which the board would be accountable to the owners.¹²⁴

The situation did not change when the position of East Coast commissioner was created. Even when the trust lands became directly administered by the Native Department (1921 to 1934), Turanga Maori were not involved in the management of their lands. In 1921, John Harvey (the commission's agent in Gisborne), suggested that prior to any leases being fully undertaken, the matter should be fully discussed. The owners, he said, might prefer to see the lands returned rather than lose possession of them for another generation. He also advocated advisory committees of owners, who might also be consulted over sales.¹²⁵ But in practice, this did not happen.¹²⁶ Harvey in fact did not keep Maori owners informed with what was happening with their lands. Professor Alan Ward suggested that he might have simply been too busy to do so.¹²⁷

122. Document F11, pp 277–281; doc A4, pp 201–202. After it was acknowledged that some blocks were loaded with debts far greater than their value, legislation was passed providing for the Native Land Court to reopen and adjust trust accounts. This led to the creation of a Bad Debts Reserve Account, to accumulate enough to pay off the principal securities debt.

123. East Coast Native Trust Lands Bill, Le 1 1902/2, Arch-NZ (doc A4(a), sec D, pp 399–402). In the draft Bill, in which Rees clearly had considerable involvement, the terms on which lands were to be managed and alienated were to be agreed upon between the 'trustees or beneficiaries' and the land council, by deed. The Bill was amended in the East Coast Native Trust Lands Bill Committee, chaired by W F Massey, at its meeting of 27 August 1902, by replacing all references to the council by references to a board, East Coast Native Trust Lands Bill Committee, LE 1 1902/2, Arch-NZ (doc A4(a), sec D, pp 407–410).

124. Section 6 of the Act provided that 'Natives claiming to be entitled to any lands' vested in the board 'shall not be barred from claiming an account of the dealings of the Board'. Section 12 did provide for agreement between trustees and beneficiaries with the board by deed, in terms of management and alienating or improving lands, and such deeds were entered into in respect of the blocks in the principal security blocks during 1903 to 1904. But in practice, there was a very limited role for the owners.

125. Document A4, p 208

126. In 1930, for instance, the remaining 21,282 acres of Mangatu 5 and 6 were sold to the Crown (as Harvey favoured the sale of non-revenue producing blocks). There is no evidence that the commissioner tried to consult with the beneficial owners of the land – not even the Mangatu no 1 committee which might have seemed to represent the Mangatu 5 and 6 owners at that time.

127. Document A4, p 208

It is clear to us that their lack of involvement caused considerable anxiety to Turanga Maori. Numerous petitions were sent to Parliament, expressing anger at the lack of information they received about their lands and, as the depression deepened, their inability to work their lands themselves. It was not, in fact, until the late 1940s that Maori had a say in the running of their lands. The creation of the East Coast Maori Trust Council (a largely advisory body sanctioned by the Maori Purposes Act 1949) signalled the first substantial role that Maori had with respect to these lands since 1902.

There is no question but that the East Coast Native Trust Lands Act was a rescue package to save Maori owners from a debt that was likely to have a significant effect on the regional if not the national economy. As such it was understandable that ownership and management would be, for a time at least, vested in professional managers. It was a necessary and painful measure. But to completely exclude Maori from participating in the development of policy for the administration of their lands went far too far. Once it became clear that this would be a long-term measure, the exclusion of Maori from even an advisory capacity could not be justified.

Our overall findings are therefore as follows:

- ▶ First, in respect of the Rees Pere trusts, failure can be attributed in part at least to the land title and transfer systems established at the time by the Crown. There was no statutory support for community land title or management, leading inevitably to the finding in the *Pouawa* case that the Rees Pere trusts were ineffective. In addition, the system of individual transfer provided under the Native Land Act 1873 meant that tribal lands could be eroded through piecemeal sales before the trusts became operative. It was the debt incurred in the purchase that ultimately made the trusts unviable as an enterprise, whatever their legal status.
- ▶ The failure of the Crown to provide adequate systems for community title and management and to prevent piecemeal erosion of community land interests breached te tino rangatiratanga guaranteed in article 2 of the Treaty. In particular that guarantee was made to the communities at community level (ki nga hapu) and to the community leadership (ki nga rangatiratanga). In addition, this failure seriously compromised the specific title guarantee in the English text of article 2 and the more general Crown obligation of active protection in respect of Maori lands.
- ▶ In respect of the New Zealand Native Land Settlement Company, to the extent that the failure of the company was attributable to bad business decisions or poor economic conditions, the investors and promoters of the company must take responsibility for their losses. To some degree, the company suffered under problems of defective titles, though this became more apparent with the establishment of the first rescue package (the Carroll Pere trust) in 1892. And we note that the intervention of Premier Atkinson which derailed the company's London promotion clearly had some effect on the company's viability. In the end, both parties must bear some responsibility, but we consider that the lion's share in this case lay with those in control of the company. We say this subject to

comments we make below with respect to defective titles inherited by its successor, the Carroll Pere trust.

- As to the Carroll Pere trust, responsibility for its failure and for the loss of lands which ought not to have been included within it, lies substantially with the Crown. It was the complex, inefficient, and contradictory system of individual transfer which destabilised the trust's titles. It made the cost of doing business too high, particularly when added to the debt burden inherited from the New Zealand Native Land Settlement Company. It was the operation of the Validation Court which allowed for the inappropriate inclusion of debt free lands into the trust and the sale of those lands against the wishes of the owners. The tenurial mess which was left to the trust to sort out proved its undoing.

The system that allowed these things to happen was established and operated in breach of the tino rangatiratanga guarantee and the Crown's obligation of active protection of community titles. It was demonstrably unfair and unreasonable.

- As to the East Coast Native Trust Lands Board, we acknowledge the Crown's welcome intervention in 1902. We find, 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 board, and then the commissioner, would not be short-term institutions, we find that the Crown should have required them to include Maori in the development of policy for the administration of their lands. In both respects, we find that the Crown failed to discharge its Treaty obligation of active protection.

We now consider the actual impact of the Rees Pere initiatives on Turanga iwi: the blocks invested in the schemes, and the lands affected.

9.5 WHAT WAS THE LONG-TERM IMPACT ON TURANGA IWI OF THE FAILURE OF SUCCESSIVE INITIATIVES BY REES AND PERE?

Turanga Maori lost a significant amount of land as a result of the failure of the successive Rees Pere initiatives: the Rees Pere trusts, the New Zealand Native Land Settlement Company, and the Carroll Pere trust. Very little of their land that was sold brought the short-term benefits that had been expected, namely close settlement and Maori community development. In general, land was sold simply to pay off debt.

Some block owners lost their lands in the 1891 mortgagee sale held by the Bank of New Zealand Estates Company. A small amount was sold by the Carroll Pere trust. Other owners saw their lands sold either by the board in order to pay off the debt owed to the Bank of New

Zealand prior to 1905, or later, as the East Coast commissioner tried to raise further funds to either develop land, or to repay the internal debt.

We summarise these alienations below. We note that it has proved difficult to give exact figures, either because of incomplete records or because neither iwi lands nor trust holdings fitted within the present inquiry district boundaries.

In broad terms, we can say that the amount of inquiry district land vested by Turanga communities in the Rees Pere trusts was over 70,000 acres. The amount acquired by the New Zealand Native Land Settlement Company (including land acquired from the Rees Pere trusts) was just over 200,000 acres. The company sold some 37,500 acres of inquiry district land.¹²⁸ About 9500 acres of inquiry district land, out of a total of about 40,000 acres, was sold in the 1891 mortgagee sale.¹²⁹ Lands vested in the Carroll Pere trust, after the mortgagee sale of 1891, amounted to nearly 100,000 acres. Roughly the same amount of land was vested in the East Coast Native Trust Lands Board in 1902, and the greater part of this was sold either by the board or by the commissioner.

Lands	Area (acres)
Lands vested in the Rees Pere trusts	70,000
Lands acquired by the company	205,500*
Lands vested in the Carroll Pere trust	100,000 [†]
Lands vested in the East Coast Native Trust Lands Board	98,299 [‡]
Trust lands sold post-1902	75,000
Trust lands returned to beneficial owners in 1955 to 1974	27,500

* Document F11, pp 112–113. This is the figure that Macky provided us with. His table lists blocks which the company 'had acquired or had a right to deal with'. It also includes land from three sources: the Rees Pere trusts (for which payment was made mostly to settlers), Rees and Pere themselves, and Maori owners from whom land was purchased directly. It also lists Mangatu 1 (90,000 acres), which the company did not own.

[†] This figure comprises approximately 65,000 acres vested in the trust with clear title, plus approximately 35,000 acres added by the Validation Court.

[‡] Document F11, pp 255–256

Inquiry district lands involved with the New Zealand Native Land Settlement Company and the trusts.

The figures in this table are all approximate only.

The table below lists details of inquiry district lands returned to their beneficial owners in 1955 – and, in the case of Mangatu 5 and 6, in 1974. The latter, now called Mangaotane station, was returned to the owners of Mangatu 1 (which had remained in Maori ownership, though it had also been managed by the East Coast Commissioner between 1917 and 1947.)

128. Document F11, pp 150–151

129. Ibid, p174

Block	Land returned (in acres)
Pakowhai	402
Te Kuri and Tangotete 1, 2	232
Te Kopua	2281
Maraetaha 2, sections 3, 6	5574
Tahora 2C2, section 2	3770
Tahora 2C3, section 3	1509
Total returned by 1955	13,768
Land in the inquiry district returned to beneficiaries in 1974	
Mangaotane station (remainder of Mangatu 5, 6)*	13,616
Total returned by 1974	27,384

* Macky's table directly quotes the amount as 5547. The correct amount is 5574. See 'Schedule of Lands Distributed by the East Coast Commissioner to 30th June 1955': doc A4(F), pp1370–1373. This changes the total to 13,768 acres and not 13,741 acres as Macky gives. Document A27, p99 states that Mangaotane was 13,608 acres when repurchased by the East Coast Commissioner by 1934, but by 1968 it totalled 13,616 acres. Note that Macky agrees in doc F11, table 20, p325, that Mangatu 5 and 6 (which together made up Mangaotane station) totalled 13,616 acres in 1952.

Land in the inquiry district returned to beneficiaries in 1955. Table cited in document F11, p337, table 22.

Turanga Maori paid a high price for their involvement in the trusts and the company. Close to three-quarters (73.9 per cent) of the land vested in the East Coast Native Trust Lands Board was sold. In 1906, Turanga lands represented perhaps a half of the total lands (over 185,000 acres) vested in the East Coast Native Trust Lands Board;¹³⁰ by 1955, when around 120,000 acres remained in the trust, the Turanga proportion of the whole had fallen to a quarter.¹³¹ Yet, it had been hoped to save much of the land for the owners. In the case of lands returned, the owners had lost control of them for over 50 years (over 70 years in the case of Mangatu 5 and 6).

Against this must be offset the economic benefits to the owners. The East Coast Commissioner, empowered both to farm and to borrow, began farming the lands in 1908. By 1955, a number of stations had been developed within the inquiry district. The development of the land also allowed the commissioner to make distributions to the owners, from lease rentals and from profits.¹³² And, from 1911, the trust began to make payments to owners of purchase moneys for land sold by the board to repay the Bank of New Zealand debt.

The general picture that emerges is one of substantial land alienation from the 1880s to 1930, and the final return to the owners in the mid twentieth century of a small proportion of the land they had originally committed to the Rees Pere initiatives. But the statistics of overall alienation do not convey the iwi stories of involvement with the trusts and the company, or the impact of that involvement. We turn to these now, and address the claims presented before us.

130. Document E6, p18

131. Ibid, pp30, 37–8

132. Document F11, p304. These payments were made annually from 1904 until the 1920s, and amounted to £4551 by 1918.

9.5.1 Ngai Tamanuhiri

Ngai Tamanuhiri have a particular claim in respect of their Maraetaha 2 land, which went through the Validation Court and was awarded to the Carroll Pere trust. Their claim arises from:

- ▶ the nature of Validation Court proceedings in respect of the Maraetaha 2 block;
- ▶ the resulting alienation of a substantial amount of these lands by the East Coast Native Trust Lands Board to repay the Bank of New Zealand mortgage;
- ▶ the initial failure of the trust to return monies owing to them from the sale of other Maraetaha lands; and
- ▶ the long-term loss of control of their lands to the East Coast Commissioner, rendering them effectively a 'landless people'.¹³³

(1) *Lands vested in the trusts and company*

Ngai Tamanuhiri's involvement with the trusts dated from 1879, when they conveyed all of their undivided interests in Maraetaha and Te Kuri in trust to Rees and Pere. Subsequently their interests were partitioned out as Maraetaha 1D, Te Kuri, and Tangotete. Maraetaha 1D (Te Kopua) remained in the hands of Rees and Pere as trustees, until it was vested directly in the East Coast Commissioner, in 1908. The commissioner agreed that there was to be no power of sale in the case of this block. Te Kuri 1 and Tangotete 1 and 2 were blocks on which the owners were living, and were not considered for sale or for farming development. Pakowhai, in which Ngai Tamanuhiri had interests, was vested first in the New Zealand Native Land Settlement Company in 1887, and then in the East Coast Native Trust Lands Board in 1902.¹³⁴

(2) *The Validation Court: Maraetaha 2 lands*

Ngai Tamanuhiri's major grievance in respect of the trusts, as noted above, arises from the loss of their Maraetaha 2 lands (16,615 acres). In particular, they challenged the Validation Court's proceedings in relation to the block, as amounting to 'substantive unfairness or illegality', and the outcome of those proceedings.¹³⁵ In 1895, Carroll and Pere, sought to have the 1882 contract validated in the Validation Court, so that Maraetaha 2 would become a specific security block owned by the trust as applicant for validation. Rees argued that the New Zealand Native Land Settlement Company had purchased the block on 17 May 1882, the day after title was awarded by the Native Land Court. Timing here was crucial because section 2 of the Native Land (Validation of Titles) Act 1896, prohibited the Validation Court from making any awards in respect of purchase contracts which predated the original award by the Native Land Court. In the case of Maraetaha 2, there existed a survey lien on the title dated February

¹³³. Document H2, p125

¹³⁴. Document A5, p 44

¹³⁵. Document H2, pp 118–119

1882, three months before the land court award and the alleged contract date. The beneficiary of the lien was the New Zealand Native Land Settlement Company. Rees advised the Validation Court that the company had expended large sums on survey. The lien strongly suggested that the date of the contract was not May as Rees had suggested, but February or earlier because surveys were usually undertaken after agreement was reached with a purchaser and in this case the work was actually funded by the purchaser. If that was correct, the Validation Court was prohibited by section 2 from accepting the Trust's application for validation even by consent.¹³⁶ The question, therefore, is whether the Validation Court acted properly in validating the company's claim to Maraetaha 2. We make findings on this matter below.

(3) *East Coast Native Trust Lands Board sales*

(a) Maraetaha 2: For Ngai Tamanuhiri, the court's vesting of Maraetaha 2 (11,000 acres)¹³⁷ in the trust was to have far-reaching consequences. The Maraetaha 2 lands were transferred to the East Coast Native Trust Lands Board. Being good quality lands, they were among the first sold off between 1904 and 1905 to clear the Bank of New Zealand debt.

Maraetaha 2, section 4 (3991 acres), a specific security block, was sold in 1904. It realised a good price: £15,967.¹³⁸ The Validation Court stated in 1908 that the block had a credit of nearly £5500. The block owners petitioned Parliament twice requesting the money owing to them, and complaining about the way in which they had lost these lands. The commissioner explained that there were a number of expenses which had to be charged to the block, and that in fact he had no cash in his possession to pay the £5967 (the original amount plus interest) due the owners, until other land was sold.¹³⁹

A further sale was made in 1905 of part of Maraetaha 2, section 6, amounting to 1349 acres, and part of Maraetaha 2, section 3, which amounted to 950 acres.¹⁴⁰

The East Coast Native Trust Lands Board sales amounted to 6290 acres, about 57 per cent of the Maraetaha land transferred to it.¹⁴¹ The price realised by the sale of these blocks indicates the value of the land which passed out of Ngai Tamanuhiri ownership in this way.

136. Document F11, pp 208–212

137. Ibid, p 210. In April 1896, the Validation Court awarded 4760 acres to the Crown.

138. Ibid, p 261

139. Document A35, pp 53–56. A further adjustment of the debt on the Muriwai lands of the trust was made in the 1920s, when the Maraetaha 2 section 4 credit was set against debts on other lands owned by the same group of owners to pay for houses constructed by the trust at Muriwai for which there was a dire need. It was 1959 before the owners of Maraetaha 2 section 4 were paid a sum of £5,347 16s 10d. A further £1100 payable to owners who could not be traced was paid to the Maori Education Foundation.

140. Document A35, p 56

141. Document H2, p 124. We have not included in this figure the sale of Maraetaha 2A sections 2 and 3 (5082 acres) as listed by Macky (doc F11, p 260), a block awarded to Ngai Tahu and Ngati Ruapani by the Native Land Court (doc A30, p 150). We note that this block was sold by the board though it had not been indebted to the bank; the beneficial owners, seeking information about the sale, brought a case against the commissioner in the Supreme Court. The case was removed to the Court of Appeal. The court found for the commissioner, as they considered the matter was one

(b) Pakowhai: A further East Coast Native Trust Lands Board sale of land in which Ngai Tamanuhiri had interests was Pakowhai. This block survived the 1891 sale, but most of it (4638 acres) was sold by the board in 1905, except for 374½ acres which was being used as papakainga land at the time, and was retained by the commissioner as a reserve for the beneficiaries.¹⁴² The sale brought in the very substantial amount of £27,253 (just over £5 17s per acre). Pakowhai 1 became a principal security block. This was questioned by Harvey in 1921, but it seems that no action was taken.¹⁴³

(4) Distributions to Ngai Tamanuhiri

For nearly 40 years, Ngai Tamanuhiri received distributions only in the form of donations; these included donations to hui, tangi, and marae improvements. From 1940, distributions were regular and substantial, averaging about £2000 a year for the beneficiaries of Maraetaha 1D, £2400 for those of Maraetaha 2, sections 3 and 6, and £336 for those of Pakowhai.¹⁴⁴

By 1950, distributions to the owners of Maraetaha blocks by the trust amounted to:

Maraetaha 1D	£21,278
Maraetaha 2, sections 3 and 6	£25,489
Pakowhai	£3949 ¹⁴⁵

On the face of it, these are considerable amounts. They were required, however, to stretch a long way. By 1959, there were 623 owners in Maraetaha 1D, and 611 in Maraetaha 2, sections 3 and 6. The process of fractionation of shares was well underway: by 1959, 84 per cent of the owners in Maraetaha 1D held fewer than five shares, and 291 owners had less than one share. In Maraetaha 2, sections 3 and 6, two-thirds of the owners held fewer than five shares by 1959.

As a result, dividends paid to shareholders between 1940 and 1950, averaged to just under £1 per share for Maraetaha 1D and just under 10 shillings per share for Maraetaha 2, sections 3 and 6. On the whole, therefore, incomes from shares were small. For Maraetaha 1D, 69 per cent of those holding shares received under £5 a year in dividends, and only 2 per cent received over £51. For Maraetaha 2, sections 3 and 6, the payments were smaller: nearly half received less than £2 10s a year. Thus, although many owners had shares in both blocks, their annual payments were still very modest.¹⁴⁶

Footnote 141 continued

clearly within the jurisdiction of the Validation Court. The commissioner paid the balance at the credit of the block in 1915 (doc A4, pp178–179). Mafeking Pere included the block in his assessment of Ngai Tamanuhiri losses before the 1941 committee of inquiry giving the total of Ngai Tamanuhiri losses through East Coast Native Trust Lands Board sales as 13,713 acres (doc A35, p82).

142. Document F11, p207; doc A35, p70

143. Document A35, pp70–71

144. *Ibid*, p98

145. Document F11, p305

146. Document A35, pp97–106

(5) *Land returned to Ngai Tamanuhiri*

Lands returned to Ngai Tamanuhiri in 1954 (Maraetaha 1D of approximately 2285 acres,¹⁴⁷ and portions of sections 3 and 6 of Maraetaha 2) amounted to 5574 acres. This was about 27 per cent, or just over a quarter of the Maraetaha block awarded by the Native Land Court in 1882. At the same time, 232 acres of Te Kuri and Tangotete 1 were returned.¹⁴⁸

(6) *Ngai Tamanuhiri and their trust lands*

Ngai Tamanuhiri anger at the loss of their lands following their vesting in the trusts and the company is still evident today. The extent of the lands they lost may not look great in terms of acreage. But Ngai Tamanuhiri had only a modest land base to begin with, and Maraetaha and Pakowhai were good quality lands – as is evident in the prices paid for them in the 1904 to 1905 sell-off.

This loss was acknowledged by a later East Coast commissioner in 1940, when he said: ‘The Muriwai people have already borne a heavy share of the burden – a large share of their lands was sold in 1904. Due to the fact that the Principal Security had not been liquidated, they received no dividends from their lands.’¹⁴⁹

And Professor Murton stated that: ‘there is no question that Ngai Tamanuhiri, more than any other group of beneficial owners, were impacted economically by the [East Coast Native Trust Lands] Board between 1902 and 1906, and by the trust thereafter’.¹⁵⁰

By the 1930s, Ngai Tamanuhiri retained just over 14,000 acres of their lands. A large part of this (9620 acres) was in the hands of the East Coast commissioner.¹⁵¹ Ngai Tamanuhiri concern about loss of control of their lands was expressed in petitions over many years. From 1889 (when they petitioned Parliament over Pakowhai) to 1939, when they requested that their lands be exempted from the provisions of the East Coast Native Trust Lands Act,¹⁵² they sought information, redress, and payments from sale of their land which seemed to them long overdue. Payments for the sale of 2299 acres of Maraetaha (parts of sections 3 and 6) to the Gisborne Borough Council (the ‘Waterworks money’) in 1905 were finally made in 1913 to 1914.¹⁵³ And for over 30 years the owners of Maraetaha 1D and Maraetaha 2, sections 3 and 6, and those of Pakowhai had received no benefits from their lands. This was despite the fact that Maraetaha 1D had had no involvement with the New Zealand Native Land Settlement Company, the Carroll Pere trust, or the East Coast Native Trust Lands Board; and that

147. Document A19, pp 58–59

148. Document F11, p337

149. Jessep, East Coast Commissioner to Langstone, Minister of Native Affairs, 22 May 1940, MA13/33B DV C, pp88–90 (doc A35, p82)

150. Document A35, p82

151. Ibid, pp36–38

152. This petition led to the establishment of the 1941 committee of inquiry: doc A35, p91.

153. Document A35, pp565–567

the Maraetaha 2 sections had been responsible for substantially more of the Bank of New Zealand debt than had been agreed to.¹⁵⁴

(7) *Should Maraetaha 2 have been vested in the Carroll Pere trust?*

We referred above to Ngai Tamanuhiri's grievance in respect of the Validation Court's vesting of Maraetaha 2 in the Carroll Pere trust. Did the Validation Court act properly in relying on a contract which was not produced in court? Mr Macky, in cross-examination, doubted whether such a contract existed; if it had, he said, it would surely have been filed before the court in 1895. He considered that the court was approving an arrangement agreed to by the parties before they got to the court: 'I doubt whether there really was any contract on that date.'¹⁵⁵ He agreed with claimant counsel that it was 'fiction'.¹⁵⁶ But, by alleging there was a contract, Macky argued, the applicants enabled the Validation Court to exercise jurisdiction.

We agree with counsel for all sides that it is very probable that no agreement was entered into on 17 May 1882, the day after the land court award. It seems far more likely that the agreement the Trust was relying on (on behalf of the company) was entered into in or before February of that year (if at all) as suggested by the earlier survey lien. This meant that the Validation Court did not have jurisdiction to validate the transaction and transfer the land to the company.

Crown counsel stressed, however, that despite the doubtful legality of the transaction, both Hemi Waaka and Tiemi Wirihana supported an agreement reached in May 1896 to separate out the Crown's interests in the block, and vest three sections totalling 11,000 acres in the trust. The court understood from Waaka that the owners had reached this agreement earlier at Muriwai, and recorded that no objections were made by the many Maori present in court.¹⁵⁷

It seems clear to us that the owners did agree in 1896 to vest the land in the trust. They agreed also that one of the Maraetaha sections of 4000 acres should bear responsibility for its share of the Carroll Pere trust's mortgage to the estates company (£4000).¹⁵⁸ They were prepared to engage in the fiction of the 1882 transaction because they still believed in what Pere was trying to achieve, and wanted to support their relations who had committed land to the trust.¹⁵⁹ They cannot possibly have foreseen, however, the price which they would have to pay for that decision in the loss of so much of their good land. Maraetaha 2, section 4, also had to bear an unexpected share of the debt burden. The agreement of the owners with the trustees was that the block should be liable for £4000 of the trust's debt. Macky thought that even this amount was 'excessive'.¹⁶⁰ But, in 1902, the block was made liable for £11,433 of the debt to

154. Ibid, p109

155. Document H2, p126

156. Ibid, p128

157. Ibid, pp 64–65

158. Document F11, pp205–206

159. This is evident also in their vesting two sections of Maraetaha 2A, totalling 5082 acres, in the trust: doc F11, p209.

the Bank of New Zealand.¹⁶¹ When it was sold it raised £15,967, of which £12,308 was paid to the bank. According to Crown historian Macky, ‘Even though Bell [the bank’s lawyer] had said in 1902 that it would be a scandal if specific securities were sold to pay off debts beyond what they owed to the Bank, this is what happened’.¹⁶²

We find that the Validation Court ought not to have validated the 1882 transaction without ensuring that proper safeguards for the Maraetaha owners were in place. The court should have stipulated that land which was not security for the Bank of New Zealand mortgage could not be sold without the consent of the owners. It should also have ensured that a specific security block could not arbitrarily have been made responsible for a greater share of the debt than its owners had agreed. In that it made no such stipulations, it failed to protect the interests of the owners.

9.5.2 Rongowhakaata

(1) *Lands vested in the trusts and company*

Four core Rongowhakaata blocks were involved in the Rees Pere trusts: Ahipipi, Whakawhititera, Pakowhai, and Kaiparo.¹⁶³ In the cases of Ahipipi and Whakawhititera, the interests of only a few owners were successfully brought into the trusts, by deeds of trust signed on 13 and 14 January 1879.

Land of three Rongowhakaata core blocks later became holdings of the New Zealand Native Land Settlement Company: Part Kaiparo (253 acres), Pakowhai (4950 acres), and Part Matawhero B (665 acres).¹⁶⁴ About 300 acres of Matawhero B appear to have been sold by the company by 1886. In 1888, the year the company went into liquidation, many of the Maori committees that had sold their land to the company reached an agreement with it, authorising it to take out a £135,000 mortgage to the Bank of New Zealand. The schedules to the agreement record the consent of the various committees; that of Kaiparo is not recorded. In 1890, the mortgage was transferred to the Bank of New Zealand Estates Company.

(a) The 1891 mortgagee sale: For Rongowhakaata, the loss of one block – Kaiparo (253 acres) – was particularly significant. This block was involved in both the trusts and the company. In 1888, the owners found that their land had been mortgaged to the bank. They sought Government intervention in 1891, as they had no other land in the district.¹⁶⁵

160. He noted, however, that the owners were also promised 200 acres of Pakowhai to live on: doc G21, p26.

161. Document F11, p268

162. Ibid, p261

163. As noted above, Ngai Tamanuhiri also had interests in Pakowhai.

164. Document A24, pp175–177

165. Document A4, p21

Kaiparo was sold in the 1891 sale, and its owners evicted. At the 1941 inquiry into the sale, two women spoke of the distress of their old people over the sale of this block. Mere Kingi, who had been born on the block in 1878 and grew up there with her family, told how they had been forcibly evicted after the sale, when the drovers brought in cattle and stock. She and her grandmother went to Mangatuku where they lived on sufferance on the land of the spouse of one of her grandmother's children. She married and still lived at Mangatuku, but had no rights there.¹⁶⁶

Tangi Matua Mirina, the granddaughter of Epina Hokeke, another grantee, also gave evidence of their attempts to resist the arrival of stock brought onto the land after the sale: 'I remember taking part with my grandparent in making attempts to drive the stock off. We were unable to do this'. Her grandfather, she said, 'died in sorrow over the loss of this property'.¹⁶⁷

(b) Compensation: Towards the end of the East Coast trust period, the question of compensation for lands sold in 1891 (before the agreement between Carroll and Pere as trustees and the Bank of New Zealand Estates Company) was raised, and in particular, the sale of Kaiparo. The issue was raised in 1945, and again in 1948. Mafeking Pere made representations to the Minister of Maori Affairs in 1948: 'Kaiparo block was sold to help salvage the present East Coast Trust lands and the owners of the block are not included in the present Trust. Their interests were lost in the salvage operations'.¹⁶⁸ Pere claimed that an earlier enquiry into the trust lands, held in 1941, had recommended that compensation be paid, and that a sum of £1500 was mentioned. In subsequent correspondence, three members of the committee of inquiry contradicted one another. Sir Apirana Ngata supported Pere, stating that the committee had decided to recommend the rejection of all such claims except Kaiparo. Chief Judge Shepherd and James Jessep disagreed.

The matter was not settled until 1951. At this time, as preparations were made for the winding up of the East Coast trusts, agreement was reached between the new East Coast Maori Trust Council, the East Coast Commissioner, and the Minister of Maori Affairs, to refer the matter to the Supreme Court. Parties appeared before the court in Gisborne on 10 September 1951, and the court invited counsel to confer. The East Coast Council considered the matter of compensation for those whose land had been sold, and decided that all owners whose lands had been sold after the date of the agreement with the estates company, 17 February 1892, to allow for the repayment of the trust debt, should be compensated.¹⁶⁹

166. Document A4(a), sec F, pp838–839

167. Document A4, p59

168. Document A24, p183

169. Ibid, p184; doc A4, p283. The formula used was: 'to the extent of twenty shillings in the pound for capital provided only, without interest'. If there had been a previous payment of compensation, this would be deducted from any further compensation paid.

Counsel for the Maori Trustee gave his views as to why the date of the 1892 Agreement should be chosen: the descendants of those whose lands were sold in 1891 would ‘to a large measure’ be compensated anyway under the post-1892 arrangement; no claim had been made by those whose lands were sold in 1891; and 1892 marked ‘the close of one chapter and the opening of another in the history of these lands’.¹⁷⁰

The question of compensation for Kaiparo was raised again before the Maori Purposes Act 1951 gave effect to the settlement agreement. At that time it was laid to rest by knowledgeable kaumatua who confirmed that most ‘if not all’ of those who would found to be titleholders in the 1891 blocks if the question were decided at that time, would either have interests in the lands administered by the East Coast Commissioner or would be entitled to the compensation monies paid for blocks sold after 1892.¹⁷¹

9.5.3 Te Whanau a Kai

For Te Whanau a Kai, their main concern in respect of trust lands has been the loss of the Tahora lands, Tahora 2C2 and 2C3.

(1) *The Tahora block in the Validation Court*

The Tahora 2 block, a very large one (213,000 acres), was the first block with lands within the inquiry district which was validated by the Validation Court and vested in the Carroll Pere trust. It was one of those blocks which Rees had hoped would enable the trust to broaden its asset base, redeem its debt to the estates company, and prevent the sell-off of further trust land. But at the time of the 1892 agreement, Tahora was not listed on the appended schedules of blocks with incomplete title.

The full story of the Tahora block may be left to the Urewera inquiry.¹⁷² But, from the evidence presented to us in the Gisborne inquiry, it is clear that serious questions arise from the circumstances in which Tahora passed through the Validation Court and was vested in the Carroll Pere trust.

The trustees applied to the court for validation of the Tahora block in December 1895. The transaction they sought to have validated was a conveyance by all the owners to Rees and Pere on behalf of the New Zealand Native Land Settlement Company. The conveyance was dated 18 December 1889; which is to say that it allegedly took place after the company had gone into liquidation. As the Crown witness Michael Macky pointed out, this was extremely unusual.¹⁷³ In Macky’s view, ‘It is possible that this transaction never happened.’¹⁷⁴ Professor Murton was

170. Document A24, p184; doc A4, p284

171. Document A24, p186

172. The report being prepared on the Tahora block for the Gisborne inquiry was not completed in time for presentation at that inquiry. It was completed subsequently, and is included in the Urewera casebook.

173. Document F11, p202

174. Ibid, p202

also of the view that Tahora should ‘probably not have been in the Trust at all given that it only had its title determined after the . . . Company had declared bankruptcy in 1888’.¹⁷⁵

It seems that the application for validation may have been triggered in an attempt to forestall an award by the Native Land Court to the Crown of part of Tahora that it had purchased. If so, it did not succeed.

On 17 April 1896, Rees applied for Tahora 2C3, section 2, and Tahora 2C2, section 2, to be vested in Carroll, Pere, and Kerekere as trustees, admitting that there was a nominal charge against the block which was just sufficient to open the court’s doors.¹⁷⁶ But there were no objectors in court, and several sections of the Tahora block were vested in the Carroll Pere trust on the same day.

Two sections of Tahora within the inquiry district, Tahora 2C2, section 2 (3843 acres) and Tahora 2C3, section 2 (15,330 acres) passed to the trust.¹⁷⁷ On 19 November 1896, Rees applied to the Validation Court for the removal of restrictions on Tahora 2C2, section 2, and Tahora 2C3, section 2.¹⁷⁸ The court granted the application.

(2) *Alienation of Tahora land*

In 1921, Commissioner Coleman sold 6711 acres of Tahora 2C3, section 2, to a private buyer, W A Chappell, for £27,730. We note that after this sale one of the trust’s solicitors and James Carroll both urged the Minister of Native Affairs to curtail the commissioner’s unlimited powers of alienation. The commissioner’s power to sell trust lands was subsequently made subject to the approval of the Native Affairs Minister. It appeared also that Coleman had had a clear conflict of interest in the sale. He was rebuked by the under-secretary of the Native Affairs Department for his dual role as solicitor for Chappell and trust commissioner.¹⁷⁹

We do not have adequate evidence before us in this inquiry to comment further on Tahora 2C2 and 2C3 alienations.

(3) *Return of land*

In 1955, the beneficial owners of Tahora 2C2, section 2, received 3770 acres back, while 1509 acres of Tahora 2C3, section 2, was returned. This was a total of 5279 acres (about 27 per cent of the blocks).

While the findings in respect of Tahora blocks cannot be made until the Urewera inquiry has completed its investigation, we would express considerable disquiet at the fact that the Validation Court appears to have constructed an agreement for the transfer of these blocks to the New Zealand Native Land Settlement company, which even the Crown considered did

175. Document B27, p6

176. Document F11, pp202–203.

177. Ibid, p203; doc A18, pp166–170, 536.

178. This was to ‘enable land to be leased & to enable moneys to be borrowed to pay costs, charges & expenses’: doc A18, p166.

179. Document F11, pp321–322

not exist in reality. In particular, we cannot see how the company can have entered into a contract after it had been liquidated. The fact that so much land appears to have been lost in this way is a serious cause for concern.

9.5.4 Te Aitanga a Mahaki

(1) *The Rees Pere trusts and New Zealand Native Land Settlement Company*

Wi Pere's key role in the trusts and New Zealand Native Land Settlement Company initiatives was reflected in the considerable amount of Te Aitanga a Mahaki land involved at each stage. In the discussion that follows, we give approximate acreages of Te Aitanga a Mahaki land vested, and alienated. As some of our sources consider all lands claimed by the iwi, rather than those just within the inquiry district, it is difficult to be more precise.

Between 1878 and 1880, Te Aitanga a Mahaki vested a number of blocks in the Rees Pere trusts.¹⁸⁰ In 1883, following the establishment of the New Zealand Native Land Settlement Company, blocks vested in Rees and Pere began to be transferred to the new venture.¹⁸¹ According to Professor Murton, Pere placed the bulk of his own family's interests in the company, and encouraged his kin to do likewise.¹⁸² Most responded enthusiastically at first, until the downturn in the company's fortunes became evident, and a number of new blocks within the inquiry district, totalling 94,550 acres, were purchased directly from Maori owners by the company between 1882 and 1884.¹⁸³ Rose estimated the amount of Mahaki land held by the company by 1883 as 115,000 acres (not all of it in the inquiry district).¹⁸⁴

Historians agree that it is difficult to give an exact figure for sales of land by the New Zealand Native Land Settlement Company. From Macky we get a figure of 39,330 acres for Mahaki lands sold by 1888.¹⁸⁵ This included the sale of Okahuatiu 1 (25,160 acres), Okahuatiu 2 (5000 acres), and Tangihanga 1C (2500 acres), which were purchased by James Williamson,

180. Document A17, p418. Though it is difficult to ascertain the exact number of blocks vested, or the acreages involved, the blocks included Whataupoko and Matawhero B.

181. We note here that the Rees Pere trusts comprised a number of legally separate trusts, one for each block. When the New Zealand Native Land Settlement Company was formed, therefore, each trust had to be vested in the company.

182. Document A26, p226

183. Document F11, p130

184. There are no complete records, but we know the blocks included Mangatu 5 and 6 (40,000 acres), Whataupoko (11,990), Okahuatiu 1 (26,427), Makauri (acreage unknown), Matawhero 1 (acreage unknown), Matawhero B (656 acres), Okahuatiu 2 (20,000 acres), Tangihanga (7000 acres), Pukepapa A (1200 acres), Motu 1 (2000 acres) and Karaka. By 1886, the blocks added to the company included Ngakoroa as well as Mangatu 1 (90,000 acres – lease only). It is uncertain exactly how much land from Tangihanga and Okahuatiu was transferred to the company. While the transfer of interests was discussed in October and November 1883, there is no record of the actual award: doc A17, pp416–417.

185. Document F11, pp151–152. Rose gives 34,337 acres to 1888, doc A17, pp171, 425. Murton states that in 1888 approximately 20 blocks or subdivisions in which Mahaki hapu and whanau had entire, or some interests, were involved with the company. At that time the blocks totalled 162,219 acres, if we follow Rose and exclude Waimata South, Waimata North (awarded to Te Aitanga a Hauiti by the Native Land Court, and Kaiparo (awarded by the Poverty Bay Commission to Ngati Maru). Murton's figure includes Mangatu 1 (90,000 acres), added in 1886, though it had been made inalienable except by lease: doc A26, p229.

a director of the Auckland Agricultural Company, after the company became insolvent in 1887. Williamson paid £10,968. Four thousand pounds of this was paid to a committee of the owners of the three blocks.¹⁸⁶ Interests were also sold in several other blocks.¹⁸⁷

(2) *The 1891 Sale and the Carroll Pere trust*

Te Aitanga a Mahaki saw some 12,280 acres, a substantial proportion of it land outside the inquiry district, alienated in the 1891 mortgage sale.¹⁸⁸

Blocks that survived the 1891 sale were transferred into the Carroll Pere trust. Eight Mahaki inquiry district blocks with completed title, amounting to approximately 60,000 acres, became principal security blocks.¹⁸⁹ In addition, 1859 acres of Mahaki land within the inquiry district were in blocks later designated specific securities.¹⁹⁰

Comparatively little land was sold during the trust period: the amount sold amounted to 1697 acres.¹⁹¹

(3) *The East Coast Native Trust Lands Board sales*

In 1902, the Carroll Pere lands were transferred to the East Coast Native Trust Lands Board. Lands within the inquiry district in which Te Aitanga a Mahaki claimed interests that came under the control of the board amounted to 76,741 acres.¹⁹²

Total alienations by the board to meet the Bank of New Zealand debt amounted to 17,406 acres.¹⁹³

There were some sales of Te Aitanga a Mahaki land during the period of administration by the East Coast commissioner. Mangatu 5 and 6 were sold in installments: 4790 acres in 1913, 4730 acres in 1914, and 9178 acres to Lysnar in 1919. We note that by a quirk of fate, this latter land returned to the East Coast Commissioner. The purchaser Lysnar defaulted on his mortgage, and in 1931 the commissioner bought the land back, and began to farm it as Mangaotane station. This was the last land returned to its owners. It is now part of Raukumara State Forest.¹⁹⁴

186. Document F11, p152

187. Document A17, p421

188. Again we have adopted Rose's figure here, excluding Waimata north and south, and Kaiparo. The blocks sold in which Mahaki had interests included Whataupoko G1, and Tangihanga C (4502 acres).

189. The third schedule, New Zealand Native Land Settlement Company (doc A4(a), sec B, p96). The principal security Mahaki blocks in the inquiry district included: Whataupoko G (1520 acres), Motu (2000 acres), Okahuatui 2 (15,190 acres), Mangatu 5 and 6 (40,150 acres), Whataupoko 5 (125 acres), Matawhero 5 (34 acres), and Matawhero 1 (185 acres).

190. Blocks with incomplete titles which later became specific security blocks included Ngakoroa (500 acres), Pukepapa (600 acres), and Makauri (50 acres) (doc A4(a), p97).

191. Document A18, pp173–174

192. Ibid, p178. The blocks included: Mangatu 5 and 6 (40,150 acres), Matawhero 1 (182 acres), Matawhero B (33 acres), Motu 1 (2000 acres), Okahuatui 2 (15,190 acres), and Whataupoko D and G (13 acres). This figure includes Whanau a Kai lands Tahora 2C2, section 2, and Tahora 2C3, section 2.

193. Document A18, p178

194. Document A26, p268

Rose states that the East Coast Commissioner sold 32,794 acres of Te Aitanga a Mahaki land, and retained 26,479 acres.¹⁹⁵

We conclude that:

- ▶ Te Aitanga a Mahaki lost heavily through their involvement with the trusts and the company;
- ▶ of the 115,000 acres of Mahaki land held by the company in 1883, a substantial amount (39,330 acres) was quickly sold during the 1880s;
- ▶ of the 76,741 acres vested in the East Coast Native Trust Lands Board, 50,200 acres was sold, that is nearly two-thirds of Mahaki land;
- ▶ land returned to Te Aitanga a Mahaki amounted to 12,861 acres in 1954, plus the 13,616-acre Mangaotane station, that is 26,477 acres;¹⁹⁶ and
- ▶ in all, lands in which Mahaki had interests, alienated through their involvement in the trusts and company, amounted to some 100,000 acres (ie, about one-seventh of their rohe).

Pere thus led from the front in his trust and company ventures; he and his iwi took a high share of the losses.

9.5.5 Conclusion

Our purpose here has been to assess the extent of the Crown's responsibility for the failure of the Rees Pere trusts and its successors the New Zealand Native Land Settlement Company and the Carroll Pere trust to achieve the purpose for which they were established and provide benefits for Turanga Maori.

On the face of it, it might seem that the Crown had no responsibility at all. The Rees Pere trusts were a joint Maori–Pakeha venture which embraced the opportunities of the new market economy. Rangatira and settler businessmen decided to work together to manage small-scale settlement of Maori lands, and to do so on terms which would benefit Maori in ways defined by Maori. The trusts faltered, and Rees and Pere embarked on a larger venture, a joint-stock company which attracted high-powered commercial interest and substantial capital. Was either the founding of the company or its demise some years later the business of the Crown? Many companies foundered in the depression of the 1880s. Likewise, the Maori and settler investors in the company paid the price that all investors may be called on to pay: the settlers lost capital, Maori lost land. In the 1890s, the years of the Carroll Pere trust salvage operation, Premier Seddon was careful to disclaim Government responsibility.

195. Document B13, p40. Land sold by Harvey, who favoured the sale of land which was not producing revenue but still had to pay rates, included Maungawaru 2 and 3, Mangaokura 1 (2027 acres) and the remaining parts of Mangatu 5 and 6 (21,282 acres). The Crown paid £13,579 for the land, which was applied to reduction of the principal security debt, doc A26, p268.

196. See doc B13, p41

The initiatives of Rees and Pere have to be considered in this light. They had a vision for the economic development of the East Coast, they sold it to the Maori communities of the coast, and they sold it also to local and Auckland investors. Undoubtedly they took calculated risks in bringing so much Maori land into the company and, in some cases, paying so much for it. In other cases, of course, they paid very little, shepherding land through the Native Land Court and into the company. But the risk they took was not just a commercial one. Rees was active in the Maori community from the 1870s onwards. And Pere knew that the responsibility he would owe his East Coast kin who supported him was inescapable.

For Turanga Maori too, the risk was doubtless apparent. It took a huge leap of faith for small rural indigenous communities to enter into such ventures with businessmen who were only names to them. If they took that leap, it was first because of the guarantee of their own leaders like Pere, and the Pakeha lawyer Rees, whom they all knew. Secondly, however, they must have sensed the excitement of a venture which promised controlled settlement, economic growth, infrastructure, and returns on their investment. They had seen their part of the coast attract settlers in the past 10 years, and it cannot have seemed unlikely that the pace of settlement would accelerate. It is hardly surprising that, like Rees and Pere, they were enthusiastic at the prospect of being part of a company set up to manage settlement, rather than having a purely passive role.

What none of the key participants can have anticipated, of course, was the national depression of the 1880s and its impact. As a result, the owners of a number of blocks forfeited them in the 1891 mortgagee sale. The commercial realities bit hard. But many other New Zealanders, and many other investors, lost too. And to the extent that Turanga leaders had hoped simply for a good return on their investment (in the form of community growth), an investment which failed, we consider that they should be allowed the dignity of a decision which backfired for reasons beyond their control, and beyond that of the Crown. The Crown cannot be held responsible for the failure of the New Zealand Native Land Settlement Company or the disappointment of the economic hopes of Turanga communities insofar as they were channeled into the company.

But that is not the whole story. The communities who supported Rees and Pere did so not just because they saw an economic future, but because the schemes were rooted in their own political and cultural landscape. They offered a role for local leadership and an alternative to the fragmentation of their assets in individual dealings. To the extent that Turanga Maori found their opportunities for land development and for community control were constrained by Crown-imposed Native Land Court processes and by titles which were useless to them in the market, the Crown did have a responsibility. The failure of the Native land regime to create conditions for Maori economic development led Pere and Rees into unsustainable initial ventures, and then to experiment on a much larger scale in the company. The scale of economic reckoning in the depression of the 1880s was correspondingly greater.

Structural difficulties continued to plague the trustees and block committees in the 1890s.

The operation of the Validation Court highlighted the notorious reputation of the East Coast land transactions and titles generally. The Carroll Pere trust both contributed to that reputation and felt its repercussions in high interest rates. The need to put land through the Validation Court meant very high legal fees. Since the trustees could not escape the court if they were to increase the trusts' asset base, repay the Bank of New Zealand debt and save the remaining trust lands, they could not evade the fees either. To the extent that the Crown's land legislation had created an environment where uncertain land titles meant high interest rates, the Crown must bear responsibility for the difficulties of the Carroll Pere trust. In the East Coast Native Trust Lands Act 1902, the Crown in our view, admitted fault itself for the crippling effects of market uncertainty on the East Coast land market. It is unprecedented for the State to consider it necessary to give a statutory guarantee of indefeasible titles.

But political admission of responsibility at the time went beyond this. As early as 1891, the native affairs committee had stated that it was '*absolutely* necessary that the Government . . . should, in the interests of the Natives and others who have just and equitable rights, step in and take . . . some action' (emphasis added).¹⁹⁷ They singled out the 'many impediments arising from the state of the Native land laws and their numerous changes, the delay of the Native Land Courts, the want of assistance, both from the Legislature and Government' which were in their view at the root of the failure of the company.¹⁹⁸ During the period between 1896 to 1898, when rescue legislation was contemplated, there were always politicians who urged the importance of protecting Maori owners' interests, and preventing the loss of their land. They considered it their responsibility to grapple with the issues. In the end, despite his disclaimers, Seddon himself was prepared to introduce a Government Bill in 1898. Though he did not see it through, in 1902 the Crown did intervene decisively. And even the chairman of the bank was prepared to emphasise the importance of conserving 'the rights of the Natives'.¹⁹⁹

The Rees Pere trusts and company were an ambitious venture which failed spectacularly. Seventy years later, Turanga Maori retrieved just over a quarter of the land they had invested. Te Aitanga a Mahaki, as have seen, saw some large blocks sold. For Ngai Tamanuhiri and Rongowhakaata the losses were lesser in size, but in the case of specific blocks, deeply felt. Ngai Tamanuhiri in particular, who had been very supportive of the trusts, were angered by the circumstances in which their land was alienated by the East Coast Native Trust Lands Board, and campaigned for many years to have their rights in respect of those lands recognised. For all owners, the intervention of the Crown in 1902 to ensure the repayment of the bank's debt, and to save what could be saved of the trust lands, meant loss of control of their lands and exclusion from them for nearly 50 years. In that the trusts had promised increased community control, this was a bitter pill to swallow. The owners were asked to sit out for 50 years an immensely complicated process by which the credits and debts on their various

197. AJHR, 1891, I-3, p28

198. Ibid, p29

199. AJHR, 1902, I-14, p6

blocks were balanced, and were largely shut out of decision-making and even information about their lands. In the early decades of the twentieth century, the trusts' story seemed to be ending no differently from the story of other East Coast lands, in large-scale alienation.

Yet, in the long-term, something was retrieved. The community origins of the trusts and company venture, and the way in which the blocks invested came to share a common fate, brought long-term disadvantage but also long-term benefit. As the commissioner embarked on developing the lands, the number of blocks in the estate became an asset which eased his access to credit and eventually gave him real commercial clout on the coast. In that sense, the trust, we might say, finally began to operate along the lines Pere and Rees had hoped for. The difference, of course, was that the commissioner had the law behind him: he had secure title to the lands, access to credit, and statutory support for his farming activities. Pere and Rees did not.

The outcome was the return of some lands, well-farmed and prospering, to the great-grandchildren of those old people who had hoped that Pere and Rees might secure them a role in the new regional economy. The returns from the lands were such that the beneficial trust owners were able also to make recompense to the descendants of those whose lands were sold to allow the remaining lands to survive. In an act of remarkable generosity they decided in 1951, as preparations were made to wind up the East Coast trusts, that payment should be made to these owners too. Nearly £100,000 was paid. We accept that this was a private matter, but we do not wish to pass over this voluntary arrangement reached by the Maori owners at that time. It seems to us to underline the owners' recognition of the collective enterprise they had entered on together in the latter part of the nineteenth century. Nothing could have been further from the individual decision-making enshrined in the 1873 Native land legislation which their tupuna had sought to escape.

In the end, Pere and Rees were beaten in their lifetimes by the system. It is true that neither of them had the background in business which might have made a difference to their early decision-making. Sir Apirana Ngata, speaking on the occasion of Pere's unveiling on 9 April 1919, paid tribute to what Pere had done for Gisborne, to his wrestling with the problem of land titles, and to his vision. And he also acknowledged Pere's mistakes:

Wi Pere was sufficiently modern in his ideas to bridge the gap between the old Maori and the incoming settlers in the settlement of the land, and if Wi Pere in some respects failed, that was not due to any failing of his intentions, but was due to the fact that things moved much more quickly than he was able to keep abreast of. The settlement of the land problem in Poverty Bay was much more due to Wi Pere than to any other man who might stand there . . . the Maori people would cherish his memory for generations because he stood head and shoulders above the people of his day. He was wrong a good many times, and they (the Maoris) told him so (laughter) – very wrong, but that did not gainsay the fact that his heart was right and that he acted up to what he thought was the benefit of his people at the time.²⁰⁰

200. Joseph Pere, 'The Leadership Role of the Hon Wi Pere', MPhil Thesis, University of Waikato, 1984, pp 211–212

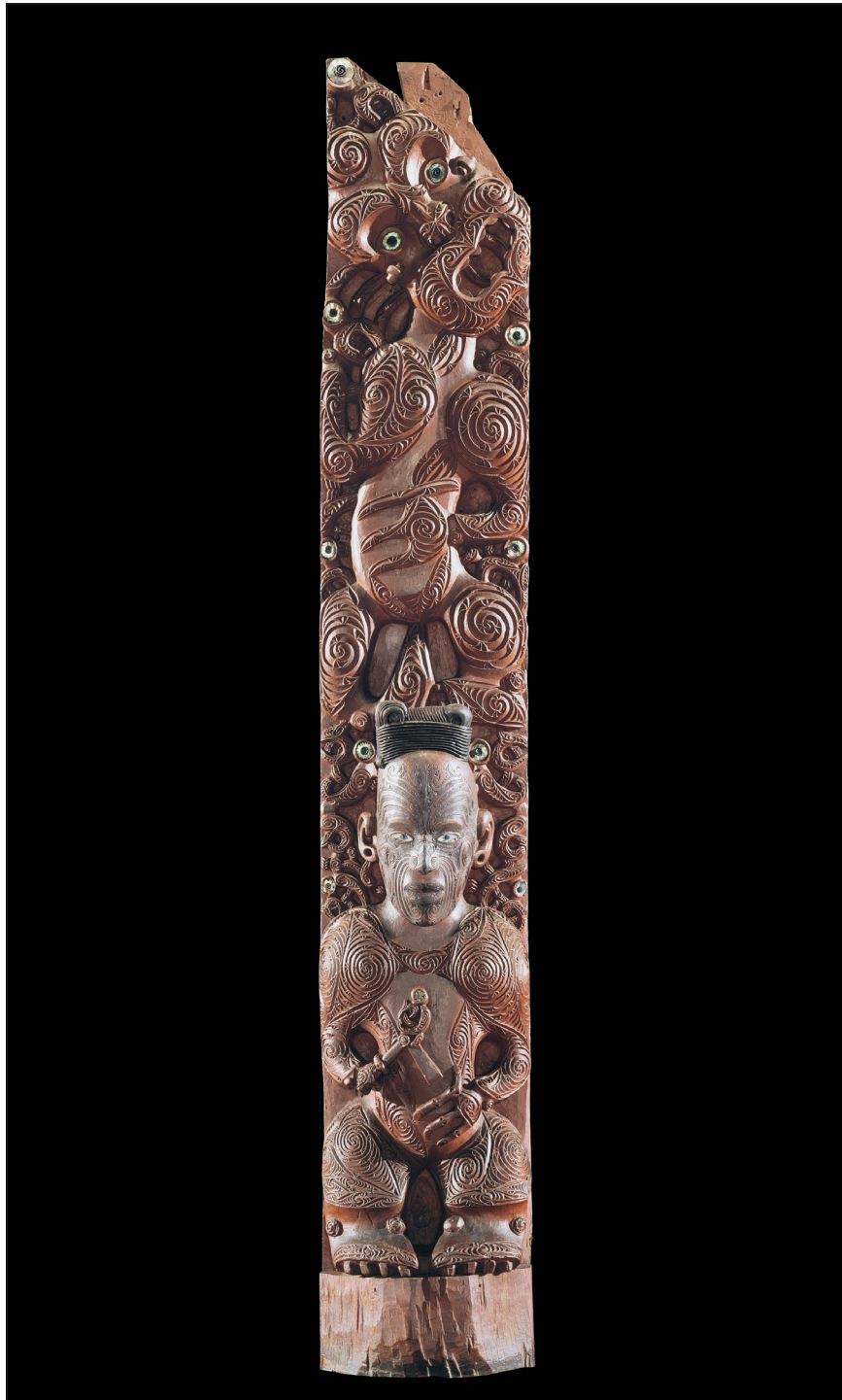


Fig 19: Rukupo Epa from Te Hau ki Turanga (ME015746/61). Photographer unknown. Lower tipuna: This tipuna is encapsulated as the legendary Raharuhi Rukupo, Ngati Kaipoho chief, master carver, provider of food for his people and skilled architect in the construction of Wharenui. He is the person responsible for the design and original construction of Te Hau Ki Turanga at its native Papakainga Orakaiaapu Marae, Manutuke, Gisborne 8028199.

CHAPTER 10

TE HAU KI TURANGA

Ko te inoi tenei o o koutou tangata pono, o o koutou tino hoa, o etahi o nga tangata o Turanga e mea ana, kia tirohia e koutou e te Runanga Rangatira tetahi o o matou pouritanga, ko to matou taonga nui ko to matou whare whakairo kia mauria huhua koretia, e te Kawanatanga, kihai matou i whakaae.

This petition of your true and faithful friends, some of the people of Turanga, prays that you will look into one of our troubles. Our very valuable carved house has been taken away, without pretext, by the Government; we did not consent to its removal.

—Petition of Maori at Turanga, 8 July 1867

10.1 INTRODUCTION

In the early 1840s, Raharuhi Rukupo, along with the Ngati Kaipoho hapu of Rongowhakaata and others, built the whare Te Hau ki Turanga at Orakaiapu Pa, Manutuke. Te Hau ki Turanga is the oldest extant meeting house in New Zealand and is renowned for the beauty of its carvings. The building was constructed as a memorial to Tamati Waka Mangere, a rangatira and the elder brother of Rukupo.

The Crown assumed possession of the whare in March 1867. Following the hostilities at Waerenga a Hika in 1865, JC Richmond visited the East Coast to assist with the implementation of the Crown's policy of land confiscation and he sought to acquire the whare. Rukupo indicated that he did not wish to part with the house; nor was it his decision alone. Richmond appeared to accept this position, but soon afterwards he sent Captain Fairchild to collect the whare. Resident magistrate Biggs paid a total of £100 to certain Maori. Fairchild removed the whare by force, despite the protests of many Maori.

In July 1867, Rukupo petitioned the Government for the return of the whare. But the Government's response was that the building appeared to be deteriorating, a considerable



Fig 20: Te Hau ki Turanga in Manawhenua exhibition.
Reproduced courtesy of Te Papa, Wellington, New Zealand (8042466).

amount of money had been paid for it, and, because the owners of the land and the whare were ‘rebels’, the whare had ‘strictly speaking’ been ‘forfeited to the Government’.¹

In October 1878, Wi Pere, Keita Wyllie, Paora Kate, and Otene Pitau petitioned the Government for the return of the whare. The native affairs select committee concluded that the original payment of £100 was inadequate, and it recommended that the Government pay the owners the sum of £300. In 1880, that amount was paid.

From 1868 to the 1930s, the whare was on display in the Colonial Museum in Wellington. In the 1930s, it was restored under the supervision of Sir Apirana Ngata. It was removed from the former National Museum in the 1990s and reinstalled as the centrepiece of the Maori collection of the Museum of New Zealand/Te Papa Tongarewa, where it remains on display.

During the interlocutory stage of this inquiry, the Crown honourably, and in our view appropriately, conceded that the assumption of possession of Te Hau ki Turanga was in breach of the principles of the Treaty of Waitangi. The Crown informed the Tribunal by memorandum dated 21 September 2001:

1. JHR, 1867, p100 (doc F5, p16)

The Crown wishes to notify the Tribunal and Rongowhakaata of its view that the removal of Te Hau ki Turanga in early 1867 from Orakaipū was undertaken without the consent of all its owners. Further, the Crown considers Te Hau ki Turanga was removed without properly identifying all those who had rights to agree to the transaction. The Crown considers that the removal by the Crown of Te Hau ki Turanga in these circumstances was a breach of the principles of the Treaty of Waitangi.²

The Crown repeated this concession in its opening submissions.³

The key issues arising from this are:

- ▶ the manner of the acquisition of Te Hau ki Turanga;
- ▶ the ownership of Te Hau ki Turanga;
- ▶ the history of the custodianship and management of Te Hau ki Turanga by Te Papa and its predecessors; and
- ▶ the current management of Te Hau ki Turanga.

10.2 THE CROWN'S ACQUISITION OF TE HAU KI TURANGA

While the Crown has conceded that the removal of Te Hau ki Turanga was, in the circumstances, a breach of the principles of the Treaty, it is none the less important that we, as a commission of inquiry, consider the evidence of the issues (though in light, of course, of the admission made) and form our own view of the facts and relevant Treaty principles.

10.2.1 The construction of Te Hau ki Turanga

The name 'Te Hau ki Turanga' has been translated as the 'spirit' or 'good-tidings from Turanga', and the 'breath' or 'vitality of Turanga'.⁴ Rukupo, with Ngati Kaipoho and others, built the whare as a memorial to Rukupo's brother, Tamati Waka Mangere.

The carvers who worked under Rukupo's supervision in the construction are believed to have been Enoka, Hakaraia Ngapatari, Hamiora Te Uarua, Heta Meha, Himiona Te Papaapiti, Hirawanu Tukuamio, Hone Tiatia, Hopa, Reweti Tauri Tuhura, Mahumahu, Matenga Tamaiora, Matenga Te Hore, Natana Hira Toromata, Paora Rakaiaora, Pera Tawhiti (Rukupo's younger brother), Poparae Kemaka, Rawiri Hokeke, and Wereta Whakahira.⁵

Te Hau ki Turanga is the oldest extant meeting house in New Zealand and is considered to be the finest example of the Turanga school of carving.⁶

2. Paper 2.208, p2

3. Document F35, p32

4. Deidre S Brown, 'Te Hau ki Turanga', *Journal of the Polynesian Society*, vol105, no1 (1996), p7; doc A23, p143

5. Ibid, p22n

6. Ibid, p7; doc E20, p7

10.2.2 The Crown acquires Te Hau ki Turanga

The evidence forming the narrative of the acquisition of Te Hau ki Turanga is taken from a number of accounts. Some of these accounts were recorded shortly after the acquisition, as in the case of JC Richmond's private correspondence to his sister. Others, such as Fairchild's recollection of the events before the native affairs select committee in 1878, were recorded considerably later.

The earliest documented reference to the removal of Te Hau ki Turanga is in a letter written by Richmond to his sister in April 1867. He wrote:

I have been travelling along the East Coast addressing 'mass meetings' of darker brethren, pursuing in short, the celebrated 'face to face policy'. So far my East Coast dealings have not had brilliant success. The only great thing done was the confiscation and carrying off of a beautiful carved house with a military promptitude that will be recorded to my glory. The Governor and an agent of the Melbourne Museum were trying to deal for it but the broad arrow and Capt Fairchild and the *Sturt* carried the day.⁷

At that time, Richmond was in Turanga assisting Reginald Biggs to negotiate for a cession of land to represent 'rebel' interests.⁸ Richmond was also informally acting as the director of the Colonial Museum.⁹ During this visit, Richmond sought to acquire Te Hau ki Turanga. Rukupo indicated to Richmond that he did not wish to give up the house, and that, in any case, the decision was not solely his to make.

Richmond appeared to accept this decision, but soon afterwards he sent Captain Fairchild of the Government steamer the *Sturt* to collect the house. Richmond had assured Fairchild that Maori had assented to the removal of the house, however, he encountered opposition and removed the whare under protest. Fairchild and Biggs arranged for £100 to be paid to certain Maori to overcome the opposition. Even after this payment was made, however, more people arrived and objected to the house's removal.¹⁰ Fairchild was insufficiently adept in te reo Maori to discuss the matter with the objectors and simply ignored them or distracted them sufficiently to allow his men to continue with the job.¹¹ After Fairchild's crew had ceased their work for the day, Maori arrived with a team of bullocks and a sled, apparently intending to remove what remained of the house. Fairchild's men forcefully opposed this group, and the following morning the removal of the house was completed.¹²

7. JC Richmond to E Richmond, 24 April 1867, Richmond-Atkinson papers, vol 2, pp 240–241 (doc F5, p8). Robert de Zouche Hall suggests that the term 'the broad arrow' refers to 'the mark of confiscation by Government, as for contraband cargo': doc F5, p8n.

8. Document F18, p 45

9. Document A23, p145

10. Ibid, p145; doc F5, p3

11. Document A23, p157

12. Ibid, p145

Contemporary newspaper reports characterised the acquisition of the house in accordance with their varying political and provincial allegiances. The *Daily Southern Cross* referred to the house being removed ‘without the owners being consulted on the subject any more than that one old man was pressed into giving his unwilling consent’, while an account in the rival *New Zealand Herald* portrayed the acquisition as being a gift from Rukupo and Te Matiki Tumuoko that was sealed with a payment of £100 to these men, who were the ‘proper owners’.¹³ The *Daily Southern Cross* later questioned whether the proper owners had been consulted and paid for the house, asserting that the house belonged to all Turanga Maori.¹⁴

10.2.3 Rangatira petition the Crown

Rangatira presented two petitions to Parliament following the removal of Te Hau ki Turanga. The first was written by Rukupo in 1867, shortly after the taking of the whare, and the second was presented by Wi Pere 11 years later. The petitions, which give us important insights into Maori views of the taking, led to select committee inquiries in which evidence was heard from the Government representatives involved: Richmond in 1867 and Fairchild in 1878. We address here the various statements on the Crown acquisition made in the petitions and in the hearings, and the findings of the two select committees.

(1) Rukupo's petition, July 1867

On 8 July 1867, Rukupo and seven others petitioned the General Assembly about the taking of Te Hau ki Turanga. Their petition read:

Ko te inoi tenei o o koutou tangata pono, o o koutou tino hoa, o etahi o nga tangata o Turanga e mea ana, kia tirohia e koutou e te Runanga Rangatira tetahi o o matou pouritanga, ko to matou taonga nui ko to matou whare whakairo kua mauria huhua koretia, e te Kawana-tanga, kihai matou i whakaae; ko nga korero pono enei o te mauranga o taua whare, ara; i te taenga mai o te Ritimona, ka tono mai kia hoatu e au te whare, kahore au i whakaae, mea atu ana ahau ki a ia, kahore, kei te iwi katoa te ritenga, ka mea mai ia ki au na ratou ranei te whare? mea atu ana ahau, kahore naku ano te whare erangi ko te mahi na matou tahi. Ko te whakahokinga mai a te Ritimona heoi ano ra, ka mutu taku tohe atu ki a koe: ka haere atu te tima me taua Pakeha, e hia ranei nga ra e ngaro atu ana taua tima ka hoki mai ano ki te tiki mai i te whare, ko Kapene Piki i haere mai, ki te tiki mai i te whare, ka mea mai ia ki au kia hoatu te whare mo te Kawana ki Poneke. Ka mea atu au ki a ia, kahore au e pai. Tenei ano etahi o nga kupu a taua Pakeha ki au, heoi ano, haere atu ana taua Pakeha ki te pakaru i te

13. *Daily Southern Cross*, 6 June 1867 (doc F5, p8); *New Zealand Herald*, 7 June 1867 (doc F5, p9)

14. Document F5, p9

whare, mauria atu ana, heoi ra kahore aku kupu whakaae ki a ia: ka peke ra nga korero. He inoi tenei na matou kia whakaarohia tenei to matou mate, ka inoi tonu matou ki a koutou. Ka huri.

Na o koutou hoa aroha i runga i te ture.

The translation followed:

This petition of your true and faithful friends, some of the people of Turanga, prays that you will look into one of our troubles. Our very valuable carved house has been taken away, without pretext, by the Government: we did not consent to its removal. This is a true account of what took place in reference to the removal of that house: at the time of Mr Richmond's visit here, he asked me to give up the house; I did not consent, but told him, 'No, it is for the whole people to consider.' He then asked me if the house belonged to them all. I answered, 'No, the house is mine, but the work was done by all of us'. To this Mr Richmond replied, 'That is all; I will cease to urge you'.

The steamer left with Mr Richmond. After having been away a short time, the steamer came back again to take away the house; Captain Biggs came to fetch away the house. He desired me to give it up for the Governor, to be taken to Wellington. I told him I did not agree to it. He said other things, which I have not forgotten. He then went to take down the house, and carried it off, but I did not give my sanction to it. This is all I have to say about it. We pray you to consider this our trouble.

And your petitioners will ever pray, &c.¹⁵

The petition was presented to the native affairs select committee by George Graham, who later gave evidence of the protests of Turanga Maori at the removal of Te Hau ki Turanga.¹⁶ Graham's evidence to the select committee referred to local Maori and some Europeans asserting that the Government never came to terms with the owners of the house, and that £100 was paid to two Maori:

There are contradictory reports in the Bay regarding it, but the natives all and some of the Europeans assert that the government never came to terms with them, but gave two natives £100 for it, and that was not until after it was on board the steamer, Captain Fairchild of the *Sturt* told me himself that the natives were protesting the whole time they were taking it away and speaking of how well they managed it, he said he kept arguing with them while his men were carrying the boards away.¹⁷

Richmond provided a written statement to the select committee. In it, he set out his motives for acquiring the house and the way in which he believed that he had negotiated with

15. 'Petition of Natives at Turanga', 8 July 1867, AJHR, 1867, G-1, p12 (doc A23, p149; doc F5, p12)

16. Document F5, p13n. George Graham was the member of the House of Representatives for Newton from 1861 to 1869. In his *Dictionary of New Zealand Biography*, Scholfield described him as 'a consistent advocate for Maori rights'.

17. Minutes of select committee, 16 August 1867, Le 1 1867/13, Archives NZ (doc A23, p149; doc F5, pp13-14)

Rukupo.¹⁸ He told the select committee that when he had ‘found’ the whare it was ‘a wreck’, hidden away beneath a half-rotten pile of raupo: ‘I observed with regret that it was utterly neglected, the porch denuded of its smaller carvings, the roof defective in many places, the carved slabs which formed the sides rotten where they were slightly fixed in the ground.’¹⁹

Richmond further said that Rukupo had indicated that the house was no longer his and that he should deal with Tareha Te Moananui as the owner of the house. It was Richmond’s stated understanding that, before ‘going into rebellion’, Rukupo had given the house to Te Moananui.²⁰ According to Richmond’s statement, he had announced at a large meeting that he intended to take the house and preserve it. Only one man, he said, had objected. Richmond then sent Biggs to obtain the consent of Maori, and he assumed that in this Biggs had been successful, having paid £100 in cash. He opined that Fairchild would not have been able to remove the house without Maori consent.

The select committee agreed with Richmond’s view of the taking. In its report, it concluded, first, that the £100 paid to Maori was a ‘considerable’ sum.²¹ Secondly, it accepted Richmond’s statement that Rukupo was a ‘leading rebel’, and it concluded that it was ‘not to be overlooked that both the house itself and the land on which it stood belonged to rebel Natives, and were, strictly speaking, forfeited to the Government’.²² And, thirdly, the committee stated that the motive was to preserve the house from decay.

(2) *Wi Pere’s petition, 1878*

In 1878, Wi Pere and others petitioned the Government either for the return of Te Hau ki Turanga or for compensation.²³ The petition was referred to the native affairs select committee, which heard evidence from Keita Wyllie (a petitioner), Samuel Locke (the resident magistrate in Turanganui), HT Clarke (the Under-Secretary for Native Affairs), and Captain Fairchild (the commander of the *Sturt*).²⁴

In her evidence, Keita Wyllie stated that the house belonged to her hapu and her uncle, the chief. Crown historian Cecilia Edwards noted that, while there was a space left in Wyllie’s

18. Document F5, p15

19. JHR, 1867, p100 (doc A23, p151)

20. Document F5, p15 Donald McLean was called to give evidence to the select committee, particularly in reference to an assertion that the house had been transferred to Tareha Te Moananui of Ahuriri, Hawke’s Bay. McLean told the select committee that at the time he had no official connection with Turanga. He understood, however, that Raharuhi Rukupo had offered the house to Tareha Te Moananui of Napier. When Morgan (or Mokena Kohere) of Ngati Porou heard of the offer, he protested, on the ground that he and the Government had the best right to it. Tareha Te Moananui then ‘relinquished his claim to it’: minutes of select committee, 17 August 1867, Le 1 1867/13, Archives NZ (doc A23, p150, doc F5, p14).

21. Document A23, p151. However, a later inquiry recommended that the sum be quadrupled; contemporary reports of the market value for the house ranging from between £300 to £1000: doc A23, pp151–152.

22. AJHR, 1867, p100 (doc A23, p152). Stirling questioned why, if this was the case, Richmond had allegedly obtained the consent of hundreds of Turanga Maori and then paid some of them. He also noted that no proof of the alleged rebel status of Raharuhi Rukupo was referred to, nor was this referred to in court: doc A23, pp152–153.

23. Document F5, p16

24. Ibid, p17

evidence for the name of the owner of the house, 'in all likelihood the name Raharuhi Rukupo was to be inserted'.²⁵ Wyllie stated that, although some members of her hapu had been 'in rebellion', the owners of the house had not. She told the committee that her uncle had received the £100 not at the time that the house was removed but subsequently, and with the promise of more to come.²⁶ However, Samuel Locke in his evidence denied that there was a promise of payment, nor had he in the 10 years since heard of such a promise being made. HT Clarke concurred with Locke.²⁷

Fairchild was the sole witness who gave evidence who had been present at the removal of the house. His evidence was quoted at length:

The Hon JC Richmond sent me for the House. He came to Turanganui, and told me to go back and get the house; that he had arranged with the natives I was to get it. I went back to where he sent me with the steamer, without anyone to represent the Govt. The natives said I should not have the house. I was not willing to come away without it, after having gone purposely for it. I said to the Maoris – 'Either pay me for the coal I have burnt in coming after it, or give me the house.' At last, they told me I could have the house for an amount. I offered them £80, and they laughed at the offer at first; then I offered them 100, thinking it would be as well to try and get the house. They agreed at last. Major Biggs arrived, and took the management of the matter. I gave him £100 which I happened to have on board the steamer, and he gave the money to the natives. I will not be certain whether they agreed to accept the £100 before Major Biggs came, or not. He paid it to them as if it was his own money. The Govt refunded the amount to him, and he paid me back. We took the house down; the natives objecting all the time. They objected as I took stick after stick. Directly after Major Biggs handed the £100 to the natives, he went away, and left it to me to get the house. The natives objected to my taking the house after the money was paid . . . I had to take the house by force. I own to that. They stood there, and objected to every stick that was touched . . . I was taking it down against their will. I took it with the tomahawk against their will. I believe they thought I would harm someone . . . I had to keep watch over it all night . . . They came with a bullock team to remove the balance of the house away. I was afraid they would get it away into the bush, and so I watched what remained of it all night long.²⁸

The committee's brief report concluded:

I am directed to report that the payment of £100 appears to the Committee to be inadequate, and they recommend that a further sum of £300 be paid to the native owners, when they have been ascertained by the Government, in final satisfaction of all claims.²⁹

25. Document F5, p18

26. Ibid

27. Ibid, pp 21, 24

28. Evidence of Captain Fairchild before Native Affairs Committee, 22 October 1878, petition 1878/291, Le 1 1878/6, Archives NZ (doc A23, p157; doc F5, p26)

29. AJHR, 1878, I-3, p 23 (doc F5, p 29); see also doc A23, p158

The committee did not explain its reasoning for its recommendation that a further sum be paid, nor why it thought that £300 was an adequate amount. It is also unclear whether the committee believed that the £100 that was paid in 1867 went to the right people. Fairchild agreed with a suggestion from the acting chairman that it was possible that the money was paid to the ‘wrong people’ because neither Biggs nor he knew who the ‘right people’ were.³⁰ Biggs, he stated, paid the £100 on board the *Sturt* to ‘ten different natives who got £10 each; they all signed a receipt for the money which Major Biggs took, and then went away’.³¹

We address below the matter of the Crown payment of compensation in the wake of the select committee’s report.

10.2.4 The Crown’s case

The Crown presented two arguments. First, Crown counsel repeated the concession that the acquisition of Te Hau ki Turanga was in breach of the principles of the Treaty.³² Counsel acknowledged that the Crown ‘breached the relationship principle of the Treaty by acting other than reasonably and in good faith in forcibly removing the house from Orakaiaapu’.³³

The Crown acknowledged that, despite having given some thought to the matter, Crown officials did not determine two essential factors: whether the house was forfeit to the Crown because of the conflict in 1865 and whether the house was a chattel or fixture at law. Nor were these factors announced as being the underlying legal basis for the Crown’s acquisition of Te Hau ki Turanga.³⁴ The two select committee reports treated the acquisition as a purchase by the Crown. Crown counsel admitted, however, that only the 1878 evidence of Keita Wyllie described the acquisition in terms of a sale and that, to Rukupo and his fellow petitioners, the house was taken without consent.³⁵

10.2.5 The claimants’ case

Counsel for Rongowhakaata argued that Te Hau ki Turanga belonged to Rongowhakaata and that Rongowhakaata’s exclusive and undisturbed possession of the whare was guaranteed under the principles of the Treaty. Furthermore, counsel said, the evidence confirmed that Rongowhakaata never consented to the extinguishment of their rights in respect of this taonga. Accordingly, those rights remained extant and the house rightfully belonged to Rongowhakaata.³⁶

30. Evidence of Captain Fairchild before Native Affairs Committee, 22 October 1878, petition 1878/291, Le 1 1878/6, p13, Archives NZ (doc A23, p158; doc F5, p28)

31. Evidence of Captain Fairchild to the Native Affairs Committee, 22 October 1878 (RDB, vol2, p599)

32. Document H14(27), p10

33. Ibid, p5

34. Ibid, pp19–20

35. Ibid, pp20–21

36. Document D32, p30

Counsel for Rongowhakaata submitted that Te Hau ki Turanga was taken illegally. They cited G Williams' definition of theft or larceny as 'the taking of a thing from the possession of another without consent'.³⁷ They referred to three sources as substantiating evidence: Richmond's letter to his sister, Fairchild's evidence before the native affairs committee, and Rukupo's petition of 1867.³⁸ These sources are particularly important, counsel argued, because they are evidence from the those who were actually involved in the removal of Te Hau ki Turanga: Richmond as instigator; Fairchild as remover; and Rukupo as deprived owner.³⁹ Counsel rejected Edwards' assertion that Rukupo consented to receive money and therefore consented to the removal of the house. They stated that Fairchild, who provided the only eyewitness account, confirmed only that money was paid, not who the recipients of it were. Richmond said that Rukupo objected, and Locke, although aware of Rukupo's status, did not name him as one of the recipients.

10.2.6 Tribunal finding and analysis

It is our view that the Crown's honourable concession on this issue provides a starting point for our finding on this issue:

The Crown wishes to notify the Tribunal and Rongowhakaata of its view that the removal of Te Hau ki Turanga in early 1867 from Orakaipua was undertaken without the consent of all its owners. Further, the Crown considers Te Hau ki Turanga was removed without properly identifying all those who had rights to agree to the transaction. The Crown considers that the removal by the Crown of Te Hau ki Turanga in these circumstances was a breach of the principles of the Treaty of Waitangi.⁴⁰

In this matter, the Crown's guarantee to Rongowhakaata of the exclusive and undisturbed possession of their property and other taonga was not respected. Te Hau ki Turanga was removed by force, in the face of objections from local Maori, and without identifying the owners or seeking their consent. We do not accept the description of the taking as a 'transaction', as used in the Crown concession. We accept that some payment was made at the time that Te Hau ki Turanga was taken, but, since those who held the rights to enter an arrangement to sell the house were not identified, nor was there any waiver of ownership on the part of the owners, this payment does not in our view bring legitimacy to the acquisition.

37. Glanville Williams, *Textbook of Criminal Law*, 2nd ed (London: Stevens and Sons, 1983), p700 (doc H3, p77)

38. Document H3, pp77–78. Stirling also questioned Richmond's claim that he had the unanimous support of a meeting of 300 to 400 Maori (later reported as 600-strong) for his acquisition of the house. Noting that Richmond then sent Biggs to obtain the consent of Rongowhakaata and that payment was proffered, Stirling argued that the consent of the owners had not actually been secured: doc A23, p152.

39. Document H3, p78

40. Paper 2.208, p2; see also doc F35, p32

We turn now to Richmond's contemporary evidence, given before the select committee in 1867. We note that, while the claimant and Crown historians agreed that the committee accepted Richmond's version of events, they differed in their interpretation of that evidence. Ms Edwards noted two conclusions from the committee's report: that 'the House could have been, strictly speaking, forfeited on the basis that the owners were rebels, but a generous amount of money had been paid' and that the motive for the acquisition was to preserve the house from decay.

Claimant historian Bruce Stirling, on the other hand, challenged both Richmond's justifications for taking the house and the select committee's conclusions. On the basis of Richmond's evidence, the committee reported that the house would be 'taken care of and preserved from permanent destruction to which it seems to have been fast advancing when discovered by the Hon JC Richmond'.⁴¹ Mr Stirling cited Fairchild's later evidence, which, while making no reference to any extensive decay, stated that the whare was complete and that great efforts were made to ensure that it was not damaged during its dismantling. Mr Stirling also offered various explanations for the raupo cover over the whare that Richmond wrote of, which ranged from the whare being heavily thatched and low sided to its being deliberately obscured to avoid pillaging or damage by Crown troops.⁴²

It is our view also that Richmond's description should be considered in the context of the history of the wharenuī. We are mindful of Leo Fowler's statement that the house was regarded as tapu following the passing of the tuakana of Raharuhi Rukupo, Tamati Waaka Mangere, who doubtless played a role in planning the building of the whare. In accordance with tikanga, the whare was 'dismantled, covered with rushes, and allowed to stand in disuse'.⁴³

It seems to us that the house would have been placed under tapu for the duration of the mourning period and that the carvings were being protected until the time was right for the tapu to be lifted and for them to be incorporated into a new building. Fairchild later stated that the house 'had not been used for a long time' and that grass was growing 'all round the door'.⁴⁴ He tried to get the help of some Maori in removing the house, but they tried to keep 'some pieces of it', so he and his men did it themselves.⁴⁵ Though Fowler's description of the house as 'dismantled' is at odds with Fairchild's account of 'taking down the house', his discussion of the reasons for the house not being in current use in 1867 is important.

41. JHR, 1867, p100 (doc A23, pp150–151; doc F5, p16)

42. Document A23, p151 Stirling cited Robert de Zouche Hall, who argued that, if the original whare had low sides and a heavy thatch, it would have given the exterior an appearance similar to that described by Richmond: doc A23, p151n. Stirling also raised the possibility that the house may not have been regularly occupied during the East Coast wars, noting that Raharuhi Rukupo and others had moved from Orakaiaapu to Pakirikiri in late 1866.

43. Leo Fowler, *Te Mana o Turanga: The Story of the Carved House Te Mana o Turanga on the Whakato Marae at Manutuke Gisborne* (Auckland: Historic Places Trust, [1974]), p8

44. Evidence of Captain Fairchild to the Native Affairs Committee, 22 October 1878 (RDB vol2, p601)

45. Ibid (p597)

Whether Te Hau ki Turanga was in an apparent state of disrepair is thus, in our view, an irrelevant factor in assessing the Crown's actions in taking or assuming possession of the whare in light of the strong objections by the assembled Maori, the surrounding circumstances of the taking, and the Crown's concessions in this inquiry. Richmond's cultural ignorance cannot be adduced in mitigation of his actions. Rongowhakaata would have found distressing not only the carrying off of the whare but also Fairchild's interference with it while it was under tapu.

The history of European collecting of Maori artefacts, and their storage in private houses and museums, has already been referred to by the Te Roroa Tribunal.⁴⁶ By the latter part of the nineteenth century, settler interest in taonga was burgeoning. In recent years, there has been an increasing understanding of the imperial practices of collecting, classifying, and displaying artefacts. Gentleman collectors, often amateurs, were fascinated by indigenous art and 'objects', which they saw as the production of 'savage' races at an earlier stage of the development of humanity. Conscious of their own scientific and classificatory urges, they also identified such urges as attributes of 'advanced' peoples, which distinguished them from those who were 'primitive'. In nineteenth-century Western museums and international exhibitions, 'cabinets of curiosities' presented the 'cultures of colonialism for the edification of the audience'.⁴⁷

It is in this context that Richmond's determination to secure Te Hau ki Turanga for the Colonial Museum must be set. Other collectors, as we have seen, were interested in the whare too. In this sense, Richmond scored a coup – of which, in typical Victorian fashion, he was very conscious – by having his own name associated with the whare's acquisition and deposit in the museum in Wellington. Thus, Te Hau ki Turanga, like so many taonga in this period, was removed from its own cultural context to be arranged in the 'Maori Hall' with other 'carved and painted objects'.⁴⁸

It is our finding that the acquisition of Te Hau ki Turanga by the Crown in 1867 was in breach of the article 2 rights of Rongowhakaata to the exclusive and undisturbed possession of their property and other taonga.

10.3 THE OWNERSHIP OF TE HAU KI TURANGA

Both claimant and Crown historians addressed the question of the ownership of Te Hau ki Turanga in relation to the appropriate recipients of the compensation recommended by the

46. Waitangi Tribunal, *The Te Roroa Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p212

47. John M MacKenzie, *The Empire of Nature: Hunting, Conservation, and British Imperialism* (Manchester: Manchester University Press, 1988), pp 36–40; I K Woodall 'Colonising Culture: The Forster Collection, its History and Display, with a Specific Focus on the Maori Taonga', MA dissertation, Courtauld Institute of Art, 1997–98, pp 24–25

48. P Tapsell 'Taonga: A Tribal Response to Museums', DPhil thesis, Oxford University, 1998, p18; Brown, p15

1878 select committee. It was not until after Wi Pere wrote to the Government in November 1879 that the compensation recommended by the committee was paid.⁴⁹ In late December, Colonel Gudgeon urged the Government to pay the compensation, because, if it was not sent soon, one of the petitioners ‘will be put in gaol for debt’.⁵⁰ In January 1880, Gudgeon wrote that the compensation had been paid to the petitioners.⁵¹ Mr Stirling stated that the Government had never ascertained the rightful owners of the house, whom the committee had recommended the compensation be paid to.⁵² Ms Edwards described as ‘unfortunate’ the lack of extant Maori Affairs correspondence from this period from which to determine exactly what steps, if any, the Government took to ensure that it paid the compensation to the ‘proper owners’, or on what basis it determined ‘proper ownership’.⁵³

10.3.1 The claimants’ case

Counsel for Rongowhakaata submitted two propositions. First, counsel referred to the principle *nemo dat (quod non habet)*; namely, ‘you cannot transfer whether by way of gift, sale, or by way of succession on death, better rights than you have yourself’.⁵⁴ Because the Crown had not acquired title to the house legally, it could not ‘transfer good title to the Colonial Museum’.⁵⁵ Secondly, counsel referred to section 26 of the Museum of New Zealand Te Papa Tongarewa Act 1992, which provided that all property ‘vested in the Board of Trustees of the . . . National Museum’ was to be vested in the board of Te Papa. Counsel for Rongowhakaata submitted that, if the National Museum or its predecessors did not hold title to the house, as Rongowhakaata maintained, then title could not vest in Te Papa.⁵⁶

Lewis Moeau gave evidence on behalf of Rongowhakaata. He stated their position in relation to the ownership of Te Hau ki Turanga, which was that they owned the whare legally and morally. A piece of pounamu was presented by Rongowhakaata. It was placed in Te Hau ki Turanga. In Rongowhakaata’s view, this proved their ownership. It was Mr Moeau’s understanding, and that of others involved in discussions with the museum on behalf of Rongowhakaata, that Rongowhakaata never relinquished ownership of Te Hau ki Turanga. He acknowledged that, in the late 1980s, representatives of Rongowhakaata agreed to let the museum have ‘custodianship’ of the whare, because Rongowhakaata could not maintain the whare in addition to the four already at Manutuke and Te Kuri a Tuatai.⁵⁷

49. Document A23, p159; doc F5, pp29–30

50. Gudgeon to Native Department, 29 December 1879, ND1879/5618 MA2, inwards correspondence register entry only, original text not extant, Archives NZ (doc A23, p159)

51. Document A23, p159; doc F5, p30

52. Document A23, pp159–160

53. Document F5, p30

54. Document H3, p79

55. Ibid

56. Ibid

57. Document D28, pp11–12

In addition to the submissions made by Rongowhakaata, the Tribunal heard submissions from Ngai Tamanuhiri. Counsel for Ngai Tamanuhiri affirmed that the legal title and cultural ownership of Te Hau ki Turanga were currently with Ngati Kaipoho and Rongowhakaata.⁵⁸ Jody Balneavis Wyllie stated that Ngai Tamanuhiri were not trying to claim ownership of Te Hau ki Turanga; they acknowledged that Te Hau ki Turanga rightfully belongs to Ngati Kaipoho and Rongowhakaata. Rather, Ngai Tamanuhiri sought an acknowledgement that they had an interest in the whare through Raharuhi Rukupo, who was of Ngai Tamanuhiri whakapapa, as well as his more widely recognised Ngati Kaipoho and Rongowhakaata whakapapa.⁵⁹

10.3.2 The Crown's case

Crown counsel submitted that, while Te Hau ki Turanga was recognised as a taonga of Rongowhakaata, it was not 'owned at law' by them.⁶⁰ Instead, it was owned by the museum, under the Museum of New Zealand Te Papa Tongarewa Act 1992.

Counsel argued that, though a Crown entity, Te Papa was legally separate from the Crown. However, in terms of this inquiry, counsel stated that it did not wish to take the jurisdictional point that Te Papa was not acting on behalf of the Crown for the purposes of section 6 of the Treaty of Waitangi Act 1975. Crown counsel noted, however, that this was not to say this point would never arise.⁶¹

Crown counsel further submitted that this Tribunal 'need not and should not' formulate a view on the legal ownership of Te Hau ki Turanga. Counsel submitted that it was 'sufficient for the Tribunal to vent legal issues and on occasion express an opinion about the correct position in law'.⁶² Counsel further suggested that in the present case the Tribunal should proceed on the assumption that Te Papa holds legal title to Te Hau ki Turanga by operation of statute.⁶³

10.3.3 Counsel for Te Papa

Counsel for Te Papa referred to a body of legislation which, taken together, fixed any alleged defect in the museum's title arising out of the circumstances of acquisition or ownership by predecessor institutions. Counsel for Te Papa submitted that the disputed ownership of any of the collections, including Te Hau ki Turanga, was perfected in favour of prior museums by virtue of section 17 of the National Art Gallery, Museum and War Memorial Act 1972.⁶⁴ That section provided:

58. Document H2, p154

59. Document E20, pp6–7

60. Document H14(27), p22

61. Ibid, p26

62. Ibid, p30

63. Ibid

64. Document H13, pp3, 7–9

17. Ownership of exhibits—Where, in respect of any exhibit held in any of the institutions at the commencement of this Act, it cannot be clearly established whether the exhibit is owned by the Board [of Trustees of the National Art Gallery, the National Museum, and the National War Memorial] or is owned by any other person, the exhibit shall be held to be owned by the Board.

10.3.4 Tribunal finding and analysis

According to Ms Edwards' evidence, a number of different groups could claim rights in Te Hau ki Turanga. So could Rukupo himself. We agree. As the carver, Rukupo must have had at least a veto in accordance with tikanga in respect of any proposal to transfer the whare. We know that prior to the taking he was opposed to selling the house – he made that clear to Richmond. We know also that, in his 1867 petition after the taking, Rukupo maintained that stance. It is clear that he exercised his veto. He did so in writing, addressing himself to the Crown. Te Hau ki Turanga was also a community facility utilised and revered by Ngati Kaipoho. That community's consent must also have been necessary, but there is no evidence that it was given. We acknowledge that there may have been wider interests; Rongowhakaata claimed then – and still claim – rights in accordance with tikanga. Ngai Tamanuhiri also claim an interest. It is not necessary to determine whether consent at this dual tribal level was also required; it is sufficient simply to conclude that the consents which were undoubtedly required were not secured. We acknowledge that the Crown did pay £300 compensation following the hearing of evidence by the native affairs committee in 1878. However, as Ms Edwards noted, there is no evidence that those who claimed ownership were compensated: 'Instead of determining who the proper owners were, [the] Government simply paid out compensation to the petitioners.'⁶⁵ In the absence of a proper inquiry at the time as to who the customary owners were, and in light of the view which we have expressed on that question, we find that the payment of £300 to the four petitioners did not, therefore, constitute payment for the whare.

We now turn to the question of whether the Museum of New Zealand currently owns Te Hau ki Turanga. For section 17 of the National Art Gallery, Museum and War Memorial Act 1972 to perfect the museum's defective title, as argued for Te Papa, it must first be established that it was not clear in 1972 whether Te Hau ki Turanga was owned by the museum's board of trustees or by another person.⁶⁶ In other words, the prerequisite is that there must have been doubt in 1972 about who owned Te Hau ki Turanga. If there had been doubt, section 17 would have been triggered and title would have passed to the museum. The difficulty for the museum in this case is there does not appear to be the slightest doubt who owned Te Hau ki Turanga in 1972. Crown agents freely admitted in 1867 that Te Hau ki Turanga was stolen. The

65. Document F5, p26

66. Transcript 4.25, pp8–9

Crown has been unable to point to any freely given agreement by the traditional owners to transfer the title they held in 1867 to the museum or to the Crown. It must at least be arguable therefore that, in 1972, the ownership of Te Hau ki Turanga remained with the traditional owners, as we have indicated. That being the case, section 17 is not triggered and title could not pass to the museum.

Though we are not a court of law, and any opinion we express on the matter will not be binding on the parties, we have considered it prudent to express a view in the hope that it may inform any negotiations between the parties over the future custody and management arrangements with respect to this taonga.

10.4 THE CUSTODIAL HISTORY OF TE HAU KI TURANGA SINCE CROWN ACQUISITION

A number of witnesses referred to the management and maintenance of Te Hau ki Turanga in the period from its acquisition by the Crown up until its present management by Te Papa.

As early as 1867 or 1868, alterations had been made to the whare. In 1868, in preparation for it being displayed in the Colonial Museum, the internal carved panels were elevated, 'so that the eye of the visitor, when standing up, may be at the elevation as if he were sitting on the floor of the house in its original state'.⁶⁷ In addition, the Colonial Museum's account book referred to the removal of the central pillar of the whare in 1869, the shifting of pillars in 1870, and the installation of windows.⁶⁸

As well as serving as an exhibit, Te Hau ki Turanga became a meeting venue for the Wellington Society (later the Philosophical Society) and the New Zealand Institute. It was also used as a venue for the university to hold lectures in natural science.⁶⁹

Documents held by Te Papa indicate that, during the period 1904 to 1913, some of the carvings in the whare were defaced and some paua inlay shells removed.⁷⁰

In 1924, a decision was made to build a new museum.⁷¹ In preparation for Te Hau ki Turanga to be displayed in the new Dominion Museum, significant work was undertaken on its panels and rafters. The designs on the latter were repainted, having been 'almost obliterated' during the period the whare was on display in the previous museum.⁷² The museum also sought funds to construct pillars for the whare and to construct cross-pieces for its roof.⁷³

By 1935, Sir Apirana Ngata had become involved in the restoration of Te Hau ki Turanga, prior to its installation in the new museum. Various items of work were undertaken under

67. *Annual Report of Colonial Museum, 1868* (doc F5, p 63)

68. Document F5, p 63

69. *Ibid*, pp 63–64

70. *Ibid*, p 64

71. *Ibid*, p 65

72. *Annual Report, 1929–1930* (doc F5, p 65)

73. Document F5, p 66

Ngata's leadership, which work included the reconfiguration of the poupou; work on the tuku-tuku panels; the completion of carvings; the lining of the inside roof; the thatching of the outside of the porch; and the installing of a new ridge pole.⁷⁴

In 1939, further work was undertaken, such as the fitting of papaka (carved skirting boards) in the spaces between the poupou. The original papaka were to be used, as well as six carved by Thomas Heberley, the museum's resident carver, and 20 new ones were to be carved by the Rotorua School of Maori Art.⁷⁵

In the mid-1970s, the museum allowed the Lazarus Descendants Incorporated Society – Ngati Porou descendants of a Ngati Porou man named Raharuhi (Lazarus) Rukupo Tapore – to install a series of plaques in the whare purporting to show their descent from its builder. The plaques were maintained by the museum despite information to the contrary being provided to it by Rongowhakaata Halbert. The Lazarus society also applied to the Maori Land Court to succeed to Raharuhi Rukupo's interests in the Mangaotane Trust. Judge Eddie Durie, as he then was, dismissed the application and concluded that there were two men named Raharuhi Rukupo, one of Ngati Porou, the other of Rongowhakaata.⁷⁶ The decision was appealed but upheld in 1976.

Further evidence indicated that the Raharuhi Rukupo of Ngati Porou could not have been the builder of Te Hau ki Turanga. Taonga belonging to Raharuhi Rukupo of Whanau a Karuwai (Ngati Porou) were uncovered at Te Araroa when his grave was disturbed by road works in 1928. As Rongowhakaata Halbert indicated to the press, however, Raharuhi Rukupo of Rongowhakaata was buried at Pakirikiri and was later moved to a cemetery at Manutuke.⁷⁷

Despite the decision of the Maori Land Court, the whakapapa provided by Halbert, and the evidence of the final resting-place of Raharuhi Rukupo of Rongowhakaata, the plaques remained on display in Te Hau ki Turanga. They were not removed until shortly before the whare was moved from the Mount Cook site in the 1990s.⁷⁸ Today, the plaque in Te Papa beside the whare, written in Maori and English, expresses the mihi of Rongowhakaata to all those who visit Te Hau ki Turanga.

10.4.1 The claimants' case

In his evidence, Lewis Moeau referred to the absence of any consultation with Rongowhakaata since Te Hau ki Turanga was taken to Wellington in 1867 until recent times. Many changes were made to the whare, as discussed above, and it was put to various uses. It was

74. Ibid

75. Document A23, pp167–168; doc D28, p10; doc F5, p67

76. *Raharuhi Rukupo (Deceased) Interim Decision*, 19 September 1975, no353, application by deputy registrar – section 135/1953 Mangaotane trust estate; final decision, 19 January 1976; amendment to final decision, 9 February 1976. 116 Gisborne minute book, fols 1–456 (as cited in doc F5, pp45–46)

77. Document A23, p168

78. Ibid; doc F5, p45

10.4.2

dismantled and reinstalled, and its constituent parts were altered. According to Mr Moeau, all of the actions in relation to Te Hau ki Turanga took place without the knowledge and consent of Rongowhakaata.⁷⁹ Nobody from Rongowhakaata was employed to make the replacement carvings, despite the fact that the whare had been originally carved by carvers from the iwi.⁸⁰ And without intending any disrespect to the female weavers involved, Mr Moeau stated that it would have been appropriate for Rongowhakaata to have been involved in the weaving projects that took place under the leadership of Sir Apirana Ngata in the 1930s.⁸¹

Mr Moeau stated that there was no Rongowhakaata involvement with Te Hau ki Turanga until the 1940s, when Rongowhakaata Halbert sent museum ethnologist WJ Phillips a letter regarding the whakapapa of the tipuna depicted in the whare. (The museum subsequently published this whakapapa in a pamphlet.⁸²) Mr Moeau also referred to communications between Halbert and museum ethnologist Dr T Barrow in the 1950s regarding the history of Te Hau ki Turanga. However, there was no ongoing relationship between the museum and Rongowhakaata. In reference to the alterations and the installation of plaques by the Lazarus Descendants Incorporated Society, Mr Moeau said that this was one of the most hurtful examples of the absence of a relationship between Rongowhakaata and the museum.⁸³

In closing submissions, counsel for Rongowhakaata did not deal with the management and care of Te Hau ki Turanga in detail, submitting that the evidence showed that, prior to 1990, Rongowhakaata had little or no involvement with that management and care.⁸⁴

10.4.2 The Crown's case

Crown counsel acknowledged that there was little or no consultation with Rongowhakaata following the acquisition of Te Hau ki Turanga.⁸⁵ However, counsel submitted that, in terms of museum practice of the time, this would not have been unusual. The Crown did acknowledge that the criticism made by Rongowhakaata in terms of the care of the wharenui 'may well be directed to museums prior to Te Papa'.⁸⁶

Counsel for Te Papa did not make any submissions on the custodial history of Te Hau ki Turanga prior to 1989.

79. Document D28, pp 8–10

80. Ibid, pp 9–10

81. Ibid, p 9

82. Ibid, p 10; doc F5, pp 67–68

83. Document D28, pp 10, 11

84. Document H3, p 80

85. Document H14 (27), p 37

86. Ibid, p 33

10.4.3 Tribunal finding and analysis

We make the observation that the treatment of Te Hau ki Turanga, including its storage and the alterations made to it, and the lack of recognition accorded Rongowhakaata by the Colonial Museum and its successor institutions have been the source of much anguish for Rongowhakaata. We find that, since the taking of Te Hau ki Turanga without Rongowhakaata's consent amounted to a breach, then the retention of the whare as long as Rongowhakaata's position remained unchanged also amounts to a breach of the principles of the Treaty.

10.5 CURRENT MANAGEMENT

The evidence presented by Mr Moeau on behalf of Rongowhakaata and Dame Cheryll Sotheran on behalf of Te Papa reflected a largely positive relationship between Rongowhakaata and Te Papa in relation to the current management of Te Hau ki Turanga. Both witnesses referred to a number of positive recent developments.⁸⁷

Walter (Rota) Waipara, of Rongowhakaata, has been appointed marae manager or pou takawaenga, and part of his role is to oversee the relationship between Te Papa and Rongowhakaata. In his evidence, Mr Moeau acknowledged that, without Mr Waipara's influence, he did not believe that Rongowhakaata would have had the degree of influence that they have had with Te Hau ki Turanga.⁸⁸

In 1992, Mr Waipara organised the 150th anniversary celebration of Te Hau ki Turanga. More than 100 members of Rongowhakaata travelled to Wellington and participated in discussions on the history of the whare and the proposals for its placement in the new national museum. Mr Moeau noted that this was the first official involvement Rongowhakaata had had with Te Hau ki Turanga since its acquisition by the Crown in 1867. The highlight of the weekend for Rongowhakaata was being able to sleep in the whare – Mr Moeau noted that this had great significance for the people of Rongowhakaata.⁸⁹

In 1994, Te Papa returned a number of kowhaiwhai panels that had been removed from the Whakato Anglican Church in Manutuke and held by Te Papa and its predecessor museums since 1913. These panels were returned by the museum as part of its 'partnership agreement' with Rongowhakaata.⁹⁰

Both witnesses also referred to the establishment of a Rongowhakaata working group to work jointly with Te Papa in the dismantling of Te Hau ki Turanga and in its transporting to, and rebuilding in, the new museum.⁹¹ Mr Moeau stated that the key functions of the working

87. Document D28; doc F17

88. Document D28, p13

89. Ibid

90. Document A23, p171; doc F17, p4

91. Document D28, p13; doc F17, p4

group were to ensure that the resiting of the whare was carried out in accordance with Rongowhakaata traditions and to keep iwi kainga informed.⁹²

Both witnesses indicated the commitment that both Te Papa and Rongowhakaata had to enter into a formal written agreement relating to the nature of their relationship and the management and care of Te Hau ki Turanga.⁹³ On the basis of the evidence presented to this Tribunal, it appears that the only issue on which the parties differ in relation to any formal agreement is on the question of the ownership of the whare. Mr Moeau referred to the recognition of Rongowhakaata ownership as being a key component – perhaps even a non-negotiable component – of the agreement, but Dame Cheryll Sotheran's evidence made no reference to ownership being a component of any agreement. Instead, she referred to Te Papa's belief that it owned Te Hau ki Turanga as a result of legislation.⁹⁴ This matter was addressed in submissions by the parties.

10.5.1 The claimants' case

In closing submissions, counsel for Rongowhakaata noted the improved relationship between Rongowhakaata and Te Papa over the last 10 years and indicated that Rongowhakaata wanted that relationship to continue. Counsel also noted that the current arrangements in respect of the management and care of Te Hau ki Turanga were generally satisfactory. Counsel referred to Rongowhakaata's view that the ownership, management, and care of Te Hau ki Turanga had to be formalised in a deed between them and Te Papa, a key component of the deed being the recognition of their ownership of the whare.

10.5.2 The Crown's case

Crown counsel submitted that Te Papa manages Te Hau ki Turanga under its 'mana taonga' policy and that Te Papa recognises that 'it is Rongowhakaata that brings Te Hau ki Turanga to life and makes it the iconic taonga that it is'.⁹⁵ Counsel noted that Rongowhakaata had been seeking a formal deed setting out the ownership, care, and management obligations, and that discussions to date had been 'fruitful and amicable'.⁹⁶

10.5.3 Te Papa's evidence

In her evidence, Dame Cheryl Southern acknowledged the positive relationship that existed between the museum and Rongowhakaata, and she further stated that Te Papa

92. Document D28, p13

93. Ibid, pp13–14; doc F17, pp4–5

94. Document D28, pp13–14; doc F17, pp2, 4–5

95. Document H14 (27), p34

96. Ibid, p36

‘Continues to be committed to entering into a formal written agreement with Rongowhakaata that sets out the nature of the relationship, [and] the conditions and expectations of both parties in respect of the ongoing care and management of Te Hau ki Turanga.’⁹⁷

10.5.4 Tribunal finding and analysis

We note the submission of counsel for Rongowhakaata that, prior to 1990, Rongowhakaata had little or no involvement with the management and care of Te Hau ki Turanga. We also note counsel’s acknowledgement that, since 1990, the relationship between the museum and Rongowhakaata had improved. In our view, this improvement, though overdue, is a portent for the future. We trust that our lack of commentary on the current and future management of Te Hau ki Turanga will be seen as an effort to avoid prejudicing this relationship in any way, rather than any criticism of it.

We make one suggestion. In our view, an amendment to the wording of one sentence on the display board at present adjacent to Te Hau ki Turanga in Te Papa would be most timely. As we have noted, the board records most appropriately the mihi of Rongowhakaata to all who visit the whare. Rongowhakaata have, however, sought findings from this Tribunal on the manner of the acquisition of their whare by the Crown.

Given this request, and the importance of the role of institutions such as museums in increasing public understanding of our shared past, it is our view that the reference on the board to Te Hau ki Turanga being ‘acquired by the government in 1867’ is an inadequate explanation of the unhappy circumstances in which the whare was removed from the possession of Rongowhakaata. We consider that Te Papa should consult with Rongowhakaata on a revised wording which reflects, appropriately and honourably, the forcible removal of the whare in the aftermath of the siege of Waerenga a Hika in 1865.

97. Document F17, p5

CHAPTER 11

THE TRIAL OF HAMIORA PERE

There is no reason of which I am aware why the sentence of death
should be commuted.

We discussed the murder of the Maori and Pakeha settlers at Matawhero, and the siege of Ngatapa, in chapter 5. We now discuss the aftermath of that event: the trial of five Maori captured at Ngatapa and, in particular, the decision to execute one of the prisoners: Hamiora Pere.¹ Five men were arrested. Wi Tamararo was convicted for murder and sentenced to death. The remaining four were convicted of treason. However, while the sentences for three (Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti) were commuted to imprisonment, Hamiora Pere was hanged. The question we have been asked to consider is whether the decision to hang Hamiora Pere was a rational one, based on evidence arising from his trial, or whether he was a convenient scapegoat.

Te Whanau a Kai's counsel argued that Hamiora Pere was wrongly executed and that he should have been treated like the other prisoners. Counsel submitted that there is no material evidence that Hamiora Pere committed 'cruel murders and/or heinous atrocities'. That being so, there was no reason why Hamiora Pere was singled out to be executed, other than to set an example. Such a reason, counsel argued, was not just.² Furthermore, given that Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti were described as 'political prisoners', and given full pardons in 1873, counsel argued that Hamiora Pere should also now be pardoned.³

Crown counsel submitted four arguments. First, counsel agreed that Hamiora Pere was made an example of but argued that his execution was the result of a rational process. Most sentences were commuted to imprisonment depending on each prisoner's actions, and

1. The Crown submitted that, owing to the equally common usage of both Peri and Pere as Hamiora's surname, as well as the rarely used Pera, it is uncertain what the correct spelling of Hamiora's name should be (doc H14(6), p 48). Claimant counsel submitted that, while Hamiora's surname is often spelt Peri, given the common nineteenth-century practice of substituting 'e' for 'i' in documents written by Pakeha, on balance it appears more likely that his name was Pere: doc H18, p 10. We have adopted the spelling 'Pere' for this report.

2. Document H18, p 45

3. Ibid, pp 42–43

according to a policy of leniency. However, those who committed ‘cruel murders or other heinous atrocities’ would be subject to capital punishment. For this reason, Hamiora Pere was sentenced to death and executed.⁴

11.1 THE TRIALS

In September 1869, five Maori were charged with offences related to the events at Matawhero, Oweta, and Ngatapa. Three of them, Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti, were charged with levying war against the Queen, or high treason.⁵ Their trial began on 20 September 1869 in the Supreme Court in Wellington. After four days of evidence, which was reported in the local press, they were convicted of treason and sentenced to be:

Drawn on a hurdle to the place of execution and be there hanged by the neck till you be dead and that afterwards your head shall be severed from your body, and your body be divided into four quarters which may afterwards be disposed of according to law.⁶

While this was the mandatory sentence for treason, the judge made it clear that only the hanging would be carried out.

The two remaining prisoners, Wi Tamararo and Hamiora Pere, were arraigned in a separate trial which took place a week later over two days. Wi Tamararo was originally charged with treason as well as the murder of three men: Tutere Kapai, Pera Kararehe, and Piripi Taki Taki. His trial occupied the first day. When Wi Tamararo entered the dock on 27 September, he was indicted with murder only. The treason charge was dropped.

At the end of the day, and after an absence of 20 minutes, the jury found Tamararo guilty of the murder of Tutere Kapai. Justice Johnston also sentenced him to be hanged, drawn, and quartered.⁷ Again, the first part of the sentence only was to be carried out. Wi Tamararo was never actually hanged. He committed suicide two days later.

4. Document H14(6)

5. ‘Gaol Report Relative to the Undernamed Prisoners Confined in Her Majesty’s Gaol at Dunedin’, J1, 1873/586, Archives NZ (doc F33, vol7, pp2308, 2311). Five other men were arrested and tried the following year. They were Aperahama Te Uatuku, Te Tamaro Tutamanui, Karamana Ngerengere, Tamati Tarahau, and Te Muna. We provide details of Aperahama Te Uatuku in chapter 6.

6. Johnston to Colonial Secretary, 11 October 1869, ‘Trial of the Maori Prisoners’, J1, 1873/586, Archives NZ (doc F33, vol7, pp2261–2262)

7. According to Crown historian Paul Goldstone, Wi Tamararo was only tried for the murder of Pera Kararehe, as the other murder indictments were withdrawn on Wi Tamararo being found guilty of the first murder: doc G2, p48. Claimant historian Brian Gilling noted that the bills of information were found to be invalid, as they had not been signed by Attorney-General James Prendergast. The court was therefore adjourned while new bills were signed by the Attorney-General. Tamararo was then rearraigned for the murder of Pera Kararehe, committed on 10 November 1868 doc C1, pp199–200.

Hamiora Pere was tried on the second day. Like Wi Tamararo, Hamiora Pere was originally charged with murder and treason.⁸ When Hamiora Pere entered the dock, however, the murder charge was dropped. He was tried for treason only. He too was found guilty. In his case, however, the judge deferred sentencing. The reason the judge gave was that he needed to consult over a doubt that had arisen regarding ‘the form of sentence for high treason in New Zealand’.⁹ Given that Matene, Rewi, and Hetariki had been sentenced, and told that their sentence would not include any punishment other than hanging, it is not clear why the judge deferred.

The day after Hamiora Pere was tried, the trials of the 78 Maori from Taranaki taken prisoner while fighting for the Nga Ruahine and Ngati Ruanui chief Titokowaru began. They were also tried for levying war against the Queen, or treason. The Taranaki prisoners were tried in batches, beginning with the trial of eight men on 30 September 1869. Those tried were found guilty and, once again, Justice Johnston deferred sentencing them until all had been tried.¹⁰

These trials can be divided into two categories in terms of procedure: those that were tried as ordinary criminal cases and those held under the more streamlined processes of the Disturbed Districts Act 1869.¹¹ Crown counsel submitted that the trial of Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti provides an important context as to why Hamiora Pere was treated differently.¹² We agree for reasons that will soon become apparent. We deal with each in turn.

8. Two documents support this. The first, a document drafted and dated 22 September 1869 (ie, before any of the Maori prisoners had been sentenced), stated the sentence for a person found guilty of murder: draft document, 22 September 1869, J1, 1873/586, Archives NZ. In the space where the name should be written, the clerk noted ‘blank for two names’. The gap was not filled in, and while we cannot state with certainty that the judge intended the names of Hamiora Pere and Wi Tamararo to be recorded, we think it very likely that this was the case. They were, at this point, the only prisoners charged with murder.

The second document, dated 11 October 1869, listed the names of those charged, their offences, and remarks made following the trial. Wi Tamararo’s offence was recorded as ‘levying war against the Queen plus the murders of Tutere Kapai, Pera Kararehe, and Piripi’. Hamiora Pere’s offence was identically worded. As well as being charged with high treason, his alleged offence was the murder of the same three men: certificate, 11 October 1869, J1 1873/586, Archives NZ in doc F33, vol7, p2254.

The document was not written and signed by the same person. A clerk wrote the preamble, the names, and the offences. The comments in the ‘remarks’ column, however, were written by the man who signed it (Justice Johnston). (There are a number of indications that this was the case. The capital ‘A’ is written differently, as is the word ‘of’.) We do not know when the document was originally drafted, but it is likely that it was written before Hamiora Pere’s trial, possibly at the same time as the previous document.

9. Johnston to Colonial Secretary, 29 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p02135)

10. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), pp98–102, 230–231

11. The Suppression of Rebellion Act 1863 provided for the prosecution of persons charged with rebellion and any associated acts of murder. However, the Act, which came into force on 3 December 1873, was only for a limited duration. Under section 11, the Act was to be in force ‘until the end the next session of the General Assembly only and no longer’.

12. Document G2, p5

11.1.1 The trial of Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti

As we have said, the trial of these three men began in the Supreme Court in Wellington on 20 September 1869. The *Wellington Independent* reported: ‘The court sat this morning for the trial of criminal cases, his Honor taking his seat on the bench, with this accustomed punctuality, precisely at ten o’clock.’¹³

The charge sheet, delivered to the jury by Justice Johnston, stated that, although the original charge when the prisoners appeared in Napier was for high treason, the jury in Wellington was not to be limited by that. In Wellington, the prisoners were to answer to ‘any indictments which may be here found against them’.¹⁴ As the trial was a criminal one, it was heard by a grand jury of 12 men. The jurors appear to have all been Pakeha. The prosecutor was the Attorney-General, James Prendergast, assisted by Mr Izard. Robert Allan was defence counsel. The *Wellington Independent*, which followed the trial closely, noted that the accused could and did object to jury members during the selection process:

The prisoners appeared to be very anxious to take advantage of this power or privilege, so much so, in fact, that they challenged nearly every jurymen that was called, until at last the court vested the discretion of the challenge in Mr Allan, the prisoners’ counsel.¹⁵

Two interpreters were provided: one from the resident magistrate’s court and the other from the Native Department.¹⁶

The judge’s notes recorded the evidence presented by the witnesses, as well as any gestures they made such as pointing to specific prisoners. The names of the witnesses, their comments, and whether the witness was being cross-examined or re-examined was all recorded. However, in general neither the questions nor the comments from counsel were recorded.¹⁷

After the evidence was heard, the jury retired. They returned after 15 minutes with a guilty verdict against all three. Johnston assumed the black cap to pass sentence:

The law which I am bound to administer leaves me no alternative and it is my duty to pass upon you the highest sentence which that law allows. The sentence that I am about to pass on you is not my word, but the word of the law. I must now proceed to pass upon you, and each of you, that awful sentence which the law has prescribed for the offence for which you have been found guilty, and I need hardly say that offence has been very greatly aggravated, not only by the long period in which you have resisted the law, but also by the inhuman

13. *Wellington Independent*, 21 September 1869, p3, J1, 1873/586, National Archives (doc F33, vol7, p2574)

14. ‘Charge delivered by Mr Justice Johnston to the Grand jury at Wellington’, 1 September 1869, micro 2 1164 c0209, Public Records Office, London (doc G2(a), p55)

15. *Wellington Independent*, 21 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2574)

16. Ibid

17. There are very occasional exceptions to this. For example, Maraea Moreti was asked ‘Did you try to save your husband?’ The question is placed in quotation marks, and is prefaced by a ‘Q’, but there is no indication as to who asked it: evidence of Maraea Moreti, J1, 1873/586, Archives NZ (doc F33, vol7, p2304)

barbarities (barbarities that have shocked and horrified society (which you have committed during that resistance.¹⁸

As we have noted, Johnston announced that the three prisoners would be hanged.

11.1.2 The trial of Wi Tamararo, Hamiora Pere, and the 78 Taranaki Maori

Wi Tamararo and Hamiora Pere were tried at a special sitting of the Supreme Court under the new Disturbed Districts Act. They were the first to be dealt with under the Act, which was enacted a month earlier on 21 August 1869.

The full title of the Act stated that it was intended: ‘To provide prompt and effectual Means for trying Persons charged with certain Offences within Proclaimed Districts and for the Punishment of Persons convicted of such Offences.’¹⁹ Furthermore, it was aimed specifically against Maori who were in ‘open rebellion and engaged in levying war against the Queen’, and who were guilty of ‘outrages and atrocities such as murder rape torturing of prisoners and cannibalism’.²⁰

Wi Tamararo and Hamiora Pere appeared together in the dock on 27 September 1869. The *Wellington Independent* described them: ‘two worse or more savage or ill looking men could not perhaps anywhere be found’.²¹ Under the new statute, the requirement for a full jury was waived. A smaller ‘petty’ jury was empowered instead.²² Although it was not necessary under the Act for the accused to be provided with this information, the prisoners were given a list of the witnesses to be called by the Crown.²³ They had the right to challenge the jury. Wi Tamararo challenged one prospective jury member in his trial. The Attorney-General on behalf of the Crown challenged another.²⁴ Interpreters were present. Robert Allan again appeared as the defence lawyer for both Wi Tamararo and Hamiora Pere, and the Attorney-General, James Prendergast, conducted the prosecution with Mr Izard, the Crown prosecutor.²⁵ The *Wellington Independent* described the scene:

The court sat this morning for the trial of some more native prisoners who stand charged with two very serious offences, viz levying war against Her Majesty and murder.

The sittings are held under a special commission appointed by Her Majesty the Governor in Council, under and by virtue of an Act passed during the session of the General Assembly . . . for the summary trial of disaffected and rebellious natives under the ‘Disturbed Native Districts Act’.

18. *Wellington Independent*, 25 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2576)

19. Document C1, p195

20. Ibid

21. *Wellington Independent*, 28 September 2004, p3 J1, 1873/586, Archives NZ (doc F33, vol7, p2577)

22. Ibid

23. Document H18, p4; doc F33, vol7, p2459

24. *Wellington Independent*, 28 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2577)

25. *Wellington Independent*, 21 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, pp2574, 2577)

This was the first trial under the act, which contains a most important provision, as it gives the Attorney General in his discretion the power or privilege of dispensing with the necessity of summoning a grand jury . . .²⁶

As we have noted, Wi Tamararo appeared in the Supreme Court on 27 September charged with murder. At the end of that day, Hamiora Pere was placed in the dock and arraigned for the crime of high treason and ‘levying war against the Queen, her Crown and dignity’. The trial continued the next day. Like Tamararo, he pleaded not guilty.²⁷

Seven prosecution witnesses gave evidence at Pere’s trial. Two of the witnesses (Maata Te Owai, who was Te Kooti’s wife, and Riria Kai Maru) had gone to the Chatham Islands with the Whakarau. Three of those called to give evidence (Ema Katipa, Marea Moreti, and Hohapata) had been taken prisoner by Te Kooti after the attacks on Matawhero and Oweta. The remaining two witnesses, Captain Porter and Colonel Whitmore, were Government officers. There is no record of evidence being called for the defence.²⁸

The hearings for both Wi Tamararo and Hamiora Pere each lasted one day. Both were found guilty of the charges brought against them. In the case of Wi Tamararo, Justice Johnston made his view clear. He wrote that the conviction was obtained in accordance with the law: ‘there is no reason of which I am aware why the sentence of death should be commuted’.²⁹ With regard to Hamiora Pere, as we have noted, the judge deferred sentencing.

11.1.3 The evidence

Our information on the trials themselves and the post-trial deliberations is based on surviving documents held at National Archives.³⁰ The key file is J1 1873/586, entitled ‘The Trial of the Maori Prisoners’. The file contains the judge’s trial notes (the only record of the trial). It also contains letters written by the judge to the Colonial Secretary on the sentences, correspondence between the Governor and the Earl of Granville (Britain) as to the policies of the time, and newspaper reports of the trials, which often recorded the evidence verbatim. A second file, discovered during the course of our hearing, provided additional documentation about the Executive Council’s decision to commute some of the sentences.

In each of the three trials, only the Crown called evidence. Justice Johnston made it clear that there had to be more than two witnesses to any incident that related to the charges against the accused. In other words, evidence had to be corroborated. We now detail the evidence provided in each of the three trials.³¹

26. *Wellington Independent*, 28 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p 2577)

27. Ibid

28. *Wellington Independent*, 30 September 1869, p 4, J1, 1873/586, Archives NZ (doc F33, vol7, p 2580)

29. Johnston to Colonial Secretary, 29 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p 2295)

30. Claimant counsel acknowledged the work of Crown historian Brent Parker in discovering the first file.

31. The evidence is in form of notes taken by Judge Johnston.

(1) *The trial of Matene Te Karo, Hetariki Te Oikau, and Rewi Tamanui Totitoti*

(a) Hetariki Te Oikau: Hetariki Te Oikau was sent to Wharekauri along with Te Kooti. He returned with the Whakarau to Whareongaonga.

Two witnesses gave detailed evidence against Hetariki. Riria Kai Mare placed Hetariki at the heart of Te Kooti's Whakarau. She stated that he was one of Te Kooti's runanga, or council. Te Kooti said that he would cut anyone down with a sword who tried to escape, and Hetariki 'used that word also'.³² She also said that he was heard to call out 'Be Strong (Kia Kaha, Kia Kaha)' during the fighting at Puketapu.³³ Wikitoria Topa confirmed that Hetariki was one of Te Kooti's soldiers. Maata Te Owai confirmed that Hetariki was part of Te Kooti's 'twelve'.³⁴ And while Maata said he was at Ngatapa and Makaretu, she did not see him go to Matawhero. Ema Katipa concurred.

The witnesses placed Hetariki at specific locations where there was fighting:

- ▶ Riria said that Hetariki went with Te Kooti to Patutahi, and that she saw him before the fighting began at Makaretu.³⁵
- ▶ Wikitoria Topa saw Hetariki with a gun, and named him as one of Te Kooti's soldiers. Again, she placed him in the kokiri that went to Puketapu, and heard him urging on those fighting the Government forces at Ngatapa.³⁶
- ▶ Maata Te Owai said Hetariki was at Makaretu but did not go to Matawhero.³⁷
- ▶ Maraea Moreti, who was taken prisoner after her husband was killed at Matawhero, agreed. However, she did say that Hetariki watched while four prisoners taken at Oweta were shot. While he did not shoot the four, Maraea said that Hetariki 'seemed pleased. He did not object'. Furthermore, he later said that 'it was not right to spare the momokino' or base-born.³⁸

There was, therefore, consistent evidence that Hetariki was fighting the Government forces, that he at times encouraged those around him to fight, and that he was present when prisoners were shot. The witnesses agreed, however, that he did not go on the kokiri to Matawhero. His activities did not involve treason.

(b) Rewi Tamanui Totitoti: Like Hetariki Te Oikau, Rewi Tamanui Totitoti went to Wharekauri with Te Kooti and returned as a member of the Whakarau. He also was said to be one of Te Kooti's 'twelve'.³⁹ Wikitoria Topa identified him as one of Te Kooti's soldiers.⁴⁰

32. Evidence of Riria Kai Mare, p 22, J1, 1873/586, Archives NZ (doc F33, vol7, p 2358)

33. Ibid, p 9, J1 (p 2345)

34. Evidence of Maata Te Owai, p 36, J1, 1873/586, Archives NZ (doc F33, vol7, p 2372)

35. Evidence of Riria Kai Mare, pp 11, 14, J1, 1873/586, Archives NZ (doc F33, vol7, pp 2347, 2350)

36. Evidence of Wikitoria Topa, pp 31, 32, J1, 1873/586, Archives NZ (doc F33, vol7, pp 2367, 2368)

37. Evidence of Maata Te Owai, pp 41, 43, J1, 1873/586, Archives NZ (doc F33, vol7, pp 2377, 2379)

38. Evidence of Maraea Moreti, p 3, J1, 1873/586, Archives NZ (doc F33, vol7, pp 2475–6). Momokino is explained as 'bad blood' in the trial.

39. Evidence of Maata Te Owai, p 36, J1, 1873/586, Archives NZ (doc F33, vol7, p 2372)

40. Evidence of Wikitoria Topa, p 26, J1, 1873/586, Archives NZ (doc F33, vol7, p 2362)

11.1.3(1)(c)

- ▶ Riria said that he was fighting at Puketapu, but that when they arrived at Hangaroa he was ill.⁴¹ Wikitoria concurred.⁴²
- ▶ Maata Te Owai also said that Rewi was part of the kokiri that went to Captain Harris's house in Turanga and that he had been present when the murder of the children was related.⁴³
- ▶ Wikitoria went one step further. She said 'the prisoners and others told us that they had killed *Wyllie's* and *Hapu's* children' at Harris's house.⁴⁴ Given that only three prisoners were on trial and that all were agreed that Hetariki did not go on that particular kokiri, the 'prisoners' concerned could only have been Rewi and Matene.

Rewi was consistently identified as one who fought at Puketapu and later at Ngatapa. He was said to have been ill at one point, but there was corroborated evidence that he was part of the kokiri that went to Matawhero.

(c) Matene Te Karo: Unlike both Hetariki and Rewi, the witnesses consistently stated that Matene Te Karo joined Te Kooti and the Whakarau after they landed at Whareongaonga.

Both Ema and Riria gave evidence that Matene was present when Te Kooti said the party (kokiri) were to 'go and kill the Pakehas and the Maoris'.⁴⁵

- ▶ Riria gave evidence that Matene went to Oweta with the kokiri, armed with a gun.⁴⁶
- ▶ Robert Goldsmith (a settler) said that Matene fired directly at him. Wi Paraone also saw Matene fire in his direction.⁴⁷
- ▶ Ema Katipa stated that Matene was present when members of the kokiri said (and Ema did not identify who said this) that men had been killed at Oweta.⁴⁸ Maata identified Matene as one of the kokiri that went to Harris's place. When they returned, she said 'they told, in the presence of all the prisoners', referring to Matene, Hetariki, and Rewi, 'of the going there the arriving there and the killing of the children *Wyllie's* and *Hapu's* children'.⁴⁹ And, as we have noted, Wikitoria said that Matene confessed to actually committing murder.

Matene was therefore identified as joining Te Kooti on his return from Wharekauri, taking part in the kokiri that went to Captain Harris's place, having a gun and firing at the settler Robert Goldsmith, and being present when the murders at Matawhero were discussed. There

41. Evidence of Riria Kai Mare, p10, J1, 1873/586, Archives NZ (doc F33, vol7, p2346)

42. Evidence of Wikitoria Topa, p29, J1, 1873/586, Archives NZ (doc F33, vol7, p2365)

43. Evidence of Maata Te Owai, pp43-44, J1, 1873/586, Archives NZ (doc F33, vol7, pp2379-2380)

44. Evidence of Wikitoria Topa, p31, J1, 1873/586, Archives NZ (doc F33, vol7, p2367) [Emphasis in original]

45. Evidence of Riria Kai Mare, p11, J1, 1873/586, Archives NZ (doc F33, vol7, p2347); evidence of Ema Katipa, J1, 1873/586, Archives NZ (doc F33, vol7, p2415)

46. Evidence of Ema Katipa, J1, 1873/586, Archives NZ (doc F33, vol7, p2415); evidence of Riria Kai Mare, J1, 1873/586, Archives NZ (doc F33, vol7, p2349)

47. Evidence of Robert Goldsmith, p69, J1, 1873/586, Archives NZ (doc F33, vol7, p2406); evidence of Wi Paraone, p97, J1 1873/586, Archives NZ (doc F33, vol7, p2434)

48. Evidence of Ema Katipa, p78, J1, 1873/586, Archives NZ (doc F33, vol7, p2415)

49. Evidence of Maata Te Owai, p44, J1, 1873/586, Archives NZ (doc F33, vol7, p2380)

was uncorroborated evidence that he and Rewi took part in the murder at Captain Harris's house.

(2) *The trial of Wi Tamararo*

The evidence against Wi Tamararo (the prisoner who later committed suicide) focused entirely on his activities during the attacks on Turanga, and the charge of murder:

- ▶ Maata Te Owai gave evidence that Wi Tamararo went with the kokiri to Matawhero, returning in the morning. He had a gun. When the kokiri returned, it was said in the presence of the prisoner that Europeans and natives had been killed at Matawhero. 'They said they had killed 100 people men, women and children'.⁵⁰
- ▶ Maraea Moreti was the key witness. She stated that Wi Tamararo was one of those who killed her husband plus Piripi and his family. The judge's trial notes provide the following:

Tamararo had a gun.

They fired at my husband Piripi, his wife and their 5 children.

(pointing to the prisoner)

He was one of them.

I saw them level their guns

Tamararo levelled his gun & fired

They fired in the *direction* of those separated

Some of them *had children* in their arms & had no weapons . . .

My husband was fired at & died.

I buried him myself. [Emphasis in original.]⁵¹

Ema Katipa confirmed Maraea's evidence, adding 'there was not *one* of them *that did not fire*' (emphasis in original).⁵²

(3) *The trial of Hamiora Pere*

Hamiora Pere joined Te Kooti at Puketapu. He was therefore not well known to the witnesses. Maraea, for example, said that she knew Hamiora Pere but did not know his name.⁵³

- ▶ Maata stated that 'the prisoner' Hamiora Pere went on a kokiri to Wairau.⁵⁴
- ▶ She also gave evidence that Hamiora Pere was present when Te Kooti said they were to go to Turanganui to fight the Europeans and the natives.⁵⁵

50. Evidence of Maata Te Owai, p 2, J1, 1873/586, Archives NZ (doc F33, vol7, p 2298)

51. Evidence of Maraea Moreti, pp 5–6, J1, 1873/586, Archives NZ (doc F33, vol7, pp 2302–2303)

52. Evidence of Ema Katipa, p 8, J1, 1873/586, Archives NZ (doc F33, vol7, p 2305)

53. Evidence of Maraea Moreti, p 23, J1, 1873/586, Archives NZ (doc F33, vol7, p 2330)

54. Evidence of Maata Te Owai, J1, 1873/586, Archives NZ (doc F33, vol7, p 2319)

55. Ibid, p 2380

- ▶ According to Maata, Hamiora Pere went in the direction of Matawhero with the kokiri. He was also present when it was said that 100 Europeans and natives had been killed at that settlement.⁵⁶
- ▶ Riria corroborated Maata's evidence. She said she saw Hamiora Pere go to Matawhero with a gun. She said Hamiora was present when Te Kooti said that the kokiri was to go to Captain Harris's place, where Wyllie and Hapu lived and kill any people they found there.⁵⁷
- ▶ On their return, Riria heard them say, in the presence of the prisoner: 'They said they saw children at Harris' place and they had killed them, 2 Maori men and a European. They said there were two half caste children and one Maori child' (emphasis in original).⁵⁸

There was therefore corroborated evidence that Hamiora Pere was part of the kokiri on at least two occasions, that he had a gun, and that he both went to and returned from Captain Harris's place after Te Kooti had instructed them to kill any people present. He was also said to be present when the murders were discussed.

The evidence of the various witnesses indicates varying degrees of involvement in the events at Matawhero and Oweta. The evidence against Wi Tamararo was conclusive. More than two witnesses saw him kill Tutere Kapai.

Of the four remaining prisoners, the following can be said:

- ▶ Hetariki did not take part in the Matawhero kokiri, or any other attack on civilians.
- ▶ There is corroborated evidence that Rewi and Matene were part of the kokiri that went to Captain Harris's house, and that they were armed.
- ▶ There is uncorroborated evidence that Rewi and Matene took part in the murder of the men and children at Captain Harris's house.
- ▶ Hamiora Pere went to Captain Harris's house armed. He was present and armed when the murders occurred. However, there is no direct evidence that he actually shot anybody.

11.1.4 The sentences

By the end of September, all five prisoners from Turanga had been tried and convicted, four had been sentenced, and Wi Tamararo had committed suicide. Hamiora Pere, along with the 78 Taranaki prisoners, was awaiting his sentence.

We now discuss the post-trial deliberations that occurred over the months of October and November.

56. Evidence of Maata Te Owai, J1, 1873/586, Archives NZ (doc F33, vol7, p2321)

57. Evidence of Riria Kai Mare, p19, J1, 1873/586, Archives NZ (doc F33, vol7, p2326)

58. Ibid, p20 (p2327)

Following each trial, Justice Johnston reported the details to the Colonial Secretary. He attached his trial notes to the report. In his report on Matene Te Karo, Rewi Tamanui Totitoti, and Hetariki Te Oikau dated 25 September 1869, he made two observations. First, he recommended that only the first part of the sentence (the hanging) should be carried out. Secondly, he stated that he could not see any reasons why the sentences should be commuted, 'other than those which may be suggested by the evidence'.⁵⁹ He then proceeded to relate a number of mitigating factors: none of the prisoners had 'occupied a conspicuous position' among Te Kooti's followers, and there was no evidence that they had taken part in the 'murder of unarmed prisoners'. Matene Te Karo in particular was said to be 'quite young' and, furthermore, had fought on the Government side at Kouaki. He noted that the jury had rejected the defence argument that Matene had been forced to join Te Kooti.⁶⁰ Despite these comments, warrants for the executions were drawn up.

On 29 September 1869, as we have noted, Justice Johnston reported Hamiora Pere's conviction for high treason and levying war against the Queen. Two weeks later, on 11 October 1869, he updated the Colonial Secretary on the situation. 'I have this day', he wrote, 'passed judgment upon the several separately indicted prisoners and groups of prisoners mentioned in my report of the 9th October, [the Taranaki prisoners,] as well as on Hamiora Pere on whose case I reported on the 29 September'.⁶¹ They were all sentenced to be hanged.

In his report, Justice Johnston made a clear distinction between the Taranaki prisoners and Hamiora Pere. Because the former had laid down their arms and surrendered, and furthermore had not taken part in atrocities, the judge told the prisoners that he was confident that their sentences would be commuted: 'they might hope after a certain period of punishment, if they should continue to behave well, and if peace should be reestablished, to be restored to liberty at some future time'.⁶²

This leniency, however, was not to be extended to Hamiora Pere. The judge wrote:

As to Hamiora te Pera, I did not feel at liberty to hold out any hope that his life would be spared, inasmuch as the evidence given against him at the trial would have justified his conviction for the participation in several murders of unarmed men women & children.⁶³

59. Johnston to Colonial Secretary, 'Report on Trial of Prisoners Hetariki Te Oikau, Rewi Tamanui Totitoti, and Matene Te Karo', 25 September 1869, in 'The Trial of the Maori Prisoners', J1, 1873/586, Archives NZ (doc F33, vol7, p2309)

60. Ibid

61. Johnston to Colonial Secretary, 11 October 1869, 'The Trial of the Maori Prisoners', J1, 1873/586, Archives NZ (doc F33, vol7, p2260). There was some discussion between the Crown historian and claimant counsel as to whom exactly Justice Johnston was referring to in this document. The positioning of the document (just prior to the trial notes of the Taranaki prisoners) and the fact that Hetariki Te Oikau, Rewi Tamanui Totitoti, and Matene Te Karo had already been sentenced, makes it clear that he was referring to Hamiora Pere and the group of Taranaki prisoners.

62. Johnston to Colonial Secretary, 'Further Report on Conviction of Hamiora Pere and Others', 11 October 1869, in 'The Trial of the Maori Prisoners', J1, 1873/586, Archives NZ (doc F33, vol7, p2264)

63. Ibid

In light of the lack of direct evidence that Pere actually shot anybody, Justice Johnston's choice of the phrase 'participation in' murder was clearly deliberate. It implied guilt by association only. He left open the question of whether Pere had actually killed anybody himself.

11.1.5 The role of the Governor

The crime of treason or levying war against the Queen was a capital offence punishable by hanging. However, sections 29 to 31 of the Disturbed Districts Act 1869 made it lawful for the Governor, on advice from his Executive Council, to commute a capital sentence to penal servitude, or a prison sentence to military service or deportation. These sections codified, to some extent, the Governor's powers under the Crown's common law prerogative of mercy.⁶⁴

The trials of the East Coast and Taranaki Maori proved something of a test case for the colonial Government. The Governor and the Executive Council needed to restore order quickly and efficiently. They also wanted to be regarded as merciful where mercy was warranted. There was also a practical issue. They had a large number of political prisoners to deal with and, as claimant counsel argued, the Crown was not about to execute all of the prisoners awaiting trial for treason.⁶⁵

On 4 September 1869, Governor Bowen wrote to Earl Granville:

My ministers agree with me that, under the peculiar circumstances of this colony, no capital offence should be carried out against persons convicted of merely carrying arms against the Queen. The law must, however, take its course in the case of persons, whether European or Natives, found guilty of murder.⁶⁶

The Crown therefore distinguished between treason alone, and treason aggravated by murder. According to Bowen, only the latter was punishable by death.

The Crown's view as to whether the sentence passed on the four remaining Turanga prisoners should be commuted changed significantly in the months leading up to 2 November 1869:

- In his report dated 29 September 1869, Justice Johnston stated that, in the case of Wi Tamararo, there was no reason for the sentence to be commuted.⁶⁷
- On 11 October 1869, as we have noted, the 78 Taranaki prisoners were convicted. As we have said, Justice Johnston stated that he felt certain that their sentences would be commuted.⁶⁸ Furthermore, if they continued to be well behaved, and if peace was

64. Thus, although Matene, Hetariki, and Rewi were not tried under the Disturbed Districts Act, the Crown still retained the common law right to commute their sentences anyway.

65. Document H18, p32

66. Bowen to Earl Granville, 4 September 1861, p6, micro 2 1164 C0209, Public Records Office, London (doc G2(a), pp51–52). We note that by 28 October 1869, that is after the prisoners from Turanga and Taranaki had been sentenced, the policy changed. Those 'convicted of treason and rebellion, and found in addition to have been *concerned in cruel murders* of unarmed men, and of women and children' were now to be denied clemency (emphasis added).

67. Johnston to Colonial Secretary, 29 September 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2293)

68. Johnston to Colonial Secretary, 11 October 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2264)

re-established, he could see no reason why they should be 'restored to liberty at some future time'. He had reason to be confident. Five days earlier, on 6 October 1869, the Executive Council had recommended that 'the sentence of death, when passed . . . be commuted to Penal Servitude'.⁶⁹

- ▶ Two days later, in a memorandum dated 13 October 1869, the Executive Council put its policy into effect. A distinction was made between Hamiora Pere and the three other East Coast prisoners. The council recommended that the sentence passed on Hetariki Te Oikau be commuted to life imprisonment on the grounds that he 'was not proved to have taken part in the murderous attacks made by night on unarmed men women and children . . .'.⁷⁰ However, the sentence of death passed on Rewi Tamanui Totitoti and Matene Te Karo, 'who were proved to have taken part in such murderous attacks', was to be carried out. There was no suggestion at this point that the latter sentences would be commuted.
- ▶ The Executive Council signed a second memorandum on the same day in relation to Hamiora Pere. Given that it had been 'proved that he had been engaged in murderous night attacks on unarmed men women and children in the Poverty Bay District', his sentence was to be carried out.⁷¹
- ▶ On 2 November 1869, in a surprise move, the Governor recommended on advice from his Executive Council that the sentences of Matene Te Karo and Rewi Tamanui Totitoti be commuted to imprisonment.⁷² The sentences of all other Maori prisoners, barring Hamiora Pere, were also commuted to penal servitude. Pere's sentence would be carried out. In a memorandum of that date, the Executive Council set out why:
 - Hamiora Pere was neither a Chatham Island prisoner, nor a member of Te Kooti's tribe, but joined voluntarily. He was not therefore avenging his imprisonment or under 'any influence of clanship'.⁷³
 - He took a prominent role in the armed parties that 'committed the Poverty Bay massacres'.⁷⁴
 - Hetariki and Rewi, on the other hand, were both incarcerated on Wharekauri. Hetariki was not proven to have taken part in the 'armed parties sent out to massacre. It is doubtful whether the latter was in more than one'.⁷⁵

69. Handwritten note headed 'For His Excellency' on Johnston to Colonial Secretary, 2 October 1869, J1, 1873/586, Archives NZ. A further note on the letter states: 'the apportionment of a period of sentence to some of the prisoners to be made after further enquiry.'

70. Memorandum, 13 October 1869, J1, 1873/586, Archives NZ (doc F33, vol7, p2287)

71. Ibid, p2267

72. Extract from minutes of proceedings of Executive Council of New Zealand, 2 November 1869, micro 2 1165 CO209, Public Records Office, London (doc G2(a), p500)

73. Ibid, p501

74. Ibid

75. Ibid, p502

- Matene, while not an original member of the Whakarau, had fought on the Government side in the past. This, plus the fact that he was said to be ‘almost a boy’, counted for him. However, they noted that Matene was ‘proved to have been in some of the parties commissioned to burn and kill’.⁷⁶

Given that all the other prisoners had their sentences commuted, why was Hamiora Pere singled out for execution?

11.2 TRIBUNAL ANALYSIS AND FINDINGS

Before we begin our discussion of the events surrounding Hamiora Pere’s trial, we must first address the question of who Hamiora Pere was. The Crown argued, first, that he was unknown in Turanga and, secondly, that one witness identified him as ‘one of Nama’s men’.⁷⁷ Claimant counsel disagreed. Maata Te Owai was said to be the only witness who had suggested that Pere was affiliated with Nama. Furthermore, counsel suggested that the document had been misread, and that in fact Maata’s comment related to Wi Tamararo.⁷⁸ Secondly, claimant counsel argued that there was evidence that Pere had connections in Turanga. Hohopatu stated that Pere was his sister’s child and that he had known him at Wairoa.⁷⁹ Ema Katipa also testified that she had known Pere when she was younger.

Having examined the evidence, it is clear that Hamiora Pere was not well known. As Dr Gilling argued, Hamiora Pere was not ‘a person of much status and importance’. He was not recognised by many people and no one in Turanga was petitioning the Governor on his behalf. However, while he may not have been well known in the area, it does appear that he had whanau connections in Turanga. Ema Katipa had strong links with Whanau a Kai. Her brother Tutere, who was killed at Matawhero, was identified as Whanau a Kai. After the death of her husband (he was also killed at Matawhero), she married the leading Whanau a Kai chief, Peka Kerekere. While we cannot be certain, we agree that Ema Katipa’s statement that she knew Pere suggests a whanau connection.

In terms of this chapter, however, we are focusing not on who Hamiora Pere was, but what happened to him.

11.2.1 A cautious approach

In the *Ngati Awa Raupatu Report*, the Waitangi Tribunal declined to review the criminal trials of 36 prisoners arraigned for the murder of Völkner and Fulloon. The Tribunal found that:

76. Extract from minutes of proceedings of Executive Council of New Zealand, 2 November 1869, micro 2 1165 CO209, Public Records Office, London (doc G2(a), p 500)

77. Document C1, p 184; doc H14(6), p 48

78. Document H18, pp 11–12

79. Ibid, pp 12–13

for reasons of public policy, we decline to review formally the evidence and the strength of the Crown's case at the trials and confine our observations to some general matters. While the public has the licence to review murder trials, it would compromise the integrity of the legal system for an official body, not specifically charged with that function to do the same.⁸⁰

Not surprisingly, the Crown suggested before us that while, under the Treaty of Waitangi Act 1975, the Tribunal is authorised to review the Crown's conduct in punishing citizens, that authority is not extended to the conduct of criminal trials by the courts.⁸¹ We acknowledge in response that: first, we are not a tribunal with expertise in criminal matters; secondly, the events occurred a long time ago; and thirdly, we did not see the trial first hand.

11.2.2 The conviction issue

It will be recalled that, in our discussion of the events at Matawhero, we concluded that Turanga Maori were in rebellion (see ch 5). We also found that by the standards of the time, the attack by Te Kooti and the Whakarau on the people of Matawhero was indiscriminate, and therefore could not be justified.

The evidence presented at Hamiora Pere's trial indicates that he was engaged in levying war against the Crown and, in our view, the actions of those at Matawhero and Oweta could not be justified as self-defence. Since, therefore, the Whakarau were clearly in rebellion at those times, we have no concern about Pere's conviction for treason. Our concerns are with his treatment following conviction and sentencing.

11.2.3 Consistency of treatment

Although all four prisoners received the same sentence, all bar Hamiora Pere had their sentence commuted by the Governor. The evidence clearly did not justify his being singled out for harsh treatment in this way. As we have said, there was no direct evidence that Pere had shot anybody. That was almost certainly the reason why the charge of murder against him was dropped when the trial began. The evidence simply had him at Matawhero with a gun. The Crown clearly did not want to risk the prospect, in this important show trial, that the evidence was insufficient to convince a jury that he was guilty of murder beyond a reasonable doubt. On the other hand, there was direct, though uncorroborated, evidence that both Rewi and Matene had been among those who confessed to the Whakarau that they had killed the children of Wyllie and Hapu.

80. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 73

81. Document H14(6), p 43

11.2.4 A complete record?

Given the lack of evidence relating directly to Pere, we examined the court's file to ascertain whether there was any possibility that it was incomplete. The National Archives J1 file, however, appears to be intact. The judge's notes are numbered and the numbering is consecutive. There are no missing pages. The prisoner was given a list of the witnesses to be called to testify against him. All of those witnesses listed gave evidence and were cross-examined. The notes of evidence for each witness are contained in the file. Furthermore, the *Wellington Independent* followed the trial closely, often printing almost verbatim accounts of the witnesses' statements. We are satisfied therefore that we have seen the complete record of the trials.

There is, however, one missing document. In his letter to the Colonial Secretary, Justice Johnston referred to a report that he had sent previously in which he had set out 'all his evidence'. This report is not in the file. We find it difficult to believe, however, that the judge would include material in this report which was neither in his own trial notes nor reported in the *Wellington Independent*. We are satisfied, therefore, that Justice Johnston's report contained his own perceptions of the evidence and is most unlikely to have contained reference to any new primary evidence relevant to the question of whether Pere had actually shot anybody.

11.2.5 Why was he treated differently?

There is circumstantial evidence that Pere was involved in the murders at Matawhero, but no direct evidence. On the other hand there is direct but uncorroborated evidence that Matene Te Oikau and Rewi Tamanui Totitoti did participate in those murders. So we are left with trial notes that make it clear that there was no direct evidence of any kind that Pere had shot anybody, while direct but uncorroborated evidence shows that the two other accused had shot unarmed men, women, and children.

On the face of it, it would appear that Hamiora Pere was hanged for reasons other than those contained in the evidence. First, he was charged with murder. Although dropped, we believe the charge continued to have momentum, making it easier for the Crown to treat him differently to the other prisoners. Secondly, and this is related, his case lacked the mitigating factors considered for the other prisoners: their age, incarceration on Wharekauri, or tribal loyalty to Te Kooti. It is, however, difficult to see how these factors could outweigh the direct evidence against Matene and Rewi, when compared to the evidence against Pere.

The third and most troubling possibility is that these were show trials. The Crown needed someone to hang for the Matawhero atrocity. We are concerned, in light of the apparent lack of rationality in the decision to hang Hamiora Pere, that this was decisive. Crown counsel conceded before us that the Crown needed a deterrent.⁸² Furthermore, we note Justice Johnston's

82. Document H14(6), p66

statement as recorded in the Executive Council minutes: ‘I *believe the result is the very best that could have been arrived at*. I am glad to know that Mr McLean thinks that one execution will be [as] useful as more would have been by way of example and caution.’ (Emphasis in original.)⁸³

A clear case for a capital punishment was made for Wi Tamararo. Using the court’s own standard of corroborative evidence, he had been convicted of murder. Two days later, however, Wi Tamararo committed suicide at Wellington Gaol. Had he not done so, we think it certain he would have been the prisoner hanged.

11.2.6 The need for a reassessment

We tread with caution here for the reasons we outlined above: we are not a tribunal with expertise in criminal matters; the events happened a long time ago; and we were not present at the trial. But having reviewed the evidence, we would be irresponsible if we did not express the concerns we have outlined. In the circumstances, we are not prepared to make any firm finding, but we recommend that the Attorney-General reassess the record in the light of our comments, with a view to considering whether the decision to hang Pere was safe. That is, whether it was made for proper reasons and in accordance with proper principles. If a serious doubt is raised on the evidence, then a formal and appropriate acknowledgement may be required.

83. Governor Bowen to Earl Granville, 24 November 1869, micro 2 1165 C0209, Public Records Office, London (doc G2(a), p 496)

CHAPTER 12

PUBLIC WORKS

12.1 INTRODUCTION

During the growth of Gisborne, and the development of a regional and national infrastructure, the Crown and its agents acquired land from Turanga Maori for public works: to build roads, provide for a railway, refuse tip, or cemetery. Legislation enabled the Crown to acquire land for these purposes, compulsorily.

Public works were often the responsibility of local government. In the Gisborne inquiry district, local authority public works takings affected Turanga Maori more than those by central Government. While the Crown has conceded that it has responsibility for designing and monitoring the legislative system for public works takings, it has also stated that ‘it [the Crown] is not responsible for the acts or omissions of local authorities or statutory bodies’.¹ We do not accept that the Crown could devolve responsibility in this manner, given that it has itself empowered local authorities to take land for public works in the first place. We stress that the Crown must take responsibility for the public works legislation. However, no evidence was presented on local authority public works takings. In the event, we only consider the takings by the Crown directly.

We address four key questions in relation to public works takings. First, was the acquisition of Turanga Maori land for public works justified? Secondly, were the owners of Turanga Maori land consulted, prior to land being considered for public works takings? Thirdly, were Maori disadvantaged in terms of the compensation they received for land taken for public works? And, fourthly, was land taken for public works returned to Turanga Maori once it was no longer required?

12.2 THE CROWN’S ABILITY TO TAKE MAORI LAND UNDER PUBLIC WORKS LEGISLATION

The Crown’s ability to acquire land for public works was provided for in numerous legislative provisions over a number of years. In order to provide some background to public works takings in Turanga, we give a detailed summation of some of the relevant legislation.²

1. Document H14(24), p4

2. See also Cathy Marr, *Public Works Takings of Maori Land, 1840–1981*, Waitangi Tribunal Rangahaua Whanui Series, 1997; Professor Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol2, ch11

12.2.1 Public works legislation and Maori land, 1862–1928

The taking of Maori land for public works was first legislated for in the Native Lands Act 1862. Section 27 of the Act allowed the Governor to take up to 5 per cent of any lands that ‘may be’ purchased from Maori (that is land that had passed through the Native Land Court) for roading purposes. There was no provision for compensation and there was no time limit for the taking from the date of the grant.

In 1864, all land was opened up to the Crown for compulsory takings under the Public Works Lands Act 1864. This included customary land, land that has passed through the Native Land Court, and land that had been purchased by Pakeha settlers (s2). The key provisions of this Act were that, before the Governor could compulsorily acquire lands, the Order in Council empowering him to do so had to be published in the *Gazette* (s4). Compensation would be awarded (s5).³ We note that there was no provision for an agreement for sale to be reached instead of a compulsory taking, no time limit on when the land could be taken, and no mention of land surplus to requirements.⁴

A year later, the Native Lands Act 1865 introduced three key changes. First, section 76 provided that the 5 per cent provision now applied to all Maori land ‘granted under the provisions of this Act’. Customary land was, therefore, now exempt. Secondly, the provision no longer had an unlimited duration. Instead, the Governor only had the power to take lands within a 10-year period from the date of the Crown grant. And, thirdly, buildings, gardens, orchards, plantations, and ornamental grounds were exempt (s76). Under the Native Lands Act 1873, the provision regarding these exempted lands changed. Section 106 of that Act provided that such land could not be taken for roading or railway purposes except where it was authorised by the Land Clauses Consolidation Act 1863. Land could, however, be taken for roading that had been granted, or ‘may be granted’, so memorial of ownership land and customary land was not necessarily exempt from such takings.

The Native Land Act Amendment Act 1878 (No 2) confirmed that any native land – that is, customary land – could be taken. It also extended the period in which ‘any Native land’ could be taken under the 1873 Act from 10 years to 15 years (s14).

In 1882, a distinction was specifically made between Maori land and general land. Under the Public Works Act 1882, a number of things had to be done before general land could be taken for public works. It had to be surveyed, the owners notified in writing and given a period within which to object (ss10–11), land not required had to be returned to the owner (s14), and compensation had to be paid (ss27–30). In terms of land owned by Maori, only land that was held under a Crown-granted certificate of title or memorial of ownership was liable for public works takings (s23). On the face of it, customary land was again explicitly exempt. However, section 24 provided that where it was necessary to take land for public

3. The Act provided that compensation could be paid as long as the person concerned had not been involved in acts of rebellion, as defined by the New Zealand Settlements Act 1863.

4. Provincial governments were also able to compulsorily take Crown-granted Maori land and Maori reserves (but not customary Maori land) from 1866 under the Provincial Compulsory Land Taking Act 1866.

works, the Governor in Council could order that such work be constructed on or through any land held or occupied by Maori owners. The owners did not have to be notified in writing and there was no period in which the owner could object. The Order in Council simply had to be gazetted for two months (s25). Compensation was provided for. If the land was held under customary ownership, the Minister was to apply to the Native Land Court to ascertain the amount to be paid and those entitled to payment (s26(1)(a)). Where land was held under a title derived from the Crown, the compensation clauses relating to general land applied (s26(2), pt III).

The Public Works Act 1894 had numerous sections. Part II contained provisions for the taking of general land. Section 17 established how owners would be notified and a process for objections. Voluntary agreements could be reached over the sale of required land, thus avoiding the need for a compulsory taking (s26). Part IV set out the provisions for the taking of Maori owned land. Under section 87, any land owned by Maori under a title derived from the Crown could be taken for a public work. That section also stipulated that, if the land were to be used for a public work other than a railway, or for defence purposes, it had to be taken in accordance with part II. Customary land, on the other hand, came under the provisions of part IV. The land did have to be surveyed, and gazetted for one month (s88), but there was no provision for a voluntary sale agreement. Neither was there any requirement for surplus land to be offered back to either the original owner or the adjacent owner. There was, however, provision for compensation. Section 90 established that applications for compensation were to be made by the taking authority to the Native Land Court within six months of the gazetting of land being taken – that is, after the land was taken.

As well as providing for land to be taken for public works in general, the Public Works Act 1894 also extended the provisions for the taking of up to 5 per cent of Maori land for roading and railways without compensation to include land whose ownership had not been determined by the Native Land Court (s91). Both customary land and land that had been through the Native Land Court could be taken. As in the 1865 Act, lands occupied by pa, villages, cultivations, buildings, gardens, orchards, plantations, and burial and ornamental grounds were exempt from takings for roads or railways. However, these exempt lands could be taken with the consent of the Governor in Council (s93).

The Public Works Amendment Act 1909 attempted to tidy up anomalies in the main Act, as well as the specific provisions relating to public works takings of Maori land. The relevant sections in the Public Works Act 1894 – sections 92 to 96 – were repealed. They were replaced by sections 387 to 394 of the Native Land Act 1909.⁵ The Governor was given wide powers. He could lay out and set apart any customary land for roading, without providing compensation (s387). He could also ‘lay out and take such roads as he thinks fit upon the freehold land’ within 15 years of that order being made (s388).

The Government’s power to take land for public works (the 5 per cent provisions) without

5. Marr, p71

compensation was abolished by section 30 of the Native Land Amendment and Native Land Claims Adjustment Act 1927.

12.2.2 The Public Works Acts 1928 and 1981

The Public Works Act 1928 continued most of the principles and policies contained in previous public works legislation. It confirmed that central and local government could take land for public purposes. Furthermore, any 'Native land and any land owned by Natives under title derived from the Crown' could be taken (s102). The definition of a 'public work' was very broad and included any land, building, or structure required for any public purpose (s2). Where Maori land did not have a title derived from the Crown, an Order in Council had to be gazetted, and a survey map produced. Where the land did have a Crown-derived title, the same procedure as for general land applied.

As with the 1894 Act, part 2 of the 1928 Act set out the procedure for taking general land, or Maori land that had a Crown-derived title. The land in question had to be surveyed and notice served on the owner (s22). Landowners had the right to object to takings. Takings excepted from this process included takings for railways and defence purposes, for roads related to these purposes, as well as for water-power or irrigation works (s13). Where the taking involved native land, a notice had to be gazetted in *Kahiti*, but the proceedings were not invalidated by a 'any failure to conform' to the process outlined in the section (s22(4)).

Under the 1928 Act, compensation for takings of general land was determined by a compensation court. Compensation for takings of all Maori land, however, was dealt with separately. Under section 104(1)(a), the taking authority 'was authorised to cause an application to be made to the Native Land Court' to determine the amount of compensation to be paid and 'the persons entitled'.

The 1928 Act also contained a number of provisions that governed the disposal of land taken for public works purposes, but which was no longer required. Section 35 provided that, where land was taken and was found to be surplus to needs, it would be offered back to the original owners to purchase in the first instance, and then to the adjacent owners. If the original owners or the adjacent owner did not purchase the land, it would be then sold at auction. These provisions, however, were contained in part 2 of the Act which, as we have noted above, did not apply to Maori customary land.

The 1928 Act also recognised that land compulsorily acquired should be used for the purpose for which it was taken (s23). Both the Crown and local bodies could, by various procedures, change the use of the land from the purpose for which it had been taken, or the land could be declared Crown land. In such situations, though the land might have become 'surplus', it would not be offered back.⁶

6. Document G17, p 41. Brent Parker noted that it was common practice all over the country for land taken for one purpose to be used for another.

The Public Works Act 1981 was a major piece of consolidating legislation. Maori land now came under the general provisions of the Act, and was no longer treated separately. Greater emphasis was given to voluntary agreements between the taking body and the owner of the land, including multiply owned Maori land (via the supervision of the Maori Land Court). The concept of an essential need for a taking was restrengthened in the Act, which stated that land ‘may not be taken under this or any other Act unless the public work in respect of which it is required is an essential work’ (s22).

As well as strengthening the definition of an essential work, the 1981 Act improved offer-back provisions. The original Maori owner was now, under sections 40 and 41, to have the first opportunity to buy back, at current market value, land no longer required (unless the commissioner of Crown lands or a local authority thought this unreasonable).

Having reviewed the relevant legislation, we now review the public works takings in Turanga.

12.3 PUBLIC WORKS TAKINGS IN THE TURANGA DISTRICT – SOME EXAMPLES

We were provided with examples of public works takings in Gisborne by the Crown. These we now list in chronological order, noting the following: the purposes for which the land was taken, the blocks or part blocks involved, and the compensation paid.⁷ Because most blocks, or part blocks, were taken for one or two different purposes, we discuss the takings block by block. There is one exception to this: the land taken for the railway in 1930. A large number of blocks, or part blocks, were taken at the same time. We have therefore dealt with these blocks as a single ‘railways’ group.

We also note that, since the evidence did not cover many takings by local bodies, the following compilation cannot be taken as a complete list of takings of Maori land for public works purposes in the inquiry district.⁸

12.3.1 The Waiohiharore and Awapuni blocks

The Waiohiharore and Awapuni blocks were divided into a number of sub-blocks. They were selected for a number of ‘edge-of-town uses’, such as a railway, a cemetery, an abattoir, and a sanitary depot.⁹

7. See chapter 8 for a discussion on the subdivision of blocks.

8. According to Parker, the proclamation registers of land taken from 1874 to 1952 (held at Archives New Zealand, Wellington) covered only land taken for general government purposes and not local body purposes: doc G17, p 5.

9. Document A13, p 21

(1) Waiohiharore 1C and 1B

A certificate of title was awarded by the Native Land Court for the 120-acre 15-perch Waiohiharore block in 1882. Of this, six acres 10 perches of land was taken for roads under the 5 per cent provisions of the public works legislation.¹⁰ By December 1899, the block (consisting of 110 acres three roods) was vested in four Maori owners. It was then partitioned. Waiohiharore 1B (36 acres two roods 19 perches) and Waiohiharore 1C (five acres) was sold into private ownership on 8 December 1899.¹¹ In December 1903, the Gisborne Harbour Board took two roods 30 perches of this now private land as the western strip of a beacon reserve.¹²

Between 1893 and 1904, two roods 34 perches of the remaining Maori land of Waiohiharore 1 was taken for a beacon reserve. All those involved (both officials and owners) believed that the land in question (then three roods one perch) had been taken in 1893 by notice in the *New Zealand Gazette*. No compensation was assessed or awarded at this time. In 1904, the district land registrar advised that the 1893 *New Zealand Gazette* had not, in fact, declared the lands to be taken. On 29 August 1904, the Governor therefore signed an Order in Council taking 28 perches of Waiohiharore 1C, and two roods six perches of Waiohiharore 1B (pursuant to section 88 of the Public Works Act 1894) for the construction of beacons and leading lights. The Maori owners had been denied the use of this land from 1893. The Gisborne Harbour Board applied to the Native Land Court to have compensation assessed for the land taken for the beacon reserve. The court dismissed the application since no one appeared in court to claim compensation. There is no evidence of any consultation with the Maori owners from 1893 onwards.¹³

(2) Waiohiharore 1D

All the Maori-owned portion (11 acres 23 perches) of Waiohiharore 1D was taken for railway purposes in 1900. Heni Kara (the wife of James Carroll), the sole owner of the 11-acre 23-perch portion of the block, agreed to a compensation settlement of £1900. There is no evidence that Mrs Carroll was consulted prior to the land being taken. She was eventually awarded £1880. The residue of the block was taken from its European owner.¹⁴

(3) Waiohiharore A, B, C, and D: takings for public health purposes

The Native Land Court awarded the 167-acre two-rood 17-perch Waiohiharore block in 1882. In 1884, eight acres 17 perches was taken for a road under the 5 per cent provisions of the public works legislation. Two years later, the block was partitioned into four blocks: Waiohiharore A, B, C, and D.¹⁵

10. Document G17, p8. Note that Alexander says that another 8 acres 2 roods 14 perches was taken for roading in 1884: doc A13, p21.

11. Document G17, pp9–10

12. Ibid, p11

13. Ibid, pp12–14

14. Ibid, p14

15. Document A13, p26

In 1900, following unsuccessful efforts by the borough council to acquire Waiohiharore 1B by agreement with the Maori owners,¹⁶ 27 acres two roods was taken from Waiohiharore A, B, C, and D pursuant to section 88 of the Public Works Act 1894. The council initially sought the land for pleasure grounds and gardens, but this was later changed to public health purposes. The Gisborne Borough Council argued that it was 'absolutely necessary to acquire these lands' and that the taking of the land should proceed quickly, before the Maori owners 'could defeat the Council'. There is no evidence that the owners of Waiohiharore A, B, C, and D were consulted prior to the land being taken.¹⁷

The 12-acre 29-perch portion taken from Waiohiharore C and D was used as a horse paddock and pound; the portion taken from Waiohiharore A and B was used as refuse dump. The portions taken from Waiohiharore C and D were transferred from the borough council to the Crown. The Minister of Lands later reserved them as part of the Gisborne domain in 1955. These partitions were never used for the purpose of their original taking.¹⁸ There were also accretions from the sea neighbouring these lands. These accretions were vested in the Crown, though controlled by the Gisborne City Council.¹⁹

(4) *Waiohiharore 2: takings for railway and harbour purposes*

The 10-acre Waiohiharore 2 block was awarded to Te Aitanga a Mahaki by the Native Land Court in 1875. It was a beachfront section, close to the city and the port.

In 1900, the whole of Waiohiharore 2 (and all of Waiohiharore 1D – see above) was taken, pursuant to section 167 of the Public Works Act 1894, for railway purposes. The owners do not appear to have been consulted. The Native Land Court awarded compensation at a rate of £260 an acre for the eastern end of the block closest to the port, and £230 an acre for the remainder. The court also awarded compensation of £57 10s for buildings on the block. The legal costs borne by the Maori owners amounted to £150. The area retained by the Crown was later assessed to be three acres three roods 30.2 perches, for which the Crown paid £1076. After deducting fees and other amounts owing, £798 17s was distributed to owners in August 1905. The five acres two roods 16.5 perches of land not needed for railway purposes was revested in the Maori owners in 1912.²⁰

However, one year later, in August 1913, four acres one rood 12 perches of Waiohiharore 2 was retaken for railway purposes, pursuant to sections 29 and 188 of the Public Works Act 1908. There is no evidence of consultation with the owners prior to this retaking. After a hearing, the court awarded £5649 10s compensation or approximately £1100 per acre. After

16. The owners were Mrs Heni Kara (Mrs Carroll) and Pare Keiha. They were apparently willing to sell the land to the Crown, but changed their minds when they realised that the Crown was purchasing on behalf of the Gisborne Borough Council. Parker commented that this 'may indicate some ill feeling towards the Council': doc G17, pp17, 20. Part of Waiohiharore was also taken for a beacon and leading lights between 1893 and 1904 – see above.

17. Document A13, pp26–27; doc G17, pp16, 18, 21

18. Document A13, pp28–29

19. Ibid, pp30–33

20. Document A13, pp9–11; doc G17, pp14–16

fees and compensation for improvements were paid, the balance of £4715 10s was paid to the Tairāwhiti District Māori Land Board for distribution to the owners (there were 499 when the land had been re-vested in 1912). It should also be noted that there were improvements on the land, consisting of a 'dwellinghouse' and two other buildings. The owner of the 'dwellinghouse' was given £15 towards shifting the house to another site.²¹

In 1914, the remaining one acre one rood 4.5 perches of Waiohiharore 2 in Māori ownership was taken under the Public Works Act 1908 for harbour works. This land was at the eastern end of the Waiohiharore 2 block, closest to the port.²² In the 1903 compensation hearing before the Native Land Court, an agreement had been reached between the Māori owners and the Gisborne Harbour Board regarding accretions at this end of Waiohiharore 2. Under this agreement, the harbour board was to obtain some of Waiohiharore 2, plus its neighbouring accretions, and pay the Māori owners £550. The owners would retain a seaward portion of the block, plus accretions neighbouring that portion. This agreement required legislative ratification, which never eventuated. Instead, all the accretions were vested in the Gisborne Harbour Board and Māori did not receive the £550.²³

The Stout–Ngata Commission commented on this chain of events in 1908:

By what authority such a grant [accretion to the Gisborne Harbour Board] was made, we are not aware. There is no statutory authority for such a grant . . . If the accretion was gradual, it would belong to the Native owners, if sudden it would belong to the Crown; but in no case can it [be] said, if it were an accretion, to be the property of the Harbour Board . . . It is most unfair that the Board should block the Natives' access to their land from the sea, and obtain a grant without notice to them, and without an opportunity to them of contending that this land belongs to them from a gradual accretion.²⁴

We were given no other evidence relating to the accretions, and there is no evidence to indicate that the owners were consulted prior to the vesting of the accretions in the harbour board, or in the taking of the last portion of Waiohiharore 2 in 1914. The court awarded compensation of £1275 for the 1914 taking. Of this, £25 was provided for legal expenses and £120 was 'to be held by the Registrar of the Court and two of the owners'. In 1958, and from 1976 to 1977, portions of this land became surplus and became part of the Gisborne Domain. The land was not offered back to the original owners.²⁵

21. Document A13, pp14–16; doc G17, pp23–27

22. Document A13, p17; doc G17, pp27–29

23. Document G17, p15

24. 'Interim Report of Native Land Commission on Native Land in the Counties of Cook, Waipatu, Wairoa and Opotiki', 18 February 1908, AJHR, 1908, G-iii, p8 (as cited in doc A13, p13)

25. Document A13, pp13, 17–20

(5) Awapuni 1, sections 1B, 1C, 1E, 2, Waiohiharore 3, and parts of Awapuni 1, sections 1A, 1F, 1K – takings for cemetery and abattoir, 1902

Land was taken from the Awapuni 1 block for a number of different public works. By 1884, some 13 acres had already been taken for roads under the 5 per cent provisions of the public works legislation.²⁶ In 1901, the Gisborne Borough Council applied to the Minister of Lands to have sections of a number of blocks taken for an abattoir. The council justified its application on the grounds that the Slaughtering and Inspections Act 1900 required it to provide an abattoir for the use of the borough. In 1902, a total of six acres two roods 30 perches (comprising all Awapuni 1, section 1B and 1C, blocks and part of Awapuni 1K block) was taken for this purpose under section 88 of the Public Works Act 1894.²⁷

The council also argued that the cemetery at Makaraka was full, and therefore additional land was necessary. When applying to the Minister of Lands to approve the taking, the council stated that, under section 38 of the Cemeteries Act 1882, they were legally required to provide a suitable cemetery. In September 1901, a council committee had tested a site at Te Awapuni for its suitability, and had recommended that 51 acres at Te Awapuni be obtained for the new cemetery. According to the *Gisborne Times*, however, the mayor suggested trying for 100 acres instead.²⁸ The Gisborne Borough Council proceeded to test the site for its suitability for a cemetery, finding the water table at a depth of four feet nearest the lagoon and seven feet on higher ground, 'a result which the committee deemed very satisfactory'.²⁹ The council resolved to obtain the land as soon as possible, one councillor pointing out that the council had lost land before by acting too slowly.³⁰

In October 1901, the *Gisborne Times* reported that Te Awapuni Maori had petitioned the borough council objecting to the taking. The *Times* reported that the council could not understand the petition (presumably as it was written in te reo Maori), but did understand that it was an objection.³¹ No response to the petition seems to have been made by the council. The land for both the abattoir (six acres two roods 30 perches of Awapuni 1B, 1C, and part 1K) and the cemetery (45 acres three roods 33 perches of all Awapuni 1, section 1E; Awapuni 2; and Waiohiharore 3; and parts of Awapuni 1A and 1F) was taken under section 88(1) of part IV of the Public Works Act 1894 by separate Orders in Council dated 4 March 1902, and gazetted on 20 March 1902.³²

It seems that the council was under the impression that the land was still Maori customary land, and that therefore it should be taken under the procedures set out in section 88(1) of part IV (which did not require notification to the owners of a taking). However, although the

26. Ibid, p40

27. Document G17, pp 21–22

28. *Gisborne Times*, 7 August 1901, p4 (doc A5, p12)

29. Ibid, p12

30. Ibid, p13

31. Ibid

32. Document A5, p14; doc G17, p21

Awapuni 1 block (189 acres two roods 10 perches) had been awarded under a memorial of ownership to 82 members of Rongowhakaata in 1887, the Native Land Court had, the previous year, partitioned the block into Awapuni 1, sections 1A to 1K. Certificates of title were issued for these partitions.³³ The land was not, therefore, customary land at the time of the taking, and thus the council should have followed the process set out in section 88(2) of the 1894 Act. Section 88(2) deemed that the taking of land under a title derived from the Crown should be handled under part two of the 1894 Act (see discussion on legislation above). The notification provisions of part two were much stricter than those for the taking of customary land, and included the necessity of notifying all owners and occupiers of a proposed taking. Should objections be made, the council was required to appoint a time and place for the objection to be heard.

The first opportunity Te Awapuni Maori got to object in person was at the Native Land Court's compensation hearing, after the land had been taken. This took place in September 1902, then was adjourned to June 1903.³⁴ At the hearing, Thomas Chrisp, counsel for the Gisborne Borough Council, stated that he was unaware of any petition from Te Awapuni Maori at the time of the taking. The minutes of the hearing show that the owners had not wanted the land taken as they placed a high value on it. Rawiri Karaka said that 'The Maori set great store in certain parts of the land' and that there was a rahui on parts of it due to kahawai, kuku, and pipi resources. There was also a spring on Waiohiharore 3. Karaka continued that he believed European land valuers 'have no idea of the value we set in this land', and noted that there was no sea frontage left to the Maori: 'The pakeha have taken all the sea frontage from the Port from us and now they want what little we have remaining. It seems they want to shut us out from the sea beach.'³⁵

A local land valuer, Frank Harris, gave evidence that the land was worth £5 10s per acre, and that the taking in 1899 of nearly 26 acres from nearby land for a nightsoil depot, had 'damned' this land.³⁶ Council valuer Quigley stated that the land was 'useless for any purpose but a cemetery'; the council valuers put the value of the land at a range from £1 to £6 per acre.³⁷ Rees, acting as counsel for the owners, stated that the nightsoil spot had devalued the remaining Maori land and that the borough should not prosper from this. He reminded the Native Land Court of its protective duty to Maori: 'The Native Land Court is the guardian of Maori rights. It stands between them and the Government . . . There in the case of Europeans it is the individual who may suffer but in this case it is a body of Natives a whole tribe in fact.'³⁸

33. Document A5, pp10, 15–16. See the 1894 deeming provision in the Native Lands Act of that year.

34. Ibid, pp17–23

35. Evidence of Rawiri Karaka, 12 June 1903, Gisborne minute book 29, pp307–308 (doc A5, pp18–19)

36. Minutes of Gisborne Borough Council, 3 October 1899, Gisborne Borough Council minute book 5, and evidence of Frank Harris, 30 September 1902, Gisborne minute book 29, p163 (doc A5, p17)

37. Evidence of William Quigley, 9 June 1903, Gisborne minute book, pp 296–299 (doc A5, pp17–18)

38. Evidence of W L Rees, 15 June 1903, Gisborne minute book 29, pp314–316 (doc A5, pp 22–23)

Wi Pere, Heni Kara (Mrs Carroll), and Wi Pere Halbert also gave evidence at the hearing. Pere said that Waiohiharore 3 and Awapuni 2 had been reserved to Maori for firewood gathering and 'for the benefit of the Maori people. My section of the people have no land near the sea'.³⁹ Heni Kara said that there was a Maori settlement by this land, and some graves on it.⁴⁰ Wi Pere noted that 'There are more suitable places for a cemetery'.⁴¹ Thomas Chrisp, reminded the court that the hearing was only for compensation purposes, and not to oppose the taking which was now complete anyway.⁴²

The court agreed that the land was valuable to Maori because they used it to obtain fuel and timber. The court noted that it was 'the only partition of the sea shore extending from the Port to the Awapuni Lagoon which had not passed from their possession', and granted a total compensation package of £961 4s 10d for 52 acres two roods 23 perches. The compensation ranged from £10 per acre (for Awapuni 1, section 1B) to £22 per acre (for Waiohiharore 3 and Awapuni 2).⁴³ Around the time of the hearing, the owners had also thrice petitioned Parliament about the taking. The native affairs committee had, in August 1904, 'no recommendation to make' regarding the three petitions.⁴⁴

It is unclear what the land was used for until 1913. In that year, a new site was purchased for a new cemetery. The Awapuni site was never used for the purpose for which it had been taken. The Gisborne Borough Council had decided, in 1910, to ask its engineer to review the suitability of the site for a cemetery. The engineer reported that the land was 'unsuitable for the purpose' because he had found water from within 18 inches to six feet of the surface. In 1911, the borough council therefore published a request in the local newspaper for offers of suitable land, of around 25 acres. By 1913, the mayor reported that a very suitable site of 20 acres had been found on the banks of the Taruheru River, opposite the still current cemetery at Makaraka. The ground of the new site was high with good drainage. The cost for acquiring the new site seems to have been around £2000, or approximately £100 per acre.⁴⁵ In 1913, therefore, the council was able to acquire a more suitable site at a negotiated price, and without resorting to a compulsory taking.

The Awapuni land taken in 1902 was not offered back to the original owners. By section 125 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1913, the Gisborne Borough Council was deemed to hold the land as 'a reserve for general utility purposes' – that is, for any purpose the borough council wished to use it. From 1944, a plantation of pines was situated on at least part of the land. Some of the land was used as a dumpsite until the late 1960s or early 1970s. At present the land is known as Watson Park, and contains

39. Evidence of Wi Pere, 12 June 1903, Gisborne minute book 29, pp 309–310 (doc A5, p 20)

40. Evidence of Heni Carroll, 12 June 1903, Gisborne minute book 29, p 311 (doc A5, p 21)

41. Evidence of Wi Pere, 12 June 1903, Gisborne minute book 29, p 316 (doc A5, p 23)

42. Evidence of Thomas Chrisp, 15 June 1903, Gisborne minute book 29, p 313 (doc A5, p 21)

43. Decision of Native Land Court, 20 June 1903, Gisborne minute book 29, pp 338–340 (doc A5, pp 24–26)

44. AJHR, 1904, I-3, p 18 (doc A5, p 28)

45. Ibid, 29–32

the Awapuni Stadium (situated on the old dump), a children's adventure playground, and Watson Park proper.⁴⁶

(6) *Further Awapuni takings: for harbour works and the airport, 1924–52*

In 1924, a total of five acres was taken from parts of Awapuni for harbour works, and vested in the harbour board. The land included 1J1, 1G2, 1G3, A1B, and B1. The Native Land Court determined compensation at £45 for 1G2, £10 for 1G3, and £77 5s for A1B.⁴⁷

The uses for which the land was taken were changed. In 1951, some of the taken land was used for the southward extension of Gisborne Airport and the associated realignment of Awapuni Road. In 1957, the remaining one acre three roods 11.1 perches of harbour board land was purchased by the Crown to form part of the Awapuni Lagoon farm settlement of the Lands and Survey Department. This portion later became part of the Awapuni Moana block, and has since been transferred back to Maori ownership. There is no evidence that the owners were consulted either prior to the taking of these lands or when they ceased to be held for the purpose for which they were taken and used for another purpose.⁴⁸

In August 1952, the whole of Awapuni 1F3 (one acre one rood two perches) was taken under the Public Works Act 1928 for a transmitter station and radio beacon site. The Air Department was particularly anxious to obtain the new site because of the upcoming royal tour. When proposing the taking, the district commissioner of works noted that 'as the land is owned by numerous Maoris, the compulsory provisions of the Public Works Act 1928 would have to be invoked'. Prior to the taking, a notice of intention to take the land was served on nine of the 15 owners. The notice of intention and a plan showing the site were displayed at the Gisborne Post Office for the statutory period of 40 days. It appears that no objections to the taking were received. The land was not occupied for any of the purposes listed under section 18(b) of the Public Works Act 1928, nor was it reported to contain burial grounds.⁴⁹

The Native Land Court awarded compensation of £120 plus 4 per cent interest. In January 1953, £125 16s 9d (less a rates debt of £2 11s 7d) was paid to the Maori Trustee.⁵⁰

(7) *Awapuni A: taking for the aerodrome and roads*

In October 1877, the Native Land Court awarded the 180-acre two-rood Awapuni block to Whanau a Kai and Ngai Te Kete.⁵¹ In May 1881, the block was partitioned into the Awapuni A and Awapuni B blocks. Awapuni A was then further partitioned. In October 1884, five acres of

46. Document A5, pp 32–35; doc G17, p 23; doc A13, p 43

47. Document A13, pp 44, 48; doc G17, p 29

48. Document A13, pp 45, 48–49

49. Document A13, pp 45–46; doc G17, pp 34–36

50. Document G17, p 36. Note that Alexander says that compensation of £137 10s was paid in December 1953: doc A13, pp 46–47.

51. We note that Awapuni A and Awapuni B were separate blocks.

Awapuni was taken for roading purposes under the 5 per cent provisions of the public works legislation. Land was subsequently taken for the aerodrome and railway.⁵²

In August 1937, nearly 140 acres had been taken from the Matawhero 1 block for aerodrome purposes under the Public Works Act 1928. With the outbreak of the Second World War, it was decided to extend the runway southwards towards Awapuni Lagoon. In 1942, five acres 0.7 perches of Awapuni A2, section 7, was taken for this purpose under the Public Works Act 1928. (In 1941, one acre 39.4 perches had already been taken from Awapuni A2, section 7, for the Gisborne to Napier railway). Two-thirds of the section was owned by a European and a third was owned by Te Nahu Wehi. The European owner and his mortgagor were notified of the purpose of the taking: Te Nahu Wehi was not.⁵³

In 1944, the Native Land Court awarded the Maori owner £75 compensation. The total comprised £10 for the one-third share in the section taken for railway purposes in 1941, and £65 for the taking for aerodrome purposes in 1942, as well as occupation of and damage to the residue of the section while it was used for defence purposes. The European owner was paid £210 for his portion (£190 plus interest), which included compensation for occupation of the whole block by the Air Force, and as compensation for the use during the war of other land owned by him. The Public Works Department's land purchase officer had argued that occupation of the section during the war had not impacted on Te Nahu Wehi, as Wehi had not been in occupation himself.⁵⁴

Wehi's portion of Awapuni A2, section 7, that was not taken for railway or airport purposes, was left without a road frontage. An accessway of 13 perches was to have been vested in him, but it was instead declared to be Crown land and set aside for the aerodrome. It appears that access may have been gained through neighbouring land. In 1963, land was taken by mutual agreement to provide access to the section, but by this point it was owned by the European owner of the other two-thirds, who had purchased the land in 1960.⁵⁵

In 1958, the lands taken for defence purposes (which included Awapuni A2, section 7) was set apart for a civilian aerodrome. In 1970, the lands taken under the Public Works Act for Gisborne Airport ceased to be held under that Act and were declared to be Crown land. There appears to have been no consultation with the owners of Awapuni A2, section 7, when the land was no longer necessary for defence purposes, and when the legal status of the land was changed, just as there had been no consultation with the Maori owner prior to the taking.⁵⁶

52. Document A13, p48

53. Ibid, p50; doc G17, p30

54. Document G17, pp30–31; doc A13, p51

55. Document A13, pp50–52; doc G17, pp31–32

56. Document A13, p53; doc G17, p32

12.3.2 Paokahu (Centennial Marine Drive)

In about 1944, 69 acres one rood 38.9 perches of land was taken, primarily from the Paokahu blocks, under the Public Works Act 1928 for roading purposes.⁵⁷ This land was made up of 23 acres two roods 9.9 perches of Maori-owned land (this also included parts of Awapuni 1, sections 1H and 1K, which had been the subject of an earlier taking in 1902 – see above), two acres 23 perches of Awapuni Lagoon, one acre three roods 15 perches of European-owned land, and 43 acres one rood 31 perches of accretion, the title of which had not yet been allocated.⁵⁸

A notice of intention to take land was published in the *New Zealand Gazette* in 1943, and displayed in the county clerk's office with the instruction that objections should be sent in writing to the clerk within 40 days. The clerk reported that there had been no objections. A Public Works Department officer reported to the under-secretary that all statutory requirements had been complied with.⁵⁹

There is no record that the owners of the Paokahu or Awapuni subdivisions were consulted by either the Cook County Council or the Crown prior to this land being taken for roading purposes.⁶⁰

The Native Land Court awarded no compensation on the grounds that the owners would receive considerable benefit from the road. However, the Paokahu lands were under lease, and therefore the owners would not benefit from the roading through the period of the lease.⁶¹

In 1974, 28 years after the land was taken, a strip of Paokahu between the road and the sea not in use for roading was declared surplus to roading requirements. Acting on advice from officials, and after two years of negotiation with representatives of the Maori owners, the Minister of Lands and the Minister of Maori Affairs decided that the strip of land should be returned to its former owners. This was now Government policy, and section 436 of the Maori Affairs Act 1953 provided the precedent for such a move. When the Minister of Lands applied to the Maori Land Court to have the land revested, the Cook County Council, which had previously sought to have the land reserved for recreation purposes, sought a Supreme Court review of the Crown's decision. After legal investigation, it was found that the Minister's application was *ultra vires*, since it was the land settlement board's legal responsibility to lodge the application with the Maori Land Court. The Minister's application to the Maori Land Court was withdrawn, but the Minister advised the land settlement board that it was his wish that the strip be revested in its former owners.⁶²

The land settlement board approved the Minister's request in March 1975. The Cook County Council then sought a rehearing of this decision. A case was stated to the Supreme

57. Document G17, pp32–33; doc A13, p55

58. Document A13, p55; doc G17, p33

59. Document G17, pp33–34; doc A13, p55

60. Document A13, pp54, 56–57

61. Ibid, pp57–58; doc A14, p30

62. Document A13, pp58–70

Court on two legal matters and, in 1977, the court confirmed that the board did indeed have the authority to approve the revesting in the former Maori owners. The issue of whether to revest the strip of land in the former owners fell to be considered by the new Minister of Lands following the 1975 election. Both the former owners and the Cook County Council lobbied the new Minister. In 1978, the land settlement board approved a recommendation by its own committee that the strip of land be revested in the former owners. An application for a revesting order was put before the Maori Land Court. At the hearing of the revesting application, the Cook County Council unsuccessfully sought an adjournment to allow an investigation by the Ombudsman into the administrative actions of the land settlement board. The court made the revesting order. The revested strip was given the new appellation of Kopututea 1 and 2. It consisted of a combined area of 14.1390 hectares and had 647 owners.⁶³

The process of ensuring the return of the lands was time-consuming and expensive, even though the lands were no longer required for the purpose for which they had been taken. The representatives of the owners received no compensation at any point for the taking of Paokahu.⁶⁴

12.3.3 Land taken from Paokahu for a refuse tip

In 1970, the Gisborne City Council publicly notified its intention to take 362 acres two roods 23 perches of Paokahu for the purposes of a refuse tip, and for future use as a recreation area. (This followed a 1955 proposal to take Paokahu 4 for a rubbish tip. This proposal had been shelved.⁶⁵) Of the 362 acres of the overall Paokahu land proposed to be taken, Maori owned 321 acres. The Mangatu Incorporation took a key role in seeking to retain the block in Maori ownership. In 1971, the Maori Land Court appointed the Mangatu Incorporation as the section 438 trustee for Paokahu 5 and 6, which consisted of 522 acres. As part of its role as trustee, the incorporation was charged with taking 'all steps necessary to oppose the taking of the land'.⁶⁶ Alexander noted that the incorporation was prepared from 1970 to consider a lease of the land, although it was adamantly opposed to the land being taken out of Maori ownership.⁶⁷

The Gisborne City Council applied to the Cook County Council for planning permission to have the area rezoned for a refuse tip. The hearing took place in July 1972. The county council ruled that only 50 acres should be set aside for the refuse tip. The Mangatu

63. Ibid, 70–77

64. Ibid, p80

65. Ibid, p82

66. Document A18, pp466–467, 469; doc A14, p89; doc A13, pp84, 87. Note various Paokahu subdivisions had been consolidated into Paokahu 5 and 6 in February 1970.

67. Document A13, pp85, 88

Incorporation appealed the taking of any land; the city council appealed on the basis that it required the whole 321 acres.⁶⁸

The city council's appeal was dismissed in 1973. Negotiations for a lease of the land carried on through 1974, and, in 1975, a lease of 50 acres of Paokahu 5 and 6 for 15 years at an annual rental of \$1000 for the first five years was agreed between the Maori Trustee and the Gisborne City Council. The rent would be reviewed both at that point and again after 10 years. If the whole 50-acre site had not been utilised after the 15-year term, then the lease could be extended for up to 10 years until the 50-acre site had been fully used. Only an area of 10 acres at a time was to be used for refuse disposal, and this area was required to be fenced. The remaining 40 acres was to continue to be farmed, and as tipping was completed on each site, it was to be regressed and returned to farming. In 1980, on review, the rental was increased to \$2200 per annum.⁶⁹

12.3.4 Land taken for a railway

In addition to the 1900 taking of all of Waiohiharore 1D and Waiohiharore 2 (see above), a number of sections of blocks were taken under the public works legislation for railway purposes in 1930. We discuss all the 1930 takings together in this section.

In 1930, the centre line for a proposed route for the Gisborne to Napier railway line was proclaimed, though work halted until 1935. The main taking of land for this railway was pursuant to the Public Works Act 1928 for the Gisborne to Waikokopu section of the line.⁷⁰ The table opposite shows the areas of land that were taken, and the compensation awarded by the Native Land Court in 1944.

Once the land was proclaimed and prior to the land actually being taken, the owners could not do anything with their land that might interfere with the completion of the railway, such as construct buildings. The Crown could, on the other hand, enter the land and even begin construction. In these takings, the land taken was not even proclaimed until after the works were constructed. The owners objected, unsuccessfully, to the taking at the Native Land Court hearing to decide compensation, but as this was not until 1944 the taking had already been completed. The former owners also complained that the compensation offered was too low, but ultimately accepted the Crown's offer.⁷¹

68. Document A18, p 473; doc A13, pp 86–87

69. Document A14, p 90; doc A13, pp 89–90

70. Document G17, p 30

71. Document A13, pp 92–94

Block	Area	Compensation	Comment
Awapuni A2 sub 7	1a 39.4p	£75	Including portion taken for airport
Awapuni A2 sub 4A3	1r 10.1p	£8 2s	
Awapuni A2 sub 4A2	2r 22.6p	£24 6s	
Awapuni A2 sub 1	2r 8.1p	£30	
Kaiparo 3	2r 30.8p	£28	
			£20 awarded to the Maori owners and £8 to a European lessee
Wharaurangi 4D	1a 5.6p	£35 1s	£13 awarded to the Maori owners, and £10 to a European lessee
Wharaurangi 4E	25.6p	£4 10s	
Wharaurangi 3	2r 13p	£23	
Wharaurangi 2	3a 6.8p	£114 15s	Plus access to be provided to the severed portion
Ruaotaua 7C2A	29.4p	£2 14s	
Ruaotaua 7C2B1	3r 17.8p	£13 10s	
Ruaotaua 7C2B2	1r 37p	£8 2s	
Ruaotaua 7C2C	1r 2.4p	Unknown	
Ruaotaua 7C roadline	14.3p	£2 14s	Plus access to be provided to the severed portion

12.3.5 Puninga takings

(1) Part Puninga 3A2 and 3B1 and part section 3, Maraetaha 2: takings for waterworks, 1947

Land totalling 140 acres three roods 9.3 perches was taken in 1947 for a new, consistent water supply for Gisborne. Some of the written material for the taking is not present on the relevant file, as the borough council had requested that the material be returned from the Public Works Department. The *Gisborne Herald* ran an article on the proposed new waterworks in 1942. In November 1945, the town clerk forwarded various procedural documents, including a newspaper advertisement, to the Public Works Department. The town clerk received two written objections. After talking to the objectors, the town clerk stated that both Mr Taipihī and Mrs Pohatu had agreed not to pursue their objections.⁷² He also sent a statutory declaration from the mayor stating that the council had complied with all relevant provisions of the Public Works Act 1928. The office solicitor of the Public Works Department then forwarded all the material to the under-secretary of the department, stating that 'all statutory requirements had been complied with'.⁷³

On 17 June 1947, the Governor in Council signed a proclamation taking 10 acres two roods 16.3 perches of Part Puninga 3A2, 58 acres 35 perches of Part Puninga 3B1, and 71 acres two roods 78 perches of section 3, Maraetaha 2, under the Public Works Act 1928. The taking was gazetted, and advertised in the *Gisborne Herald* on 9 July 1947.

⁷². Document G17, p38

⁷³. Ibid, p39

(2) Lot 1 DP3892 Part Puninga 3A2: taking for waterworks, 1950

In 1950, a further three roods 36.5 perches of Part Puninga 3A2 was taken for the waterworks project under the Public Works Act 1928. As with the earlier Puninga taking, the town clerk forwarded material, including a statutory declaration and a newspaper advertisement, to the Public Works Department, stating that no objections had been received and that all the provisions of the Public Works Act had been complied with. The Gisborne resident engineer also sent a memorandum to the district engineer stating that there were no objections to the taking and that no buildings or burial grounds were located on the land to be taken. The Governor in Council signed the proclamation taking the land on 23 December 1949, and the taking was gazetted in early 1950.⁷⁴

12.3.6 Umukapua A2 – deviation at Manutuke

When the decision was made to build a road bridge across the Te Arai River, the survey indicated that the new road would pass over Maori-owned land. In 1929, one rood 33.9 perches was taken from Umukapua A2 for the construction of the bridge. In 1931, a new line was taken for a road south of Manutuke. The amount of any compensation for both takings is unknown.⁷⁵

In 1958, land was again taken when the state highway was realigned to bypass Manutuke township. Some of the land taken was used for gardens and cultivations and, therefore, under the legislation, required the consent of the Governor-General prior to the taking. Consent was given. Further land was taken for roading in 1959 and 1960. It is not known if compensation was awarded for these takings.⁷⁶

12.3.7 Te Arai Matawai

A road running along the Waimata Valley went predominantly through Maori-owned Te Arai Matawai (returned by the Poverty Bay Commission – see chapter 8), on the southern side of the river, rather than through the Crown land on the northern side. A small realignment of the road was surveyed in 1897, and in 1907, 46 acres of Te Arai Matawai was taken for an extension of the road. There is no record of any consultation, nor of compensation being paid for the taking.⁷⁷

74. Document G17, pp39–40

75. Document A13, pp110–112

76. Ibid, pp111–112

77. Ibid, p113

12.3.8 Ruangarehu

In 1972, land was taken from Ruangarehu 1, A, D, F, and H1 for the deviation of the Gisborne to Whakatane main highway. According to the department's records, the owners were not informed or consulted. It appears that the owners received notification only when the taking was published in the *New Zealand Gazette*, on 20 November 1972.⁷⁸

12.3.9 Waiohiharore C2D

In 1950, half an acre was taken from Waiohiharore C2D, C2E, D7, and D9 to provide access to Awapuni Public School. Access had previously been by the courtesy of the owners of adjoining land. The Native Land Court ordered compensation of £13.⁷⁹

12.4 THE CROWN AND CLAIMANT CASES

12.4.1 The Crown's case

Crown counsel argued that 'from time to time, the Crown has obligations under article 1 of the Treaty to acquire land compulsorily in the public interest to provide public works'.⁸⁰ The Crown, counsel said, therefore had to balance the acquisition of land with its obligation to protect rangatiratanga. Counsel acknowledged that 'the Crown must adequately consult with Maori and, where possible, protect Maori rights and interests in land the loss of which would have major adverse social, cultural, and economic impacts for Maori'.⁸¹

Counsel presented four key arguments. First, counsel said that the Crown was justified in taking Maori land for public works, given the need for growth and the development of infrastructure in the region.⁸² Counsel did, however, acknowledge that in two cases – the taking of nearly 46 acres of land (from Awapuni 1, section 1E; Awapuni 2; Waiohiharore 3; and part of Awapuni 1, sections 1A and 1F) for a public cemetery in 1902, and 27 acres two roods of Waiohiharore A, B, C, and D for public health purposes – the justification 'may have been insufficient'.⁸³ Secondly, the Crown noted the lack of consultation with the owners of Maori land prior to the middle of the twentieth century.⁸⁴ Thirdly, counsel argued that

78. Document A18, pp 463–464

79. Ibid, p 464

80. Document H14(24), p 4

81. Document H14(4), p 4

82. SOI24.2.1 (doc H14(24), p 11)

83. Document H14(24), pp 11–12. The Crown acknowledged, with regards to Waiohiharore, that 'it appears that the Council justified taking this land because it was Maori land not held under a Land Transfer certificate of title and therefore subject to different objection and compensation procedures under the Public Works Act 1894': doc G17, pp 16–21; doc H14(24), p 12.

84. Document H14(24), p 7

compensation was assessed by the Native Land Court. It was acknowledged, however, that in the case of Waiohiorore 1, where the land was taken for a navigation beacon and lights reserve, the compensation may have been inadequate or even not paid.⁸⁵ And, fourthly, the Crown acknowledged that, on occasion, the Crown was tardy in returning land to Turanga Maori when it was no longer required for the purpose for which it was taken. Counsel cited the Centennial Marine Drive acquisition as an example. The Crown noted that, in general, it has always been permissible to use land acquired for one purpose for another, if either the first did not work out or the first purpose did work out but another was deemed more important.⁸⁶ The Crown argued that assuming an offer-back after each purpose had been met would be unreasonable.

12.4.2 The claimants' case

Claimant counsel also presented four arguments. First, that public works takings can be justified only where there were no alternatives.⁸⁷ Secondly, that there was no evidence that Turanga Maori were consulted prior to the taking of land for public works – a point on which the Crown seemed to claimant counsel to agree, as the legislation failed to make consultation a requirement for public works takings of Maori land. Thirdly, counsel noted where the take was less than 5 per cent, Maori were not compensated for land lost, and that, furthermore, when Maori were compensated in the twentieth century, the rate was considerably lower than that sought by the owners.⁸⁸ And, fourthly, counsel submitted that, once the land was no longer required, it should have been returned to the original owners rather than being transformed into another public works taking.⁸⁹

12.4.3 Tribunal finding and analysis

The evidence presented to us on public works was limited. The Crown and claimant historians provided information on the block histories of some public works takings, but no evidence as to why particular pieces of land were chosen. We do not know whether specific

85. As we have noted, the land in question was believed by all involved to have been taken in 1893 by the *New Zealand Gazette* notice. Consequently, no compensation was assessed or awarded at this time. See section 12.3.1 above for details of this taking.

86. Document H14(24), p 22

87. Document H3, p 73

88. Document H1, p 111; doc B13, p 49. Claimant counsel referred to public works taking by the council in 1944 for roading purposes. In 1947, the Native Land Court ruled that no compensation was payable to the owners of Paokahu and Awapuni 1K because the blocks would benefit from the residential development enabled by the construction of the roading: doc H1, p 111; doc H3, p 74. Alexander describes this decision as being based on the 'betterment principle': the court's rationale for awarding no compensation was that the proposed road would improve the value of the lands and be of benefit to the owners: doc A13, p 58; doc H3, p 74.

89. Document H3, p 74. Claimant counsel noted that the Gisborne Domain Board took over land that was originally taken for the railway, and that land that was taken for a cemetery is now a playing field.

sites chosen for roads or the railway, for example, were taken because of technical requirements. We are therefore unable to comment generally as to whether Turanga Maori land was targeted in public works takings. We can, and do, comment on whether the takings were justified, but our comments on the issues raised in the submissions and on the principles of public works legislation can be only general in nature.

We now turn to our four key questions in relation to public works takings:

- ▶ whether the acquisition of Turanga Maori land for public works takings was justified;
- ▶ whether the owners of Turanga Maori land were consulted, prior to their lands being taken;
- ▶ whether Maori were disadvantaged in terms of the compensation they received for land taken for public works; and
- ▶ whether land taken for public works was returned to Turanga Maori once it was no longer required.

We first address the issue of whether the Crown was justified. The relationship between the compulsory acquisition of Maori land and the central principle of the Treaty of Waitangi (that is the exchange of the right to *kawanatanga* for the guarantee of *tino rangatiratanga*) has been addressed in the *Turangi Township Report 1995*. We can do no more than repeat that Tribunal's findings:

if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in *exceptional circumstances and as a last resort* in the national interest. [Emphasis added.]⁹⁰

Plainly, this is the correct standard to apply to public works takings in this inquiry. In order to be justified, takings must be exceptional.

The Crown has conceded that, in two instances, the justification for the taking of certain Awapuni and Waiohiorore lands for a cemetery and the taking of parts of Waiohiorore A, B, C, and D for public works 'may have been insufficient'. We agree. The land was taken from unwilling owners, who objected to the take, and stressed that this land was valuable to them. Furthermore, the Gisborne Borough Council did not need to compulsorily acquire land for a replacement cemetery. In 1913, it acquired a suitable section by negotiation.

The taking of part of the four-acre one-rood 12-perch section from Waiohiorore 2 in 1913 for railway purposes also falls in this category. The Railways Department agreed that three acres and 14 perches which lay between Awapuni Road and the sea was no longer required and declared it to be 'untagged Crown land'.⁹¹

As we have said, we know too little about the majority of takings in Turanga, and especially those takings by local authorities, to comment directly on most of the individual takings. It is

90. Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995) p285

91. Document A13, pp15, 19

apparent, however, that, in these two cases, the appropriate standards were not met. We find accordingly and recommend therefore that the Gisborne District Council (now the owner in both cases) and the former Maori owners discuss how best to rectify the situation.

We now turn to the question of consultation. We note that this general issue is dealt with comprehensively in the *Napier Hospital and Health Services Report*.⁹² While there is no general duty of consultation with Maori in the formulation of policy that may affect them, there is no question that the Crown must at the very least consult with Maori landowners before compulsorily acquiring of their lands *in prima facie breach of the article 2 promise of exclusive tribal possession*.⁹³ The Crown acknowledged that there appears to have been no general practice of consultation with Maori owners before compulsory takings were effected in Turanga.

The third issue was that of compensation. In most of the examples we have been referred to, compensation was paid as directed by the Native Land Court. However, we note the example identified by counsel, of the taking of Paokahu and Awapuni 1K in 1944 for roading, where the court declined to direct compensation. We have also been referred to the takings of up to 5 per cent of Crown-granted blocks for roading, for which compensation was not payable under legislative provisions. The Crown has itself acknowledged that in order to achieve an appropriate balance between article 1 kawanatanga and article 2 rangatiratanga, the Crown must be measured in its approach to compulsory takings, and must pay fair market compensation.⁹⁴

Finally, we consider whether the Crown is justified in retaining lands taken compulsorily but no longer required. It is clear from the evidence presented to us that, historically, land taken under Public Works Acts and subsequently not required was not returned to Turanga Maori. In general, it was retained and used for other purposes or sold. We acknowledge that the legislation did not always provide for such lands to be returned. However, we believe that such a provision should have been required by a Crown Treaty partner striving to actively protect Maori in the retention of their lands. It is our view that land taken compulsorily should be returned, or offered back to the original owners or their successors as acknowledged in principle in the Public Works Act 1981. We find accordingly.

92. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p68

93. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665, 683 (Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p67)

94. Document H14(24), p4

CHAPTER 13

RATES

13.1 INTRODUCTION

The Rongowhakaata and Te Aitanga a Mahaki claimants allege that some of their land was compulsorily sold or taken from Maori management for a period of time to cover rates arrears, as was allowed for in the rating legislation. However, neither the claimants nor the Crown supplied us with full details of land at Turanga affected by rates arrears. We are therefore unable to make particular findings in relation to SOI25 on rating issues, nor to answer the key question of how much Maori land was lost in Turanga, either temporarily or permanently, due to rates.

For the sake of completeness, we provide a brief background to the rating of Maori land, and an even briefer narrative of the sales and receiverships we were made aware of, with the arguments of the parties set out, and a commentary by the Tribunal.¹ This is followed by a separate section on the claim of Robert Kotuku Cookson and his late wife, Huinga Jane Cookson, into the rates charged against Karaka 16A under the Rating Powers Act 1988. Mr and Mrs Cookson argued that a larger area of land should have been assessed as constituting a meeting place, and therefore should have been exempted from rating, than was assessed and exempted.

13.2 MAORI AND RATING LAW – A BRIEF BACKGROUND

Early rating legislation was concerned with raising revenue for the construction of roads. Maori land was exempt from much of the early rating legislation. In general, until 1893, only Maori land that was occupied by a non-Maori was liable for rates, which were usually borne by the occupier – usually a Pakeha lessee. Increasingly, however, local authorities were charged with funding their own local public works. This meant that they were ever anxious for Maori to contribute rates revenue, especially in areas with significant Maori populations. Local authorities regularly complained to central Government that, even when Maori were

1. For a full discussion of the rating legislation and Maori land, see Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series 1997. See also the evidence of Robert Hayes to the Hauraki Tribunal (Wai 686 ROI, doc R15).

liable for rates, it was very difficult to get Maori to pay them, especially on multiply owned land (ie, land owned by many owners as tenants in common, often with undefined shares).²

Local authorities pressured Government to spread the burden of rates equally on Maori and non-Maori. Conversely, the Maori (and some Pakeha) members of Parliament argued that the imposition of rates on Maori was unfair. These arguments took several broad approaches. One common argument was that Maori had already contributed to local and national infrastructure by originally selling land cheaply to the Crown, and that they had not requested many of the roads and railways which were said to have increased the value of their land and which they were being rated for.³ Moreover, due to title difficulties, it was, as Ngata maintained in 1927, very difficult for Maori to utilise their land, make it productive, and therefore capable of attracting rates.⁴

In recognition of the particular problems facing Maori in the use of their land, the rating legislation exempted customary Maori land (if not occupied by a European) from rating at all times. It did not allow the sale of other Maori land to cover rating debts until 1893 (usually such sales required the consent of the Native Minister). In addition, the Native Minister could exempt Maori land from rates if its owners were particularly poor. Freehold Maori land, on the other hand was expected to be rated in the same way as general freehold land. From 1893, Crown granted Maori land could be sold to cover rating debts, or be placed in receivership and leased until the rating debt was fully paid.

The Native Land Rating Act 1924 marked a new phase in the rating of Maori land. It followed many of the recommendations of a Government committee that had met earlier in the year to consider ‘this most difficult and thorny question’.⁵ The committee concluded that ‘the only solution of the Native rating problem must be bound up with the profitable occupation of Native lands’, and strongly recommended that the Native Land Court be used to determine, on an individual basis, what Maori lands were to be rated and how to recover those rates.⁶ Under section 4 of the 1924 Act, aside from customary land, all Maori land was liable for rates, with the specific exceptions of land on which an urupa, a meeting house, or a church was situated (all exceptions not exceeding five acres).

Rating legislation in the second half of the twentieth century was concerned with bringing ‘unproductive’ Maori land into production, and therefore making it able to bear rates.⁷ Under the Rating Act 1967, the Maori Land Court could consider the alienation of a block of freehold

2. Evidence of Robert Hayes (Wai 686 RO1, doc R15), p19

3. Ibid, pp11, 18, 23. See, for example, the NZPD, speeches of Henare Tomoana, Hone Mohi Tawhai, and Major Te Wheoro in 1882; Hone Heke and Mahuta Te Wherowhero in 1904; and Maui Pomare in 1924.

4. Ibid, pp25, 27

5. Prime Minister Coates (Wai 686 RO1, doc R15, p22)

6. Ibid, pp21–22

7. Tom Bennion, *Maori and Rating Law*, Waitangi Tribunal Rangahaua Whanui Series, 1997, pp71–72. See, for example, the recommendations of the Pritchard–Waetford committee and the debate that ensued in Parliament and led to the consequent Maori Affairs Amendment Act 1967.

Maori land in order to promote its 'effective and profitable use'.⁸ This provision was repealed by the Maori Purposes Act 1970.

The Rating Powers Act 1988 was intended to consolidate the rating power of different types of local authorities. The exemptions of up to five acres (2.03 ha) for meeting houses, marae, and urupa were retained. The exemption of customary land from rating also remained, and the power to sell Maori land for rating debt was removed.⁹

An important new piece of rating legislation was passed in 2002 in the form of the Local Government (Rating) Act 2002. We note that no submissions were heard on this legislation in the Turanga inquiry, as hearings finished prior to the introduction of the Act.

Like previous legislation, the 2002 Act stated that Maori freehold land was liable for rates in the same way that general land was. The Act provided for owners to be listed as ratepayers, for trustees to be charged for rates on rateable Maori freehold land, and for those using Maori freehold land in multiple ownership to be charged accordingly (ss92–94).

Maori land could be exempted from rates under certain conditions. First, the Governor General, by Order in Council, could exempt Maori freehold land, on the recommendation of the Maori Land Court. The local authority of the land in question had to consent (s116).

The Act did provide for a number of non-rateable categories. This was a general list, rather than a specifically Maori one. Land not exceeding two hectares that was used as a cemetery, burial ground, crematorium, or Maori burial ground was classified non-rateable, as was Maori customary land. Land used for a marae or meeting place or upon which a meeting house was erected (if less than two hectares) was also non-rateable (sch 1, cls10–13).

13.3 RATES – A CAUSE OF THE LOSS OF MAORI LAND AT TURANGA?

We were provided with only a limited number of examples of the effect of rating in Turanga. We do not know if the examples given are the only blocks of Maori land at Turanga that were affected by rates arrears, or, if not, how representative they are of the effect of rates as a whole.

The following Te Aitanga a Mahaki lands were sold either by arrangement or, in one case, compulsorily, owing to rates.

- ▶ Two interests in Waiohiharore A2B were sold by the owners in September 1914 because their interests were of 'no use to the owners', and because they had a rates debt of £15 2s 9d.
- ▶ In September 1916, the Poututu B5 block was sold to the Wi Pere trust (whose lands completely surrounded Poututu B5). The block owed rates and, it was said, 'could not be used in its current state'.¹⁰

8. Ibid, p72

9. Ibid, p73

10. Document A18, p346

- ▶ A charging order was made in favour of the Gisborne Borough Council over Waiohiharore B block (11 acres four perches) in May 1926 because of unpaid rates amounting to £61 13s. The block was subsequently vested in the Native Trustee for sale, as the owners did not object to its sale – ‘the land with its heavy rates is a burden to them’.¹¹
- ▶ In 1927, the Waiohiharore A3, A4A, and A4B blocks also had charging orders over them in favour of the Gisborne Borough Council for over £100 in total. The land was leased to a European who was responsible for paying the rates. But the lessee had died, leaving his financial affairs in disarray. The block was sold, with the new owner paying the outstanding rates.¹²

The following information is available for Rongowhakaata blocks:

- ▶ Eighteen charging orders were granted to two local authorities (the Cook County Council and the Gisborne Harbour Board) for rates arrears for the two-acre 16-perch Aohuna A1 block.¹³ The cumulative total owed from 1932 to 1950 was £29 16s 6d. In 1953, the Maori Land Court appointed the local county clerk to act as a receiver.
- ▶ Similar orders were made for the Aohuna D4A2 and D4B blocks. The blocks were leased to generate an income for rates.
- ▶ Four subdivisions of Paokahu 3 block were put into rates receivership in 1933.¹⁴ They were leased to Ernest Harden in 1934, for a term of 21 years. The amount owing for all four blocks at 1936 was £21 18s 11d. The Tairāwhiti Māori Land Board paid this amount from the rents received, plus an additional £49 that was also found owing. After two years, the rent had paid the accrued debts. The lease then continued for the full 21-year period.¹⁵

13.4 THE CROWN’S CASE

The Crown submitted two arguments. First, that the imposition of rates was not the major factor in terms of the sale of Māori land. The sale of Māori land under the Rating Act 1925, counsel argued, was a very rare step and the jurisdiction was only exercised after significant procedural requirements were fulfilled. Furthermore, no evidence had been presented that suggested that such a power was exercised in Turanga.¹⁶ Secondly, counsel argued that it was legitimate to enter into a lease agreement that required the lessee to pay off rates arrears, when

11. Document A18, pp 345–346

12. Ibid, pp 346–347

13. Document A11, pp 34–36. There is confusion in document A11 as to whether this refers to Aohuna A1 or A2.

14. The four blocks – 3A (6 acres 2 roods 31 perches, with two owners), 3B (20 acres 13 perches, with three owners), 3D (33 acres 1 rood 35 perches, with 10 owners), and 3H (48 acres 2 roods 7 perches, with 53 owners) – had not been leased in the 1920s and 1930s when the rest of the Paokahu 3 subdivisions were, and subsequently had not been paying any rates.

15. Document A11, p 36; doc A14, pp 4, 27–28

16. Document H14 (25), pp 10–11

the lease was for longer than was required to pay the debt. The owners were not prejudiced because they resumed charge of the land when the receivership ended. The Treaty guarantee of property was therefore kept.¹⁷

13.5 THE CLAIMANTS' CASE

Claimant counsel submitted two arguments. First, the rating of Maori coupled with the system of fragmented land holdings, was a contributing factor in the sale of Maori land.¹⁸ The sale of interests in Waiohiharore A2B in 1914, Poututu B5 in 1916, and Waiohiharore B2 in 1927 were cited as examples of this.¹⁹ Secondly, counsel argued that the appointment of rates receivers to lease Maori land in order to recover rates arrears removed control and management of Maori land out of the hands of the owners.²⁰

13.6 TRIBUNAL ANALYSIS AND FINDINGS

As we outlined in the introduction, this Tribunal is unable to make specific findings in relation to rating claims, as insufficient evidence was presented. There are, however, four things that we can state. First, we consider that Maori land should bear a fair share of the district's rates burden. Secondly, we are aware of the crippling effect on production and utility on Maori land as a result of the fragmentation of title and fractionation of ownership. Thirdly, no taking can be justified for non-payment but receivership is understandable. Finally, we note that the issue of rates takings was not a big one in Turanga.

13.7 RATES – THE COOKSON CLAIM

We turn now to the specific claim filed by Robert Kotuku Cookson. This claim relates to a piece of land, Te Karaka 16A. This land contained the home of Mr Cookson and his late wife, Huinga Jane Cookson, and their whanau. It comprised 2.7351 hectares.²¹

In 1992, Mr and Mrs Cookson applied to the Maori Land Court for the land known as Te Karaka 16A to be set aside as a Maori reservation. Mr Cookson explained later why this land was set aside: 'We decided to set the land aside as a meeting place for our whanau and uri.

17. Ibid, p8

18. Document H2, p150; see also doc H3, p75

19. Document A18, pp345–346

20. Document H3, p75

21. Document E13, para 48

A place where they could always find sanctuary and peace within their ancestral homeland. A place where we could keep the ahi ka (home fires) burning.’²²

On 2 October 1992, the Maori Land Court made a recommendation, pursuant to section 439 of the Maori Affairs Act 1953, that Te Karaka 16A be set aside as a Maori reservation.²³ On 3 December 1992, the *New Zealand Gazette* recorded that the land was now set apart as a Maori reservation ‘for the purpose of a meeting place for the common use and benefit of the whanau of Robert Kotuku Cookson and Huinga Jane Cookson and their descendants’.²⁴

By setting aside Te Karaka 16A as a Maori reservation for the purposes of a meeting place, Mr and Mrs Cookson believed that this land would be exempt from rates. The basis for this understanding was that the Rating Powers Act 1988 exempts certain categories of land, including land not exceeding 2.03 hectares in any one instance ‘set apart and used for the purposes of a marae or meeting place under section 439 of the Maori Affairs Act 1953 or any corresponding provision’ (sch 1, pt 2, cl 14(a)).

The Gisborne District Council, however, did not accept that Te Karaka 16A was exempt from rates and continued to levy them on the block. Since Mr and Mrs Cookson refused to pay these rates, the Gisborne District Council brought proceedings to recover \$2271.64, being the rates for Te Karaka 16A for the years ending 30 June 1994 and 30 June 1995.²⁵

The initial claim filed by the council was for \$2719.31, later reduced to the above figure.²⁶ A valuer from Valuation New Zealand, Mr Craig, determined that a portion of 4000 square metres (0.4 hectares of a 2.7-hectare title) should be regarded *actually* as being used as a meeting place, for the purposes of clause 14(a) of part 2 of the first schedule to the Rating Powers Act.²⁷ As a result, the rates for this 4000 square metre area were subtracted from the original claim.

In his affidavit, filed in support of the district council proceedings, Mr Craig explained why only 4000 square metres of the title was treated as non-rateable. Mr Craig recalled meeting with Mr Cookson on or about 26 February 1996 to discuss the designation of ‘a Maori reservation for the purposes of a meeting place’ under section 439 of the Maori Affairs Act 1953, and the effect of that designation on the rateability of a property.²⁸ According to Mr Craig, Mr Cookson indicated that the cottage built in 1984 was now used as a meeting place, and that the dwelling built in 1966 was Mr Cookson’s place of private residence. On the basis that the cottage built in 1984 was used as a meeting place, Mr Craig set about determining the

22. Document E13, para 65

23. *Ibid*, para 70

24. *New Zealand Gazette*, 3 December 1992, no 197, p 4392 (doc E13(a)(c))

25. *Gisborne District Council v Cookson* unreported, 1 August 1996, District Court, Gisborne, NP10/96 (doc E13(a)(f), p1)

26. *Ibid*, pp1–2

27. *Ibid*, p2

28. *Gisborne District Council v Cookson* unreported, 26 September 1996, District Court, Gisborne, NP10/96 (doc E13(a)(g), p1)

curtilage that should attach to this building. Mr Craig assessed an area of 4000 square metres, or one acre, as attaching to the land.²⁹

Notices of the new valuations were sent out to Mr and Mrs Cookson at the end of February 1996. These notices set out a specific period in which Mr and Mrs Cookson could object to the apportionment made pursuant to section 202 of the Rating Powers Act. According to Mr Craig, and no evidence was presented to dispute this point, Mr and Mrs Cookson did not file an objection to this apportionment.³⁰ Following the reassessment by Mr Craig, the district council reduced its claim as we have seen by \$447.67 to \$2271.64. The Cooksons made no payment.

The council's claim for rates arrears was heard before Judge Holderness in the District Court at Gisborne on 27 March 1997. Mr and Mrs Cookson argued that no part of Te Karaka 16A was rateable pursuant to section 6 of the Rating Powers Act and clauses 14 and 15 of part 2 of the first schedule to that Act.

For completeness, we note that one of the council's arguments was that the Maori Land Court had made an error in recommending that Te Karaka 16A be set aside as a Maori reservation and that this error was continued when the notice was published by Te Puni Kokiri in the *New Zealand Gazette*. This argument was that section 439(6) of the Maori Affairs Act 1953 provided that no land could be set apart as a Maori reservation while it was subject to a mortgage or a charge. It was the council's evidence that, when the Maori Land Court made this recommendation on 2 October 1992, Te Karaka 16A was subject to a mortgage to the Bank of New Zealand. By the time this mortgage was discharged on 27 May 1994, the land had been made subject to a charge for rates arrears. The reservation should therefore have never been set aside.

In a written decision, the District Court indicated to the council that it doubted whether the court had jurisdiction to review the recommendation of the Maori Land Court in establishing the Maori reservation. Judge Holderness was not prepared to go further than observing that on the evidence presented, the setting apart of the land as a Maori reservation may have been contrary to section 439(6) of the 1953 Act.

As to the issue of the reduced area of exemption, Mr Cookson explained to the court that the land is 'papa tipu' and that he and his wife do not regard themselves as 'owners' of the land but merely as custodians for future generations for the period of their lives. Mr and Mrs Cookson submitted that the whole of the land should be exempt from rates on the premise that they do not derive any economic benefit from the land and that it provides a meeting place for their mokopuna so that their whanau may strengthen and flourish. Judge Holderness recorded and affirmed Mr Cookson's explanation:

29. Ibid, p2

30. Ibid, pp4-5

Mr Cookson explained that in reality the land is ‘whenua rahui’ and that its value is in sustaining members of the defendants’ whanau, now and in the years to come. I have not the slightest reason to doubt what Mr Cookson emphasised namely, that the land will continue to be a place for members of the whanau (and their descendants) to gather, to talk and to receive sustenance for each other and from the land.³¹

The Cooksons argued that Valuation New Zealand had no understanding of these matters and even less right to impose arbitrary limitations. The District Court did not uphold the Cooksons’ arguments. Instead, the judge held that, in the absence of any objection by the defendants to the Valuer-General or the Land Valuation Tribunal, the Valuation New Zealand assessment must stand. Accordingly, the court entered judgment for the council in the sum of \$2271.64.

We begin by recording that, in this claim, it is not open to the Waitangi Tribunal to sit as a review or appeal court in respect of the judgment of the District Court in the case of the Cooksons’ land. The judgment obtained by the Gisborne District Court in 1997 is a valid judgment, legally enforceable in the normal way. We are given to understand that an appeal was lodged against that judgment, but the appeal has yet to be heard. The options available to this Tribunal in dealing with the Cooksons’ claim are therefore extremely limited, and frankly we are somewhat surprised that the time spent by counsel in prosecuting the claim was not more profitably spent in prosecuting the appeal.

We do, however, record that Mr Cookson vehemently denied before us that he had any conversation with Mr Craig of Valuation New Zealand which would have provided a basis for reducing the rating exemption on Te Karaka 16A to 4000 square metres. For the record, we produce in full the transcript of the exchange between the Tribunal and Mr Cookson in this regard.

Tribunal: I see that if you look at paragraph 4 they say that Mr Cookson identified the dwelling built in 1996 as being his own residence with the 1984 cottage as being the meeting place. That appears to have been the basis for the division. Do you want to comment about that Mr Cookson?

Cookson: No, that never happened. . . .

Tribunal: Did Mr Craig ask you which of those houses was the meeting house?

Cookson: No.

Tribunal: You’re quite sure of that?

Cookson: Yes. I’ve always told him that the reserve is the whole land as set out by the Court, and I’ve stuck to that, that’s the reserve.

31. *Gisborne District Council v Cookson* unreported, 27 March 1997, District Court, Gisborne, NP10/96 (doc E13(a)(j), p12)

Tribunal: Did you discuss the two houses at all?

Cookson: No.

Tribunal: You're quite sure of that?

Cookson: Yes.³²

It appears that Mr Cookson was not legally represented before the District Court, and it may have been that his lack of familiarity with legal process led to these matters not being properly traversed before the court. In any event, if there was a genuine dispute between Mr Craig and Mr Cookson over whether there was a proper basis for the reduction in exemption area, and if there was not an opportunity to properly traverse these matters before the District Court, then it is at least possible that a court more fully appraised of the facts and background would have decided the matter differently. These matters may be of some relevance on appeal.

We would also note that matters such as these are of the highest racial and cultural sensitivity. These matters go to the differing approaches of Maori and non-Maori to land and family. That is not to say that matters of land and family are not of great importance to all cultures in New Zealand. It is rather that the enduring relationship between land and kin group in traditional Maori society leads, even today, to the strong desire amongst whanau and hapu to establish cultural facilities which celebrate that connection. These desires may be less pressing among other cultures in New Zealand.

A broad and unquibbling approach to the Rating Powers Act suggests that there are two competing but not irreconcilable considerations at play here. The purpose of the law appears to be to recognise and support the provision of genuine cultural facilities to strengthen whanau, hapu, and iwi while discouraging attempts to utilise clause 14(a) as a mere rates dodge.

For what it is worth, Mr Cookson impressed us as a man who held his beliefs and principles firmly and honestly. We observe that Mr Cookson may be better served by applying to the Maori Land Court under section 338(5) of the Te Ture Whenua Maori Act 1993. Under this section, a reservation can be reduced in size on the recommendation of the Maori Land Court, so that some of the land originally reserved can be excluded from the reservation. If Te Karaka 16A were regazetted as a reservation which did not exceed two hectares, then it would be exempt from all future rates pursuant to part 1 of schedule 1 of the Local Government (Rating) Act 2002. However, beyond these general observations, it is unnecessary and inappropriate for us to go.

32. Transcript 4.23, pp194–195

CHAPTER 14

MANGATU TITLE DETERMINATION – THE NGARIKI KAIPUTAHİ STORY

*Ka tu au ka titiro
Ki te hauauru
Ki te tonga o te ra
Tu mai Maungahaumia, te maunga tapu
O Ngariki Kaiputahi e*

*.
Ka titiro aku kamo, ki te tonga
Ki nga ngaru e papaki mai ra
te urunga mai o Ngariki, te Iwi tuturu ake
Nga Ahi-ka o Mangatu
taku turangawaewae e . . .*

*I stand and look
To the western breeze
To the setting of the sun
There stands Maungahaumia, the sacred mountain
Of Ngariki Kaiputahi*

*.
My eyes look to the south
To the great waves that crash there
The landing place of Ngariki, the original people
The guardians of the ancestral fires of Mangatu
The place where my legs can stand . . .*

14.1 INTRODUCTION

The Mangatu block of 160,360 acres is located in the north of the Gisborne inquiry district, an area of mostly hilly terrain interspaced with occasional river flats. The block came before

the Native Land Court for title determination in 1881.¹ Because different parties were claiming different parts of the block, and because of the need to pay for survey costs, the block was divided into six sections. After a lengthy hearing, the largest section, Mangatu 1 of 100,000 acres, and two other sections of 20,000 acres each (Mangatu 5 and 6), were awarded to a group represented by Wi Pere. This group was made up of members of Ngati Wahia and Ngariki descent, and of people who could affiliate to both groups. Within the Ngariki group were the descendants of the chief Rawiri Tamanui, whose uri make up Ngariki Kaiputahi today.

In its 1881 judgment, the court stated it was ‘satisfied that the land originally belonged to Ngariki and that they were completely broken as a tribe in the time of Ihu and his sons and again by Te Whiwhi Grandfather of Waaka Mahuika, and that since then, though they continued to dwell on the land they can only have done so in subjection of the conquerors.’ The court qualified this statement somewhat, noting that Ngariki did have rights in Mangatu 1 through their residence on the land.² In other respects, however, both the court’s reasoning and the practical effect of its decision remained opaque.

As for the other Mangatu blocks, east of Mangatu 1 is the Mangatu 2 block of 11,000 acres. The hearing for this section was uncontested, it being treated as an extension of the Waipawa block, which was being heard at the same time. Mangatu 2 was awarded to the group Ngaitamatea. The Mangatu 3 block is a thin sliver of 3680 acres to the south-west of the Mangatu 1 block. It was awarded to the hapu Whakauaki without contest. The Mangatu 4 block of 6000 acres was heard together with the Mangatu 1 block. It was awarded to a group represented by the chief Wi Mahuika, who was the main counterclaimant to Wi Pere.³ Mangatu 4 is commonly referred to as the Whanau a Taupara block. The Mangatu 5 and 6 blocks of 20,000 acres were each awarded to six people, most of whom were on the title to Mangatu 1. Mangatu 5 had been set aside by Wi Pere to cover survey costs for all the blocks.⁴

The Ngariki Kaiputahi claim before us is based on the argument that the judgment of 1881 was incorrect. While Ngariki Kaiputahi do not deny that other groups hold rights in the Mangatu block, they are emphatic that Ngariki Kaiputahi were never conquered as a tribe and that they held rights under their own mana. Ngariki Kaiputahi argue that the court’s error has had a long-term effect on them, reducing the amount of land they were eventually awarded in the block and threatening their integrity, autonomy, and rangatiratanga as a tribal group.⁵

This chapter contains a more detailed analysis than would otherwise normally be the case. We do not feel that witnesses properly came to terms with the evidence before them.

1. The title investigation was heard by two judges, Theophilus Heale and Laughlin O’Brien. The assessor was Retireti Tapihana of Te Arawa: doc A27, p26.

2. Gisborne minute book 7, p201 (doc A21(b), pt1)

3. Gisborne minute book 7, pp212–213 (doc A21(b), pt1; doc A27, p41)

4. Document A27, pp80–107

5. Document C23, pp15–16

14.2 JURISDICTION

The question of whether or not the Tribunal can properly retrace a decision of the Native Land Court was addressed during hearings. Counsel for Ngariki Kaiputahi argued that issues of title determination are inseparable from questions of Crown native land policies in the nineteenth century, including the legislative framework under which the court operated. They also argued that:

if the Native Land Court made a poor decision such that the integrity, autonomy and rangatiratanga of a customary group was affected, including threatened loss of a customary communal identity and an ancestral estate, and the Crown was aware of that, then the Crown has breached the principles of the Treaty of Waitangi.⁶

While the Crown generally accepted this approach, counsel cautioned that there should be ‘a high threshold for intervention of this sort in the results of the Court’s title determination process.’⁷ Crown counsel commented that:

The practical issue for the Tribunal is that examination of these kinds of claims is heavy with factual content of Maori–Maori relationships rather than Crown–Maori relationships. This will impact on the evidence the Tribunal is called upon to evaluate to decide such cases.⁸

The Waitangi Tribunal is not an appellate court. For the record, we note that, in addition to the 1881 hearing, evidence of customary rights in the Mangatu block was given to the Native Land Court in the period 1916 to 1923. Title issues were revisited in the 1960s, when the question of rights to Mangatu 5 and 6 blocks was addressed. In its 1970 judgment on title for the Mangaotane station, the Maori Land Court stated:

the customary title to the Mangatu blocks was investigated in a manner probably as thorough as any similar title has ever been investigated and . . . it would be a futile exercise for this Court at this stage to try to establish that the eventual findings were incorrect.⁹

We will consider that view in the course of this chapter. For present purposes, we record that we agree with counsel for Ngariki Kaiputahi that in some instances the Tribunal can properly be called upon to consider whether the Crown responded appropriately to a decision of the Native Land Court, and to judge that response in terms of the principles of the Treaty of Waitangi. We accept also that the threshold to be met before intervention can be justified so long after the actual hearing should be a high one. The Tribunal should not lightly upset

6. Document H8, p7

7. Document H14(19), p8

8. Ibid, p9

9. ‘Decision with respect to Mangatu Nos 5 and 6 Blocks’, East Coast Land Investigation minute book, p316 (doc A21(d), pt7)

long-standing determinations of right between hapu. A useful standard would be whether the decision of the court when viewed against the evidence which was or should have been before it was so demonstrably unsafe (in meaning or right) as to have justified the intervention of the Crown at the time. Thus, it must be established that the court applied an obviously wrong principle, failed to take account of plainly relevant evidence, or misunderstood evidence in some material way. The categories of failure cannot of course be closed, but the principle must be that the Tribunal should intervene only in clear cases.

In respect of the Mangatu block, Ngariki Kaiputahi have consistently and persistently objected to the decision of the 1881 Native Land Court, but with little effect. They appealed against court decisions in the period 1917 to 1922, and lodged two parliamentary petitions on the matter, one in 1958 and another in 1975.¹⁰ It remains to be seen, however, whether the claimants can show that the 1881 court's rejection of Ngariki Kaiputahi rights was demonstrably unsafe.

14.3 THE NGARIKI KAIPUTAHİ CASE

Ngariki Kaiputahi argued that the 1881 decision of the Native Land Court, that Ngariki Kaiputahi were conquered as a tribe, was a 'substantial mistake'.¹¹ They held that the decision was 'in essence, a confiscation of a tribal interest and identity by the operation of legislation more absolute than the "standard" injury to communal title resulting from the creation of individual shares'.¹² Furthermore, they stated that the 1881 decision 'caused considerable and ongoing prejudice, including prejudice to Ngariki Kaiputahi's right and ability to identify itself in a customary manner'.¹³

As to why the court could have made such a mistake, their overall argument is that Ngariki Kaiputahi were confused with other 'Ngariki' groups, who, they argue, had in fact been conquered. In contrast to such groups, Ngariki Kaiputahi argue, customary evidence given by a number of witnesses showed that Ngariki Kaiputahi were substantial right-holders in the land, and that their rights were exercised under their own mana.

We note that Ngariki Kaiputahi presented a substantial body of technical and customary evidence to the Tribunal on this matter. They also placed a large collection of primary documents relating to the 1881 hearing and subsequent investigations surrounding the apportionment of relative interests on the Tribunal record.¹⁴ We reviewed this material.

10. Document A21(d), pts 8–12; doc A21, pp 37–44

11. Document H8, p 48

12. Ibid, p 25

13. Ibid, p 48

14. Document A21(b); doc A21(c); doc A21(d)

14.4 THE CROWN CASE

The Crown argued that in 1881 the Native Land Court was presented with competing evidence as to customary rights in the Mangatu block, and that the court preferred the claim advanced by Wi Pere to that of a separate interest advanced by Pera Te Uatuku, the Ngariki Kaiputahi rangatira of the time.¹⁵ In this manner, the Crown stated, the court was consistent with the decision over the Manukawhitikitiki block, where, although Wi Pere and Pera Te Uatuku were counterclaimants, Ngariki Kaiputahi interests were placed on the title under the successful case run by Wi Pere.¹⁶

The Crown noted that Ngariki Kaiputahi did not appeal the 1881 decision. It could not, therefore, reasonably have had cause to consider that:

as a result of the 1881 title determination and vesting in owners of the Mangatu blocks the Crown was obliged to intervene on behalf of Pera Te Uatuku and Ngariki Kaiputahi.

the claim by Ngariki Kaiputahi does not expose a flaw in the Court processes serious enough to justify a conclusion that under the Treaty of Waitangi the Crown should have intervened when this result was brought to the Crown's attention.¹⁷

Instead, the Crown suggests, Ngariki Kaiputahi interests were affected by events subsequent to Wi Pere's death in 1915. These events were connected to ownership and management arrangements for the Mangatu block, and a general questioning of entitlement by all parties at that time.¹⁸

The Crown chose not to present evidence on the matter of Ngariki Kaiputahi interests in the Mangatu block, although counsel cross-examined the following witnesses: Ms Arapere, Mr Robson, Ms Haapu, and Dr Gilling.¹⁹

14.5 THE 1881 HEARING

This section reviews the 1881 Native Land Court hearing and decision on title for the Mangatu 1 block. We first introduce the competing parties in the case and describe their relationship to one another. We then discuss the evidence presented to the 1881 court. This is followed by a review of the court's decision.

15. Pera Te Uatuku is sometimes referred to as Pera Te Uetuku. For consistency, we use the first spelling.

16. Document H14(19), p10

17. Ibid, pp4, 9

18. Ibid, pp4, 10

19. Document A21; doc A22; doc A27; doc A32

14.5.1 The parties

The Mangatu block of approximately 160,680 acres came before the Native Land Court in 1881. Sufficient notice of the case appears to have been given to ensure that all parties with an interest were able to attend the hearing.²⁰ After a preliminary discussion before the court, the block was divided into three portions. Evidence was taken for each portion separately. The largest portion contained around 146,000 acres. At the conclusion of the hearing, this portion was further divided into the Mangatu 1 (100,000 acres), Mangatu 4 (6000 acres) and Mangatu 5 and 6 blocks (20,000 acres each). The hearing of this area is typically referred to as being for the Mangatu 1 block.

The second portion, of 11,000 acres, later became the Mangatu 2 block. This portion was uncontested before the court, being treated instead as an extension of the Waipawa block that was being heard at the same time. Mangatu 2 was awarded to the group Ngaitamatea. The third portion, which became the Mangatu 3 block, is a thin sliver of 3680 acres in the south-west of the Mangatu block. It was awarded to the hapu Whakauaki without contest. We will make no further reference to the Mangatu 2 and Mangatu 3 blocks, as their hearing and subsequent history has little bearing on the problem of Ngariki Kaiputahi addressed here.

The larger 146,000-acre portion was claimed by a number of competing parties. Wi Pere and Wi Haronga had lodged an application for investigation and were treated by the court as the principal contestants. They represented a group that comprised both Ngati Wahia and Ngariki, and people who could affiliate to both. Pera Te Uatuku (son of Rawiri Tamanui and rangatira of Ngariki Kaiputahi) appeared as a witness in support of Wi Pere's case. Wi Pere and Pera Te Uatuku therefore operated as co-claimants. We concur with Dr Gilling's evidence in this regard.²¹ The minutes place Wi Pere and Pera Te Uatuku together in the claimant's case, as compared to the cases of various 'objectors' or counterclaimants. Evidence of this cooperation can be seen in the statement by Pera Te Uatuku that: 'Part of this Block is Wahia and part Ngariki. I am not descended from Wahia.'²² Other evidence of cooperation can be seen in the manner in which Wi Pere arranged the survey of the block (taking an advance from the Crown for the purpose), while Pera appears to have acted as a guide to the surveyors.²³ Finally, Te Hira Te Uatuku, son of Pera Te Uatuku and successor to the leadership of Ngariki Kaiputahi after Pera's death, stated in 1921: 'I never heard my father Pera complaining that he had been unfairly treated in that [1881] Court. Pera was quite in accord with Wi Pere's conduct of the case.'²⁴

20. Document C17, p15; doc H8, p11; doc H14 (19), p12

21. Document C17, p16. Although we disagree with Gilling's conclusion that the testimony of Pera Te Uatuku before the 1881 court shows 'that through this period there was intense rivalry, even open animosity, between [Pera] and Wi Pere'. This comment can only apply to the hearing of Manukawhitikitiki, not Mangatu. (doc A32, p 67)

22. Gisborne minute book 7, p194 (doc A21(b), pt1)

23. Document A22, pp 27–28

24. Gisborne minute book 46, p204 (doc A21(c), pt5)

Wi Mahuika, another Te Aitanga a Mahaki rangatira of note, led a second group comprised mainly of members of Te Whanau a Taupara. Wi Mahuika's overall position was that while Wi Pere as the leader of Ngati Wahia had a strong claim to the land, Te Whanau a Taupara had similarly strong rights. As Wi Mahuika stated, 'I consider that Wi Pere and I are the rightful owners as we are from the two conquering chiefs'.²⁵ The claim by Wi Mahuika was thus not strictly a counterclaim, but a claim for inclusion with Ngati Wahia. As we detail below, Wi Pere disagreed with this and a significant dispute developed between the two leaders.

The Mangatu title investigation was therefore different to the Manukawhitikitiki hearing of 1875, where Wi Pere and Pera Te Uatuku opposed one other as counterclaimants.²⁶ Indeed, the central dispute in 1881 that the court was required to have resolved was that between Wi Pere and Wi Mahuika, not Wi Pere and Pera Te Uatuku. Accordingly, we disagree with the Crown's interpretation of the evidence for Mangatu noted above, that is, that the court preferred the claim of Wi Pere to a separate claim by Pera Te Uatuku.²⁷ The situation was more complex than that.

A third party to the hearing was led by Pimia Te Aata, who set up an independent case for Ngariki through the ancestor Anarehi, although it is unclear exactly who this group contained in 1881.²⁸

A fourth claim was advanced by Hoera Katipo. This claim was to rights in the northern part of Mangatu through conquests by Ngaitai, a kin group from the Whakatohea region.

Two final 'objectors' appeared, namely Hira Kirikahu and Heni Kotikoti. Both claimed through an ancestor, Mokaituatini, as well as through Ngariki.²⁹

In some way or another, therefore, three different parties thus sought to represent or claim through 'Ngariki': the group under Wi Pere with Ngati Wahia, which included Ngariki Kaiputahi (represented by Pera Te Uatuku) and others who identified as Ngariki; a group led by Pimia Te Aata; and the individuals Hira Kirikahu and Heni Kotikoti.³⁰

It is here that we must comment on the different Ngariki groups discussed before the court in 1881. In our view, 'Ngariki' was a name used to describe a number of kin groups who resided across much of inland Turanga from the time of Ruapani and afterwards. Through conflicts in the seventeenth, eighteenth, and early nineteenth centuries, various descendants of Mahaki bested some of these Ngariki groups in battle. Some Ngariki people left the district to reside elsewhere. Others remained living among the victors, often intermarrying with

25. Gisborne minute book 7, p160 (doc A21(b), pt1)

26. Document A32, p18. We note that, in this instance, the court allowed a list of Ngariki Kaiputahi owners to be placed on the title as part of a wider group of owners put in by Wi Pere: doc A22, p27.

27. Document H14(19), pp9–10

28. Gisborne minute book 7, p104 (doc A21(b), pt1). Heremaia Rauwehe claimed through both Ngariki and Ngati Wahia, although he was included with Pimia Aata's group.

29. Gisborne minute book 7, pp169–171 (doc A21(b), pt1)

30. Peti Moreti claimed under Ngariki and Te Whanau a Taupara, which suggests additional forms of multiple affiliation: Gisborne minute book 7, p105 (doc A21(b), pt1).

them and thus conveying older ancestral rights to the descendants of their union. However, the displacement or amalgamation of the Ngariki groups was not complete. By the time of the Mangatu hearing in 1881, a number of relatively small kin groups retained their 'Ngariki' identity, either exclusively or intertwined with other, predominantly Mahaki descent lines. In a very general sense, Ngariki Kaiputahi were one of these 'Ngariki' groups. However, Ngariki Kaiputahi could also be defined by separate criteria. That is, Ngariki Kaiputahi were one of the first kin-groups to return to Mangatu after the evacuation of that place during the period of widespread conflict across Turanga in the 1820s and 1830s (these events are discussed further below). Ngariki Kaiputahi were led by Rawiri Tamanui, a chief who had allied with and fought beside certain descendants of Mahaki.³¹ As a kin group, then, Ngariki Kaiputahi comprised Rawiri Tamanui, his immediate siblings, and their direct descendants.

In summary, therefore, although Ngariki Kaiputahi were often described as 'Ngariki' in land court minutes, when we refer to 'Ngariki' below we are referring to the wider genealogical category whose exact composition is less certain. When we refer to 'Ngariki Kaiputahi', we are talking of the more specific descent group led by Rawiri Tamanui.

14.5.2 Evidence

The Native Land Court heard evidence on customary interests in the Mangatu 1 block over 12 days. Wi Pere gave evidence for four of those days. Other witnesses included Pimia Te Aata, Hori Mokai, Wi Mahuika, Panapa Waihopi, Paora Haapa, Hoera Katipo, Peti Taihuka, Hira Kirikahu, Heni Kotikoti, Pera Te Uatuku, and Henare Kingi.³²

The customary evidence given for Mangatu 1 was lengthy and complex. We do not recount the evidence in detail, but extract certain key themes and arguments from it, particularly the dispute between Wi Pere and Wi Mahuika over the conquest of Ngariki. A word of caution is necessary, though. Minute book evidence has certain limitations. Often minutes represent notes, not a verbatim transcription.³³ Sometimes material such as whakapapa appears to have been missed out. During the cross-examination of witnesses, questions were seldom recorded; rather, answers were set out in the form of statements. Although the minute books contain a record in English the evidence was most likely given in Maori. Arguably, too, the use of certain key phrases in English can colour evidence given in Maori in a way that was not intended by witnesses, making the task of interpretation doubly difficult.

After settling preliminary matters, such as the position of the block's northern boundary, the 1881 court took evidence from what it termed the 'objectors', those individuals or groups who were not party to the main claim lodged by Wi Pere and Wi Haronga.

31. Document C23, p5

32. See Gisborne minute book 7, pp99–106, 138, 140–147, 149–197, 199–203 (doc A21(b), pt1). As discussed below, the Ngariki Kaiputahi group can be clearly seen on the lists of owners put to the Maori Land Court in 1917.

33. Concluding summaries of evidence by the competing parties for Mangatu 1 were not recorded in the minutes: see Gisborne minute book 7, p197 (doc A21(b), pt1).

Pimia Aata appeared first. She set up a claim under the Ngariki ancestor Anarehi.³⁴ Pimia Aata mentioned periods of conflict at the time of Ranginuihaihu (Ihu), Te Whiwhi, and later between various Turanga groups and Whakatohea. While Aata's evidence paralleled that which came to be given by other witnesses, her interpretation of the rights in land that derived from such evidence differed substantially. Aata believed that the descendants of Anarehi had an exclusive claim to the land of Mangatu, stating that most of the fights between different groups took place outside the area, whereas the descendants of Anarehi kept occupation in Mangatu.³⁵ We note that Aata described cultivations and pa on the block that were purportedly owned and utilised by Pera Te Uatuku (the son of Rawiri Tamanui) and his whanau in support of her claim.

Aata's claim was problematic. Under a lengthy cross-examination by Wi Pere, Aata spoke of a strategic relationship that she believed she had formed with Pera Te Uatuku to claim the land of Mangatu. She referred to conflict in 1875 between Pera Te Uatuku and Wi Pere over the title investigation of the Manukawhitikitiki block, an area immediately to the south of Mangatu.³⁶ However, any strategic relationship Aata had with Pera had clearly dissolved by 1881. During his own evidence, which we discuss further below, Pera Te Uatuku was at pains to distance himself from the case set up by Aata, stating:

I never said to you [Pimia] that Anarehi owned this land but said it belonged to Ngariki. Part of this Block is Wahia's and part Ngariki. I am not descended from Wahia. You offered to take up my case. I never said [that] you and I would take Anarehi for the ancestor[.] I know you are my relation and I am descendant of Anarehi[.] [I] never told you a short time ago to be strong in your claim [through] Anarehi.³⁷

The second case of 'objectors' was conducted by Hoera Katipo. This claim was to rights in the northern part of Mangatu through conquests by Ngaitai. Hoera was supported by two other witnesses, Taiuru and Peti Taihuka.³⁸ However, at the conclusion of Wi Pere's case a further witness, Henare Kingi, appeared. He was highly critical of Hoera Katipo's claim, stating: 'I belong to Ngaitai, I have no claim. Hoera said he was sent to set their claim by Conquest – his people never authorised him to appear . . . Hoera has set up a claim of his own.'³⁹

Wi Mahuika led the next 'objectors' case, speaking for the group Te Whanau a Taupara.⁴⁰ His claim was based on the various exploits of, alternatively, Mahaki, his son Ranginuihaihu

34. Gisborne minute book 7, pp141–153 (doc A21(b), pt1). Aata also called the witness Hori Mokai.

35. Ibid

36. Ibid

37. Ibid, p194. We note that Wi Pere confirmed that, while Pera Te Uatuku descended from Anarehi, he 'has no claim through him': Gisborne minute book 7, p184 (doc A21(b), pt1).

38. Gisborne minute book 7, pp164–169 (doc A21(b), pt1)

39. Ibid, p196 (doc A21(b), pt1)

40. Panapa Waihopi and Paora Haapa also gave evidence for Wi Mahuika's case: see Gisborne minute book 7, pp161–164 (doc A21(b), pt1).

(Ihu), and their descendant through Taupara, Te Whiwhi.⁴¹ A common theme of Mahuika's evidence was the defeat but subsequent 'return' of various Ngariki people to Mangatu. As stated, Mahuika's argument was that while Ngati Wahia had a strong claim to the land, Te Whanau a Taupara had similarly strong rights.⁴²

Wi Mahuika first described the conquests of Mahaki 'outside this Block', conquests where Ngariki were defeated and had their land taken.⁴³ He then referred to a disagreement that had taken place between Mahaki's son, Te Ranginui ihu (Ihu), and Po (alternatively referred to in the evidence as Ngariki Po or Ngatipo).⁴⁴ Ngariki Po were bested in the dispute and retreated to Opotoki. Then, as the minutes record, 'Ihu heard that Po was being maltreated so he sent for him and he came back on this land and the land remained under Ihu & Po's mana'.⁴⁵ Mahuika maintained that through these conflicts 'all the land went to Ihu'.⁴⁶ However, he later stated under cross-examination by Wi Pere that 'I am of Ngatipo', suggesting that marriages between the descendants of Ihu and Po had taken place.⁴⁷

For Mahuika, the next significant phase of conflict with Ngariki took place in the 1820s, during what is often termed the 'Pikai fights'.⁴⁸ Te Whiwhi, a rangatira of high standing among Te Aitanga a Mahaki, sought to mediate in a dispute that had taken place among various parts of Te Whanau a Kai. He was unsuccessful in this, however, and his son, Pikai, was killed soon afterwards by members of a Te Whanau a Kai party led by Te Hiki.⁴⁹ After failing to make peace with Te Hiki, Te Whiwhi sought assistance from other tribes to avenge his son's death. Fighting quickly became widespread among the closely related kin groups of Turanga. Te Hiki's party occupied a pa called Mapouriki. The pa was besieged by Te Whiwhi and taken. Te Hiki was killed.

According to Mahuika, a Ngariki group led by the chief Hirokiroki was one of the parties that had been asked by Te Whiwhi to assist him, but they had declined to do so.⁵⁰ Thus, once Mapouriki had fallen, Te Whiwhi attacked and defeated Ngariki in a series of battles, driving them from the wider region. However, like the time of Po, Ngariki were then 'put back' on the land. Their occupation was short lived, though. Some time after their return Ngariki set a

41. Gisborne minute book 7, pp153–158 (doc A21(b), pt1)

42. Ibid, p160

43. Ibid, p153

44. Ibid, p154

45. Ibid

46. Ibid, p157

47. Gisborne minute book 7, p160 (doc A21(b), pt1). Another witness, Panapa Waihopi, who supported Wi Mahuika's case, stated 'This Piece is Po's piece[. He] joined in with the conquerors[.] Te Whiwhi descended from Po so also did Hinekoia and Wi Pere's ancestor[.] Wi Haronga & Wi Pere can only claim in Po's piece.' Gisborne minute book 7, p162 (doc A21(b), pt1)

48. The 1820s date has been taken from document A22, pp48–49. For other versions of these conflicts, see document A22, pp33, 48–50; document A25, pp161–163; and the evidence of Wi Pere in Gisborne minute book 7, pp175–178 (doc A21(b), pt1).

49. See also Wi Pere's evidence, in Gisborne minute book 7, pp176–179 (doc A21(b), pt1).

50. Gisborne minute book 7, p155 (doc A21(b), pt1)

snare to kill another Mahaki chief, Ihoterangi. Te Whiwhi heard of this and, in Mahuika's words, he 'went and drove them clean off the land'.⁵¹

In Mahuika's view, 'Whiwhi's conquest finally settled the mana on this land and settled all former fightings'.⁵² Afterwards, it was only Rawiri Tamanui and his whanau who returned to Mangatu. As the minutes record: 'None of Ngariki ever returned on this land except Rawiri Tamanui and his family. Rawiri continued to live there'.⁵³ Wi Mahuika thus appears to have objected to Ngariki persons other than Rawiri Tamanui's descendants having a claim to the land. He stated, 'I don't object to those who they took back but I object to Ngariki coming in through them'.⁵⁴ We presume that this was a reference to the wider body of Ngariki-affiliated persons represented in 1881 by Wi Pere, not Ngariki Kaiputahi themselves.

There is one final twist to the story. According to Wi Mahuika, Rawiri Tamanui did not simply return to Mangatu after other, region-wide conflicts in the 1830s, but was ordered to do so by Mahuika's father, Waaka Mahuika. This apparently happened when Tamanui and his whanau resided at Waerenga a Hika.⁵⁵ A dispute broke out over the theft of a pipe by Tamanui's son, Pera Te Uatuku, who must have been a young man at the time.⁵⁶ According to Wi Mahuika, Tamanui was then 'returned' to Mangatu to save his life, and when he lived there he lived under the protection of Waaka Mahuika.⁵⁷ Wi Mahuika appears to have believed that these events further strengthened his rights in the land.⁵⁸ The question of Tamanui's 'return' to Mangatu is discussed further below. It appears to be a matter of considerable dispute between Wi Mahuika and Pera Te Uatuku, the position of the latter being supported by Wi Pere.

Two final 'objectors' appeared, namely Hira Kirikahu and Heni Kotikoti. Both claimed through an ancestor Mokaituatini, as well as through Ngariki. Hira did not live on Mangatu, although he had apparently visited the place. Their claims appear to have been as individuals who resided outside of the Turanga region, rather than for any wider tribal group.

Wi Pere conducted the case for Ngati Wahia and a group of people of Ngariki descent that included the descendants of Rawiri Tamanui, or Ngariki Kaiputahi. Pere gave evidence for two days, presenting a lengthy account of the history of Mangatu and surrounding lands. He was then cross-examined for two days by various claimants and the court.

From the outset Pere stated that Mangatu belonged to Ngati Wahia and Ngariki. He gave a Ngariki Kaiputahi whakapapa down to Pera Te Uatuku as his first piece of evidence, linking

51. Ibid

52. Ibid, p160

53. Ibid, p156

54. Ibid, p160

55. Ibid, p156

56. For other versions of this story, see Gisborne minute book 46, pp 202–203 (doc A21(c), pt5).

57. Gisborne minute book 7, p156 (doc A21(b), pt1)

58. Ibid, p158

this whakapapa to other individuals such as Matenga Taihuka and Tiopira Tawhiao.⁵⁹ The minutes record statements by Pere, such as: ‘This Block belonged to Ngariki. Wahia, also. Ngariki were the original owners’.⁶⁰ Pere expressed the view that Ngariki and Ngati Wahia were ‘one people through marriage’.⁶¹ Pere also gave whakapapa for ‘the sections of Ngariki’, although unfortunately the whakapapa was not recorded in the minutes.

Recounting the history of the area, Wi Pere first spoke of events that took place at the time of Ihu, his sons, and his grandson Wahia.⁶² Some of this evidence differed to that given by Wi Mahuika. According to Pere, although Po (Ngariki Po) fled to Opotiki and was invited back by Ihu, peace was then made between them, a peace cemented by the gift of birds from Po.⁶³ Other conflicts then took place between Ihu and Parua, another chief of Ngariki descent (although not, it appears, Ngariki Po). Parua was killed by Apanui, ancestor of Te Whanau a Apanui, who received a greenstone for doing so.⁶⁴ However, Ihu and his wife, Te Nonoikura, were subsequently killed by Parua’s father-in-law.⁶⁵ According to Pere, this conflict took place outside the Mangatu area and led to the establishment of rights elsewhere. After Ihu’s death, though, the gifts of food that Po had given to Ihu went to Ihu’s grandson, Wahia.⁶⁶

Pere therefore disagreed with Wi Mahuika on the rights derived through Ihu’s conquests, stating: ‘Ihu had no Pa on this Block he lived just outside’.⁶⁷ According to Pere, it was Ihu’s grandson, Wahia, who fought with Ngariki Po in Mangatu and acquired rights there. As Pere stated: ‘[A] plot was made against Wahia so he made a stand and took this land and defeated Ngariki (one part) a remnant remained on the land and he was their chief’.⁶⁸

The thrust of Pere’s evidence, therefore, was that customary rights in Mangatu rested primarily with the descendants of Wahia, who had defeated and intermarried with various sections of Ngariki (and thus also acquired take tipuna rights through them). Rights did not rest with the descendants of Ihu as a group, including Taupara. Pere stated, for instance, that Te Whanau a Kai did not have rights in Mangatu through Kai – Kai was another of Ihu’s sons.⁶⁹ In this respect, Pere was in considerable disagreement with Mahuika.

59. Gisborne minute book 7, pp172–173 (doc A21(b), pt1). Ngariki Kaiputahi ‘substantially agree’ with this whakapapa, although they believe that a number of generations have been missed out: see doc A22, p28. We note also that in 1917, during the allocation of relative interests, the court placed Matenga Taihuka with group number 11, a Ngati Wahia group. Tiopira Taiwhiao was placed at the head of group 27, a Ngariki group: see Gisborne minute book 43, pp204, 210 (doc A21(b), pt8).

60. Gisborne minute book 7, p102 (doc A21(b), pt1)

61. Ibid

62. Ibid, p173

63. Ibid, p174

64. Ibid

65. Document A25, pp100–102

66. Gisborne minute book 7, p174 (doc A21(b), pt1)

67. Ibid, pp174, 187

68. Ibid, p187

69. Ibid, p186

A further phase of conflict discussed by Pere was that which extended through the lifetime of Te Whiwhi and, subsequently, Ihoterangi and Rangiwhakataiaia.⁷⁰ Pere and Mahuika generally agreed with one another that Te Whiwhi had sought to keep the peace within Te Whanau a Kai, but that after the death of his son, Pikai, fighting broke out between Te Whiwhi and a part of Te Whanau a Kai. This fighting drew in other Turanga groups, such as Rongowhakaata. However, Pere did not recount any defeats of Ngariki by Te Whiwhi at this time, as Mahuika had. Rather, he explained that when Te Whiwhi was killed (and, later, when his successor Ihoterangi was killed), Rangiwhakataiaia assumed leadership of what appears to have been a coalition of kin groups.⁷¹ Further fighting then took place between Rangiwhakataiaia and Rongowhakaata, who had been allied to parts of Te Whanau a Kai.⁷² Over time, this fighting became widespread, sparking the involvement of Whakatohea and Te Aitanga a Hauiti.

The details of this period are too complex to properly recount. Alliances between groups changed, chiefs were killed (including eventually Rangiwhakataiaia), battles were fought and won, new leaders arose, and new peace arrangements were made.⁷³ What is significant in Pere's evidence is his argument that 'during all the fights none of these hapus lived on this land [Mangatu]' and that 'In all these fights no land was subdivided or settled on by the three tribes'.⁷⁴ As for Ngariki, Pere stated that: 'The remainder of Ngariki entered under the banner of Rangiwhakataiaia & were with him in all his fights'.⁷⁵ He repeated this during his cross-examination by Mahuika: 'Rangiwhakataiaia and his people went with Whiwhi he saved the remnants of Ngariki'.⁷⁶ We presume that the Ngariki referred to by Pere included Rawiri Tamanui and his close kin.

Wi Pere was thus in considerable disagreement with Wi Mahuika over rights in Mangatu which, Mahuika had argued, derived to Te Whanau a Taupara through battles fought by Te Whiwhi with sections of Ngariki. Pere stated, for example, that 'Te Whiwhi's mana was destroyed after his death'.⁷⁷ Pere also argued that once the Pikai fights had ceased, Rangiwhakataiaia went to occupy the Mangatu area with a section of Ngariki.⁷⁸ We note that Ngariki Kaiputahi today state that the 'Pikai fights' did not involve them. Rather, they believe, it was a different group of Ngariki who were expelled from the district at that time.⁷⁹

70. Ibid, p176. Rangiwhakataiaia was, according to Pere, the grandson of Ihoterangi, and father of Wi Haronga: Gisborne minute book 7, p185 (doc A21(b), pt1).

71. Gisborne minute book 7, pp177–178 (doc A21(b), pt1)

72. Ibid, pp178–179 (doc A21(b), pt1)

73. See generally Gisborne minute book 7, pp177–182 (doc A21(b), pt1)

74. Gisborne minute book 7, p182 (doc A21(b), pt1)

75. Ibid, p183

76. Ibid, p187

77. Ibid, p192

78. Ibid, pp190–191

79. Document A22, pp11, 33, 48–50

Wi Pere thus held that Ngariki lived ‘under’,⁸⁰ or had joined the descendants of Wahia, not Taupara. When questioned by the court’s assessor, he stated: ‘The two Ngariki’s [*sic*] owned this land one who joined the conquerors remained but the other was driven away.’⁸¹ Pere did not consider the ancestral rights of Ngariki Kaiputahi to have been extinguished. The court minutes are quite clear on this. Pere stated, ‘Tamanui has a claim on this land. [A]lso Pera from Ngariki. Anarehi has no claim. It is through the ancient ancestors that Pera derived his claim.’⁸² Similarly, under cross-examination by Wi Mahuika, the minutes record the following: ‘What lands have been dealt with under the Ngariki ancestor[?] – none except this land this is their only land their claims to other lands are through other hapus. This land was the only land left them.’⁸³ Pere also stated that ‘Tamanui is a relative of mine’, although he did not specify how they were related to one another.⁸⁴

Nor did Wi Pere support the view advanced by Wi Mahuika that Mahuika’s father, Waaka Mahuika, had ‘returned’ Tamanui and his whanau to Mangatu (with the implication that he had mana over them). At one point Pere stated that ‘Ngariki were not beaten by Mahuika’.⁸⁵ Pere’s evidence on this reflects, we believe, an ongoing disagreement between Pera Te Uatuku and Wi Mahuika as to what in fact happened at that time:

My mother and Tipuna went to conduct Tamanui & his children as far as Waerengahika and Waka [Mahuika] said to them to go back on their own land which had grown cold during their absence[.] Rawiri [Tamanui] told him he never gave him back his land that it was in his own hands.⁸⁶

Pera Te Uatuku gave evidence after Wi Pere. As stated, Pera’s evidence was made in support of the wider claim by Wi Pere. It is significant, we believe, that Pera Te Uatuku was one of two witness called by Wi Pere to speak in support of his case. It indicates the closeness of their relationship at this time.

Pera was first concerned to distance himself from, and indeed deny the claim advanced by Pimia Aata under the ancestor Anarehi.⁸⁷ Pera was also at great pains to refute the statement by Wi Mahuika that the latter’s father had ‘returned’ Tamanui to Mangatu, stating: ‘My father returned me to Mangatu. I am not under the mana of Mahuika.’⁸⁸ And later:

Waka [Mahuika] said to me to go back on your lands but those lands that have grown cold let them come to me. My father said none of his lands had grown cold. My father did not say

80. Gisborne minute book 7, p193 (doc A21(b), pt1)

81. Ibid, p192

82. Ibid, p184

83. Ibid, p187

84. Ibid, p184

85. Ibid, p182

86. Ibid, p193

87. Ibid

88. Ibid, p194

to Waka as you are going to give my lands back will you not give me the whole. I never said so at the investigation of Manukawhitikitiki that he had given me the whole of the lands. . . . It was on account of my misdeeds that my father took me back on this land.⁸⁹

Pera also disagreed with Mahuika over various details of the conflict which followed the Pikai fights, particularly the battle of Ruapekapeka.⁹⁰ Again, the thrust of his testimony was to refute the assertion that his father, Tamanui, lived under the mana of Waaka Mahuika, and that therefore Ngai Kaputahi were a conquered tribe.

The court, however, intervened during Pera's testimony, the minutes recording the following: 'Court read the evidence in Manukawhitikitiki in which he [Pera] said that Waka having sent him back that that was the second or third time our land was given back etc showing that his present evidence *is totally false*' (emphasis in original).⁹¹ This is somewhat perplexing. We note that the minutes for Manukawhitikitiki are incomplete and difficult to read.⁹² The minutes certainly record a statement by Pera that the land had been 'given back' a number of times. The problem, we believe, was not the fact that Ngariki Kaiputahi had returned to the land a number of times, but what such a return signified under tikanga. As we discuss further below, it is entirely possible for long-standing ancestral rights to be reactivated after a period of absence. That appeared to be the case in this instance.

A final witness, Henare Kingi, appeared to support Wi Pere's case. Kingi belonged to Ngaitai. He did not advance a separate claim on the land. Rather, Henare disputed the Ngaitai claim advanced by Hoera Katipo, stating:

Hoera said he was sent to set up their claim by conquest – his people never authorised him to appear, we afterwards had a meeting[. W]hen we came here the tribe told us not to set up a claim through conquest but to see Wi Pere and Ngariki[,] the conquest being over Ngaitai. Hoera has set up a claim of his own.⁹³

When questioned by the court, Kingi recounted the following:

Ngariki had mana because they retained Ngaitai. I did not hear they were under the mana of Aitangamahaki. Never heard that they were completely destroyed. Titirangi and Tamanui went and invited us on this land.⁹⁴

If Kingi's statement was correct, then Rawiri Tamanui had exercised an important customary right by inviting non-right-holding people onto the land. The evidence does not allow us to say anything more on the matter, though.

89. Ibid, pp194–195

90. Ibid, p195

91. Ibid, p196

92. Document A32, pp15, 18; doc H8, p19

93. Gisborne minute book 7, p196 (doc A21(b), pt1)

94. Ibid

14.5.3 The 1881 decision

The judgment given on 11 April 1881 was so short and terse that it can be set out in full here:

The evidence on this claim is exceedingly confused but the Court is satisfied that the land originally belonged to Ngariki and that they were completely broken as a tribe in the time of Ihu and his sons and again by Te Whiwhi Grandfather of Waaka Mahuika, and that since then, though they continued to dwell on the land they can only have done so in subjection of the conquerors.

Disputes then occurred and much fighting between Te Whiwhi and Ngawahia with Whanauakai and between them and Ngapotiki, Whanauataupara, and Ngaitamatea and at a later period these disputes between nearly related Hapu's [*sic*] were still further complicated by alliances with or against Rongowhakaata and Whakatohea. But all these wars had no relation to this Block which remained after Te Whiwhi's death and until the return of the remnants of the tribe in Hinekoia, unoccupied unless by a fear of the Ngaitamatea and the remnants of Ngariki under their protection.

The claim attempted to be made under Anarehi is unsustained by proof or probability and the Court has no hesitation in rejecting it.

The Court finds that the claim by conquest made on behalf of the Ngaitai tribe in the North part of the Block has not been proved. The fight which occurred then was against Ngatira who were not the owners of the land and no occupation has been shown on any part of the Block except as guests and on sufferance.

Some doubt exists as to the personal claims of Hira Kiriahu. His ancestor Mokai Matini and his descendants do not appear to have taken any part in the wars on the land and they appear to have lived away at Tokomaru. Te Hira is very positive as to the residence of his father at Tawhitiatakitaki with him in his infancy and the Court believes it but it may have been as a visitor only to his tribal relations and the Court does not see its way to admit him unless by consent.

The Court finds that the chief owners of the land are Wi Pere and Wi Haronga and the descendants of Wahia.

That the descendants of Waaka Mahuika and those of the party who returned to the land after Ruapekapeka also have claims on part of it and the Ngariki who were brought back on to this land, have rights in respect of their residence.⁹⁵

In other words, the court gave clear support to the rights of Ngati Wahia, as represented by Wi Pere and Wi Haronga. The court was also clear in its rejection of both the claim by Pimia Te Aata through Anarehi and the claim of Hoera Katipo through conquests by Ngaitai. The court appeared to give more circumspect recognition to Te Whanau a Taupara (described as 'the descendants of Waaka Mahuika and those of the party who returned to the land after

95. Gisborne minute book 7, pp199–201 (doc A21(b), pt1)

Ruapekapeka'). Ngariki were stated to have been broken as a tribe and to hold rights only 'in respect of their residence'. As for the claims by Hira Kirikahu and Heni Kotikoti, neither individual appears to have been placed on the successful lists of owners, so we presume that consent was not given.

The court was less clear with its reasoning. Uncertainty arising from the contest between Wi Pere and Wi Mahuika must have been expressed by Maori at the time. In a rare, perhaps unprecedented move, the court sought to clarify its judgment on 13 April 1881:

All the morning discussing as to names of owners and the portions of land to be given.

The Court then said that it meant by its judgment that Wi Mahuika & his party have proved that the mana over the Ngariki and on this land descended from Te Whiwhi and remained to them to the last to the time of Ruapekapeka and therefore they are entitled to participate as claimants. If the parties cannot agree upon the names and the Court is obliged to fix a proportion it would say that the claims of the three hapu's [*sic*] represented by Wi Mahuika as coupled with Ngatiwahia and Ngariki may be estimated at about 6 per cent.⁹⁶

A portion of 6000 acres was then cut off from Mangatu 1 for the party led by Wi Mahuika. This portion became the Mangatu 4 block and was awarded to them.

However, the court's reasoning requires further examination. The initial statement that Ngariki were 'completely broken as a tribe in the time of Ihu and his sons and again by Te Whiwhi grandfather of Wi Mahuika' appears to support the case advanced by Wi Mahuika, that is, for the inclusion of both Ngati Wahia and Te Whanau a Taupara in the title. The statement of clarification, however, speaks of mana for Wi Mahuika's party descending from Te Whiwhi, who was a more recent ancestor. This latter statement, plus the fact that the court allowed but 6 per cent of the land to be awarded to the group represented by Wi Mahuika, strongly suggests that the court saw Wi Pere's party as the principal right-holders.

But Wi Pere had run a claim on behalf of both Ngati Wahia and Ngariki. His evidence had been quite clear in respect to the dual nature of rights in the area: that Mangatu belonged to both Ngariki and Wahia. For the court to have endorsed Wi Pere's case and to have awarded title on evidence other than that presented by Pere, would have required explanation. Yet, no explanation was given.

The problem for Ngariki Kaiputahi was the court's treatment of 'Ngariki' as a single, undifferentiated tribe, one that had been broken at different times but which continued to reside on the land. The court remained blind, or indeed by its own admission 'exceedingly confused', as to what had in fact been given in evidence. The unfortunate fact for Ngariki, and for Ngariki Kaiputahi in particular, is that under tikanga there is no such thing as rights purely 'in respect of residence'. Unless acquired through gift, rights can only exist with some

96. Ibid, pp 212–213

ancestral source. Unless a group is completely exterminated in battle, even conquering parties need to marry into a defeated tribe and occupy their land to secure rights. The court's decision therefore remained stark for Ngariki Kaiputahi, constituting as it did a denial of their ancestral rights.

Criticism of the confused nature of the 1881 judgment is supported, in part, by Judge Robert Noble Jones, who reviewed the case in 1916. Judge Jones had been asked to clarify the meaning of the 1881 judgment and to assess whether members of Te Whanau a Taupara were allowed back onto the title of Mangatu 1. We will return to the context of Judge Jones's finding later below. Judge Jones first stated that:

The court . . . can well understand the difficulty the natives have in construing the judgment since it contains some apparent inconsistencies which may be due to errors in copying it into the minute book. Then the natives who heard it read seem to have some confusion in their minds and the court was called upon to endeavour within a couple of days to explain its own judgment. That explanation, if this court may be allowed to say so, really [muddled] it more than it was before.⁹⁷

After recounting some of the evidence that had been minuted in 1881, Judge Jones further stated:

it would have been perfectly simple for the court to have said 'we think one or the other is correct'. But it allowed itself to wander into a discussion of the evidence in the first part of the judgment and by inference leading one to believe it was taking Wi Mahuika's side. However when it comes to findings of the court it makes no doubt of its opinion in saying that Wi Pere & Wi Haronga & the descendants of Wahia are the chief owners of the land. These were the people represented by the claimants: and then it also finds that those of [Wi] Mahuika's party who returned to the land after Ruapekapeka would also have claims on a part of it. This then is clearly inconsistent with the view that they had retained large rights under the conquest by Ihu or that the subsequent battles against Whanauakai as their allies in later days affected the Mangatu Block.⁹⁸

Judge Jones concluded that the test to establish which party the 1881 court actually supported was that of the proportion of land awarded to each: 'Whatever the actual wording of the judgment [the awarding of 6000 acres to Wi Mahuika's party] shows the Court's estimate of their claim and the court in addition laying out of a separate portion of the block to satisfy that claim.'⁹⁹

97. Gisborne minute book 42, p153 (doc A21(b), pt7)

98. Ibid, pp155-156

99. Ibid, p156

Judge Jones did not consider the question of Ngariki rights. He appears to have taken at face value the 1881 judgment that Ngariki had been ‘completely broken as a tribe’.¹⁰⁰ He did not discuss the distinction between the different Ngariki groups, or the fact that Wi Pere had spoken of the ‘ancient rights’ of Rawiri Tamanui. Admittedly, he had not been asked to do this.

Further contradictions can be found in the 1881 decision. Subsequent to the court’s judgment, those awarded title to Mangatu 1 (that is, the party represented by Wi Pere) acted in a manner that could only mean that Ngariki Kaiputahi were believed, by them at least, to have important rights in the land. While arranging a list of owners for the block, Wi Pere persuaded the court to issue a certificate of title to a small group of 12 individuals and to place restrictions on the title preventing alienation except by lease for 21 years. This was done on the understanding that the 12 would enter into a voluntary arrangement, establishing a trust for a list of 179 ‘owners’ which the court also recorded.¹⁰¹ That list, as we discuss further below, contained individuals who could affiliate either to Ngati Wahia (a total of 51), to Ngariki (64), or to both Ngati Wahia and Ngariki (63).¹⁰² Ngariki Kaiputahi were included in the Ngariki category. The intention of the trust was to protect the land from individualisation and thus from pressures of sale. The trustees would act as a board of management. The judges were not unsympathetic to this plan, commenting that ‘the introduction of all the vast number of names in the titles was destroying the value of the lands of all this district and the evil is becoming so great that if the Native Land Court cannot lessen the evil the legislature will have to apply a remedy’.¹⁰³

Pera Te Uatuku of Ngariki Kaiputahi became one of the 12 trustee-owners, taking the place of honour at the top of the list.¹⁰⁴ In effect, Pera was given a significant leadership role beside other leaders in the wider community of owners, many of whom affiliated with Ngariki.¹⁰⁵ The court did not act to prevent or impede this in any way. Furthermore, given the court’s statement about the defeat of Ngariki and the court’s emphatic rejection of Pera’s evidence, Wi Pere would have been justified in maximising his interests by denying Pera and his

100. Gisborne minute book 7, p200 (doc A21(b), pt1). We note also that in 1922 the Native Appellate Court stated: ‘One of the inexplicable things in the vaguely expressed judgment of 1881 is the statement that after Te Whiwhi’s death and until the return of the remnant of the tribe in [*sic*] Hinekoia the block remained unoccupied unless by a few of the Ngaitamatea and the remnants of Ngariki under their protection. This statement appears to us not only not borne out by the evidence but to be opposed to other findings of the 1881 Court’: Native Appellate Court minute book 21, p53 (doc A21(c), pt6).

101. Document C17, pp20–21; see also ch9

102. Nine individuals were also allocated to an ‘Aroha’ category: ‘Minutes of Owner Meetings at Waihirere and Ownership Lists’, Maori Land Court (Gisborne) (doc A21(b), pt5).

103. Gisborne minute book 7, pp257–258 (in A21(b), pt1); doc A27, p35

104. Nine other members of Ngariki Kaiputahi, such as Rawiri Tamanui 11 and Te Hira Te Uatuku, were included in the longer list of owners. The total of 10 members of Ngariki Kaiputahi is based on the list put before the court in 1917: see Gisborne minute book 42, p211 (doc A21(b), pt7).

105. We note that Te Hira Uatuku, another member of Ngariki Kaiputahi, was placed with Wi Pere and four others on the title of Mangatu 6, an area that had been set aside with Mangatu 5 to cover survey and development costs: see Gisborne minute book 7, p217 (doc A21(b), pt1); doc A27, pp43, 81–84.

immediate kin any place on the block. That he did not do so is a powerful indication that the court had got its tikanga wrong.

Over time the trusteeship arranged in 1881 encountered problems. There were questions about the validity of the trust deed. The owners had not been unanimous in their support of it. There may also have been questions about whether beneficiaries made under the trust could be succeeded to.¹⁰⁶ Before the problems came to a head, the Government introduced a legislative solution. Wi Pere, James Carroll, and William Rees sponsored the Mangatu No 1 Empowering Act of 1893. The Act incorporated the 179 owners listed by the Native Land Court in the Mangatu 1 block. It also provided for the election of a management committee, the members of which were to be appointed by vote from among the owners. Pera Te Uatuku was elected to the management committee in 1893, along with six other owners of the block.¹⁰⁷ The community of owners of Mangatu 1 clearly did not consider Ngariki Kaiputahi to have been utterly conquered, or to hold rights solely through their residence.

One final matter is worth raising. If Ngariki Kaiputahi were indeed a vassal hapu, living in subservience to Ngati Wahia, we would expect them to have sought to escape from their servitude. They had an opportunity to do so in 1865, when the Crown intervened militarily in the affairs of Turanga. Ngariki Kaiputahi might then have allied with the Crown, or at least refused to support Te Aitanga a Mahaki at that time. Yet they did not do so. Pera Te Uatuku and his immediate kin fought beside Te Aitanga a Mahaki and other Turanga kin groups at Waerenga a Hika. They suffered exile as rebels and later joined Te Kooti, becoming part of the Whakarau. That history does not strike us as being of a people locked in servitude and anxious to escape.

The court's decision in 1881 was therefore unsafe. First, the court failed to properly justify its decision or to explain its understanding of the evidence, if indeed it understood the evidence properly at all. Secondly, the court's statement about the utter defeat of Ngariki was not reflected in the subsequent award of title to a select group of 12 owners headed by Pera Te Uatuku or indeed the composition of the list of 179 owners put in by Wi Pere. Thirdly, the subsequent behaviour of the wider community of owners does not indicate that Ngariki were considered, by them at least, to be without rights, even after the judgment of the court which purported to extinguish them.

Because of Wi Pere's intervention, however, the 1881 decision did not take full effect, in so far as it affected Ngariki Kaiputahi's interests. The trusteeship arrangement saved Ngariki Kaiputahi from the brunt of the judgment. Because relative interests to the block remained undecided, they were neither advantaged nor disadvantaged. Rather, Ngariki Kaiputahi participated as part of the wider group of 179 owners, being represented by their own rangatira in management decisions. This takes us to the next important step in the Ngariki Kaiputahi story, the determination of relative interests between 1916 and 1917.

106. Document A32, pp 89–91

107. Document A21, pp 26–27; doc A27, p120

14.6 THE DETERMINATION OF RELATIVE INTERESTS, 1916–17

Wi Pere died in late 1915.¹⁰⁸ After his death, the community of owners in the Mangatu 1 block began to question how relative interests in the land might be divided.¹⁰⁹ Section 9 of the Mangatu No 1 Empowering Act 1893 had provided for this eventuality, stating: ‘The relative shares of the owners shall be determined by consent, or, in case of dispute, then by the Native Land Court as if the said land were subject to the ordinary jurisdiction of that Court.’ Two main steps to the process could thus take place: the owners could attempt to decide matters by consensus, or resort to a third, independent, party, in this case the Native Land Court. We will review each step in turn.

14.6.1 Allocation by the committee of owners

In August 1916, a committee of owners of Mangatu 1 divided the 179 individuals recorded in 1881 into four groups: those descended from Ngati Wahia alone (a total of 51 persons), those descended from Ngariki alone (64), those descended from both Ngati Wahia and Ngariki (63), and those who had been included through ‘Aroha’ (9).¹¹⁰ The direct descendants of Rawiri Tamanui were included on the Ngariki list. We note that, despite the intervening 35 years, no succession cases had been heard or successors awarded. The allocation of interests concerned only the original list of owners, whether alive or dead.

Te Hira Te Uatuku, the son of Pera Te Uatuku and successor to the leadership of Ngariki Kaiputahi, sat on the 1916 committee of owners. Although there is but limited record of the discussions that took place, committee minutes suggested that Pera was in general agreement with the process.¹¹¹ The committee went through the 1881 list, discussing whakapapa and occupation. It also set about apportioning relative interests to individuals in the lists, although the exact detail of its decision is unknown.¹¹² Later evidence before the Native Land Court suggests that the Ngariki portion was to receive 17,500 shares out of a possible 100,000 (a single share being equivalent to an acre of land).¹¹³

14.6.2 Preliminary hearing by the Native Land Court, 1916

Initially, the committee delayed revealing its allocation to the owners, choosing instead to wait until a session of the Native Land Court.¹¹⁴ When revealed, however, the allocation was

108. Gisborne minute book 43, p175 (doc A21(b), pt8)

109. Document A21, p30

110. ‘Minutes of Owner Meetings at Waihirere and Ownership Lists’, Maori Land Court, Gisborne (doc A21(b), pt5)

111. Document A21, p31

112. There is a record of the list of names, but not of the shares allocated to them: doc A21(b), pt5.

113. Patu Te Rito stated that ‘The Wahias are prepared to give 17500 shares for the Ngariki’: Gisborne minute book 43, p147 (doc A21(b), pt8).

114. Document A21, p32. Although the Maori Land Court noted in its decision of 11 May 1917 that: ‘a suggested allotment was submitted to the block owners at a meeting held at Waihiriri on the 16th day of November 1916 when

not agreed to by all owners.¹¹⁵ This triggered intervention by the Native Land Court. Lists that had been drawn up by the committee were submitted to the court and the court was asked to interpret the meaning of the original 1881 judgment. A hearing was held, presided over by Judge Robert Jones.¹¹⁶ We have cited from Jones's decision in the previous section, particularly his concern over 'apparent inconsistencies' in the 1881 decision.¹¹⁷

Jones was also asked to consider whether members of Te Whanau a Taupara could be included on the title of Mangatu 1 (as we have seen they had been placed on the 6000-acre Mangatu 4 block in 1881). He concluded that, despite the contradictory nature of the 1881 decision, the award given to Te Whanau a Taupara must have reflected the court's view in 1881 of the relative merit of their claim. Jones stated: 'This court must hold that the people in the title of Mangatu [1] were not entitled to set up rights under the conquest through Taupara as a substantive right.'¹¹⁸ As we shall see later below, Te Whanau a Taupara persisted in their belief that they held valid rights in Mangatu 1 and petitioned Parliament for inclusion in the block.

14.6.3 First determination of relative interests by the Native Land Court, 1917

In April and May 1917, the Native Land Court sat again, this time to allocate relative interests between the 179 owners recorded in 1881.¹¹⁹ Judge Michael Gilfedder presided. At the beginning of the hearing, William Pitt, representing Te Whanau a Taupara, asked that the case be put aside until Parliament could consider their appeal for inclusion. Gilfedder declined this request, citing Jones's finding. An amended list of owners and shares was then read out by the court. This list appears to have broken down groups into individual allocations.¹²⁰ In almost every instance, though, exception was taken by the owners to the number of shares allocated.¹²¹

Rather than stick to the four lists drawn up by the owners' committee in 1916 (Wahia, Wahia and Ngariki, Ngariki, and individuals included through aroha), the court suggested that a 'better system of grouping' be established. This meant smaller, whanau-sized groups.¹²² However, the first step the court took was to reallocate individuals to one of three categories: Wahia, Ngariki, or those who had been placed on the block through aroha. The Wahia list

Footnote 114 continued

little or no exception was taken to the scheme proposed. When however the matter came before the Court numerous objections were raised': Gisborne minute book 43, p196 (doc A21(b), pt8).

115. Gisborne minute book 43, pp133–134 (doc A21(b), pt8). It is also possible that the main objection came from Te Whanau a Taupara.

116. See summary of events by Jackson in Gisborne minute book 43, p134 (doc A21(b), pt8)

117. Gisborne minute book 42, p153 (doc A21(b), pt7)

118. Ibid, p156 (doc A21(b), pt7)

119. Gisborne minute book 43, pp133–214 (doc A21(b), pt8)

120. Various witnesses before the 1917 hearing mention individual awards proposed by the committee. However, the full committee list with these allocations has not been located.

121. Gisborne minute book 43, p135 (doc A21(b), pt8)

122. Ibid, p136

increased from 51 to 112 names. The earlier distinction between tuturu Ngati Wahia and individuals who were taha rua Ngati Wahia and Ngariki was thus lost. At the same time, the total membership of the tuturu Ngariki list dropped from 64 to 47 individuals as individuals chose to stress Ngati Wahia connections over Ngariki connections or were placed on the aroha list (the number of individuals on the ‘aroa’ list increased from nine to 20 persons, 12 of whom had come from the 1916 ‘Ngariki’ list).

The court then moved to allocate an overall proportion of the block to each group. Presumably calling on the 1881 decision, the court suggested that Ngariki advance their claims first ‘for more than nominal shares’.¹²³ Poneke Huihui appeared on the behalf of all those who identified as Ngariki and argued for a substantial shareholding for them:

the right of the Ngariki has been recognised. See the evidence of Pimia Te Aata . . . who put forward the rights of the Ngariki. At the conferences even now the claims & rights of Ngariki are recognised by the [Ngati] Wahia. Wi Pere said after the fighting was over the Ngariki lived on one side of the stream and the Wahia on the other. Wi Pere gave the [whakapapa] of Pera te Uatuku from Ngariki. They have had continuous occupation. I am ready to abide by the evidence given by Wi Pere about the Ngariki people. The Court of 1881 gave its decision in accordance with Wi Pere’s evidence. We must all rely on Wi Pere’s evidence and our shares must be based on his evidence and the decision of the Court. The Block belonged to Ngariki at first but they were worsted in War and although they lived on the land they lived there as a conquered people. It is suggested that the Ngariki should get half the block.¹²⁴

Representatives for other groups objected to this. William Pitt disagreed with Huihui’s interpretation of the 1881 judgment, stating that ‘Ngariki have no right except through residence’. However, he suggested that Ngariki be allocated between 17,000 and 20,000 acres.¹²⁵ Himiona Katipa supported Pitt’s proposal that ‘good shares’ be given to Ngariki. He commented: ‘I always heard Wi Pere say the Ngariki had a good right: Some of the Ngariki got interests in an adjoining block. Wi Pere in allocating the rents gave some of the Ngariki large rents.’¹²⁶ J Mitchell, a representative for Ngati Wahia, suggested that but 8000 acres would be sufficient for the Ngariki list, particularly as many Ngariki had recently come in under Wahia.¹²⁷

On 27 April, the court issued an interim decision, which it considered a ‘fair & equitable allotment’, giving 12,000 acres to the Wi Pere whanau, 11,000 acres to the Wi Haronga whanau, 2000 acres to the aroha list, 15,000 acres to the Ngariki list, and the balance of 60,000 acres to the longer, composite Wahia list.¹²⁸

123. Ibid, p148

124. Ibid

125. Ibid, p149

126. Ibid

127. Ibid, p150

128. Ibid, p151

Time was then set aside for each group to confer and to 'suggest an allocation of the shares awarded to them'.¹²⁹ After some discussion, the owners were divided into 31 'whanau' groups, with an additional list of individuals included through 'aroa'. Twenty of the whanau groups were described as belonging to 'Wahia' and 11 groups were described as belonging to 'Ngariki', although the Ngariki groups tended to have fewer members. Evidence was then given to the court as to occupation and descent for each group. A number of arguments arose concerning not only Ngariki.¹³⁰ It was a lengthy process.

A number of witnesses spoke in support of the Ngariki Kaiputahi or Ngariki claims. Rawiri Karaha, advocate for list 5, stated, 'The Ngarikis have lived continuously on this land.'¹³¹ Mini Kerekere, advocate for list 6, said, 'The principal Ngariki to return was Rawiri Tamanui.'¹³² Mere Ngari, speaking for list 9, stated, 'Rawiri Tamanui was an important man'.¹³³ This evidence was generally consistent with statements made by Wi Pere in 1881. Poneke Huihui, representing Ngariki Kaiputahi itself, explained that 'Rawiri Tamanui had a strong right and good occupation'.¹³⁴ 'Nearly all the witnesses so far', he stated, 'admit that Rawiri Tamanui was a leading Ngariki who lived died & is buried on the block'. Huihui also described the generations of Ngariki Kaiputahi who had been living on the land, commenting with concern that 'There are large families but few are in the list of owners'.¹³⁵

Tension was evident, however, between Ngariki Kaiputahi and other members of the Ngariki group, particularly those who could cite lesser histories of occupation. Reflecting this tension, William Pitt stated, 'no exception should or could be taken to the continuous occupation of these [Ngariki Kaiputahi] people but when Poneke claims 14000 acres out of the 15000 acres it is a preposterous claim. They are entitled no doubt to larger shares than other Ngariki claims.'¹³⁶

The court issued its decision on 11 May 1917, allocating shares among the whanau groups and to individuals within each group.¹³⁷ It summarised its views of the rights in Mangatu 1 as such: 'The judgment of 1881 decided that the chief owners of the block were Wi Pere, Wi Haronga, other descendants of Wahia and the Ngarikis who were brought back and lived on the land. The Mahuikas were adjudged to be entitled to a portion of the block and that Court set it aside for them.'¹³⁸

129. Considerable unminuted discussion appears to have taken place, including the giving of whakapapa: Gisborne minute book 43, pp151–152 (A21(b), pt8).

130. Arguments included the status of Anaru Matete, the shares sought by the Wi Pere whanau, whether certain individuals were properly in the Wahia list, whether certain individuals in fact claimed under Taupara, and the amount of shares to be given to individuals on the 'take kores' or 'aroa' list.

131. Gisborne minute book 43, p163 (doc A21(b), pt8)

132. Ibid, p164

133. Ibid, p166

134. Ibid, p186

135. Ibid

136. Ibid, p187

137. Ibid, pp195–211

138. Ibid, p196

In the final tally, the 20 groups defined as Ngati Wahia were to receive 57,000 shares between them. The 11 Ngariki groups were awarded 15,000 shares. The Wi Pere whanau was awarded 15,000 shares, and the Wi Haronga whanau was awarded 11,000 shares. These latter two awards were exceptional, standing outside the system of allocation used for the majority of the owners. They are best described as mana awards. The 20 individuals who had been introduced into the list through 'Aroha' were awarded 2000 shares, or 100 shares each. Within the Ngariki group, the Ngariki Kaiputahi list of Pera Te Uatuku and his close relatives (list 30) received a total of 6000 shares.

It is reasonable to assume that by 1917 the owners understood that the Native Land Court was obliged to follow the 1881 judgment, a decision which spoke of the 'conquest' of Ngariki. This had a significant influence on the identity adopted by the owners, making it attractive for people to stress their Ngati Wahia side over their Ngariki side, if they were indeed able. An analysis of the lists shows that either some or all of the individuals on the whanau groups numbered 4, 9, 10, and 13 by the court in 1917 had previously been listed as Ngariki in the committee list of 1916. The evidence is clear, therefore, that identification as Ngariki was discouraged by the 1881 decision and that the wider Ngariki group, including Ngariki Kaiputahi, suffered a loss of mana as a result.

Aside from entitlements given under 'Aroha', and the Wi Pere and Wi Haronga whanau awards, the court followed the following principle in allocating shares:

[the court] endeavoured as far as practicable to follow the rule laid down by the Native Appellate Court in the Motatau No 2 case. Where there has been continuous occupation through grandparents, parents & the present claimants larger shares have been allotted than where the parent or both parent & grandparent ceased to occupy. Where a parent and children appear in the list of owners the children have received proportionately reduced shares according to what was considered a reasonable and equitable rather than a mathematical apportionment.¹³⁹

Although never spelt out in full, the court's approach meant that individuals with continuous and current occupation and ancestral rights as Ngati Wahia received around 1000 shares each. In contrast, individuals with lesser occupation (but good occupation by their parents) received between 500 and 800 shares, and those with poor occupation (or occupation by their grandparents) received anywhere between 200 and 400 shares.¹⁴⁰ Persons listed as 'minors' in 1881 were given anywhere between half and three quarters of the allocation given to a parent.

A second factor is evident. Without explicitly stating so, the court distinguished between rights as Wahia and rights as Ngariki, giving a lesser amount to Ngariki. For example, Hemi

139. Ibid, p197

140. Ibid, pp199–211

Waiapu, a man with good occupation in the Ngariki Kaiputahi group (list 30) received 900 shares, where an equivalent person on a Wahia list would likely have received 1000 shares. Or when Neri Wharekete of the Ngariki Kaiputahi group was awarded 400 shares, a Wahia person of a similar generation and occupation, such as Te Rato on list 16, received 500 shares. When those whose occupation could only be traced to their grandparents on the Wahia list received between 200 and 400 shares each, one Ngariki whanau with poor occupation (say that of list 27), received between 150 and 200 shares per person. The approach taken by the court, therefore, was to discount Ngariki awards by 100 shares each. This meant a deduction of anything from 10 to 50 per cent, depending on the extent of occupation by the individual concerned.

The 1881 judgment thus had two main effects on Ngariki Kaiputahi. First, it resulted in a loss of mana as individuals abandoned their identification as Ngariki when they legitimately held both Ngariki and Wahia descent. Secondly, it had a material effect on those of Ngariki descent who would not or could not defect to the Wahia list, reducing their share allocation by anywhere between 10 and 50 per cent. We note, however, that, with the exception of Ngariki Kaiputahi (list 30), none of the nine other Ngariki groups set out in the 1916 lists had equivalent levels of recent or continuous occupation when compared to many of the Wahia groups. This fact goes some considerable way to explaining the low overall ratio of shares awarded to the Ngariki group when compared to the Wahia group.

14.7 THE INTRODUCTION OF TE WHANAU A TAUPARA

Our findings as to detriment for Ngariki Kaiputahi would have been relatively straightforward if the 1917 decision was the end of the matter. However, further complications arose. As discussed, in 1916 the owners of Mangatu 4 – that is, the 6000-acre portion which had been divided off in 1881 for Te Whanau a Taupara – asked the Native Land Court to be included in the Mangatu 1 block. They argued that they had ancestral rights in the land which had not been properly recognised. Judge Jones declined to allow this, stating that Taupara was unable to set up a separate claim to Mangatu 1 and that the court was bound by the 1881 decision, as confused as it was, which separated Mangatu 1 and 4 blocks.

Te Whanau a Taupara then petitioned Parliament. They were successful in persuading Parliament to intervene and special legislation was passed. Section 6 of the Native Land Laws Amendment and Native Land Claims Adjustment Act 1917 allowed the Native Land Court to reopen the question of ownership of Te Whanau a Taupara interests in both the Mangatu 1 and Mangatu 4 blocks.

14.7.1 Determination of Taupara owners, 1918

This new round of title determination got dealt with in two bites. First, the land court sat in 1918 to determine which Taupara individuals might be added to the title.¹⁴¹ A new list of Taupara was drawn up that included those who had been on the title to Mangatu 4 and those who had missed out. The court also set out its reasons for doing so, giving an interpretation to section 6 of the 1917 amendment. This interpretation was then tested before the Native Appellate Court in 1919 and the Supreme Court in 1921.¹⁴² The Supreme Court ruled that, ultimately, the Act was intended to remedy an injustice which may have been done to Te Whanau a Taupara. Taupara applicants who did not already exist on the title to Mangatu 4 could be admitted to the title of Mangatu 1. Existing Taupara owners in Mangatu 4 could claim additional shares in Mangatu 1. Existing owners of Mangatu 1 could also be declared owners of Mangatu 4, if they were able to affiliate to Taupara (there were some individuals already in Mangatu 1 who could claim under a Taupara whakapapa).

According to the Supreme Court, the 1917 amendment Act created ‘a *tabula rasa* in favour of the members of [Te Whanau a Taupara]’.¹⁴³ In other words, Te Whanau a Taupara could argue their case afresh. The key limitation was that no person whose name appeared in the original 1881 order could be removed from the title, although existing interests allocated by the Native Land Court in May 1917 could be modified. This also meant that the list of Taupara owners drawn up by the Native Land Court in 1918 stood.

14.7.2 Native Land Court rehearing of relative interests, 1921

The second bite to the process commenced. In 1921, the Native Land Court began a new round of investigation into the relative interests of all parties.¹⁴⁴ Mangatu 1 and Mangatu 4 were treated as a single block of 106,000 acres. The court considered both the revised Taupara list drawn up in 1918 and the older list of Ngati Wahia and Ngariki drawn up in 1881 (the list which the Native Land Court had apportioned interests to in 1917). The different groups then set about advancing their cases.

There is little indication that parties cooperated with one another during this time. Indeed, relationships between the groups appear to have deteriorated further. Each party sought to maximise its own interests and objected to the interests of others.¹⁴⁵ Adversarial behaviour and relentless cross-examination of witnesses became common.¹⁴⁶

141. See Gisborne minute book 43, pp 65–142 (doc A21(c), pt1)

142. Gisborne minute book 43, pp 23–25, 65–142 (doc A21(c), pt1); Native Appellate Court judgment, 11 August 1919, pp 13–16 (doc A21(c)); *In Re Mangatu Nos 1 & 4 Blocks* [1922] NZLR 158 (sc) (doc A21(c), pt 4). The initial Native Land Court hearing also decided on which persons could be admitted to the Mangatu block under Taupara, but not what interest or share they would get.

143. *In Re Mangatu Nos 1 & 4 Blocks* [1922] NZLR 158, 166 (sc) (doc A21(c), pt 4)

144. Ibid, p 166; see also Gisborne minute book 46, pp 228–229 (doc A21(c), pt 5)

145. Gisborne minute book 46, pp 144–223 (doc A21(c), pt 5)

146. Document A27, pp 130–135, 140–144

The argument between Te Whanau a Taupara and Ngati Wahia which had dominated the hearing in 1881 was effectively refought. We cannot recount the details of the evidence here, which was extensive, but we will refer to two key themes that developed in regard to Ngariki. First, Ngati Wahia witnesses were careful to stress the dual nature of rights in Mangatu, speaking of the close connection between Ngati Wahia and Ngariki. This appears to have been a strategy to minimise the court's acknowledgment of Taupara rights, rather than to enhance Ngariki rights. Witnesses stated that sections of Ngariki had been bested in war and that rights from these fights descended from Ihu to Wahia. However, this did not mean that those Ngariki who continued to reside on the land did so without ancestral rights. Matenga Taihuka, for instance, stated, 'Wahia & Ngariki are the two principal owners in this block'.¹⁴⁷ He named pa belonging to both parties.¹⁴⁸ Himiona Katipa stated, 'It is for me to decide whether I should take Wahia or Ngariki, I will claim under both'.¹⁴⁹ Te Kani Pere, Wi Pere's son, told the court of canoe building which had taken place, we suspect, in the 1840s. According to Te Kani, authority for the canoe building was under Ngati Wahia and Ngariki: 'When I said Ngariki joined in consenting to canoebuilding I meant the Tamanuis . . . & others – *the true Ngarikis of the block*' (emphasis in original).¹⁵⁰

Second was the vexed question of the 'return' of Rawiri Tamanui after the region-wide period of conflict in the 1820s and 1830s, including the Pikai fights. Appearing for Ngati Wahia, Rawhina Ahuroa supported the Wi Pere version of the 'return' given in 1881.¹⁵¹ According to Rawhina, Wi Pere's mother, Riria Mauaranui, had accompanied Tamanui back to Mangatu in order to save Pera Te Uatuku, who was going to be killed because of his theft of a pipe.¹⁵² Rawhina did not suggest that the 'return' signified any state of servitude on the part of Tamanui, though. We note that as a young child, Rawhina had been adopted by Tamanui, and was brought up in close association with other members of Ngati Wahia and Ngariki. 'My parents and Rawiri lived together', Rawhina stated.¹⁵³ This too is good evidence that Ngariki Kaiputahi were not living in a state of servitude.

Te Kani Pere gave evidence for Ngati Wahia. He expanded on the background to the 'return' by reference to earlier cooperation between Tamanui and Ngati Wahia rangatira, particularly at times of war.¹⁵⁴ He stated:

147. Gisborne minute book 46, p163 (doc A21(c), pt5)

148. Ibid, p164 (doc A21(c), pt5)

149. Ibid, p183 (doc A21(c), pt5)

150. Ibid, pp185–195 (doc A21(c), pt5)

151. Rawhina Ahuroa was the daughter of Hone Ahuroa: Gisborne minute book 46, p150 (doc A21(c), pt5).

152. Gisborne minute book 46, pp150, 156 (doc A21(c), pt5); see also evidence of Te Kani Pere, Gisborne minute book 46, pp192–194 (doc A21(c), pt5)

153. Gisborne minute book 46, p159 (doc A21(c), pt5). Rawhina also maintained that 'Ngariki is a separate tribe – their "takes" are different'.

154. This followed Wi Pere's assertion in 1881 that 'The remainder of Ngariki entered under the banner of Rangiwhakataiaia & were with him in all his fights': Gisborne minute book 7, p183 (doc A21(b), pt1).

As to the returning of Rawiri Tamanui on to land – I heard Kaumoana brought Tamanui from Mahia.

Kaumoana went to Mahia to raise a war-party and while there saw Tamanui & owing to the killing of Rito Te Rangi he returned here with Rawiri Tamanui & went over to Uawa to raise a war-party. On arrival they joined in fights there perhaps against N' Porou or N' Ira. On the verge of their returning by canoe Hinekoia arrived from Ngapuhi. She commenced teaching Christianity and the war-party was not proceeded with. They returned. On arrival at Kaiti Pera stole a pipe. They went to Patutahi then came back to Toenga. News of stolen pipe reached Kaumoana and Poihipi Ranguohakamoia. Poihipi went to kill Pera. My grandmother Riria stopped him from doing so.

It was then arranged by Riria[,] Poihipi and others to return Pera & Rawiri to Mangatu. Riria their cousins took them as far as Waerengaahika where they were allowed to depart.

I heard *Waaka Mahuika met them at Whiurau – that is how the story arose that Waaka returned them.*

They were told to go back to Mangatu under Rawiri's own rights. [Emphasis in original.]¹⁵⁵

Ngariki Kaiputahi maintained separate representation from Ngati Wahia during the 1921 hearings.¹⁵⁶ Te Hira Te Uatuku, grandson of Rawiri Tamanui and successor to the leadership of Ngariki Kaiputahi, gave evidence. Te Hira spoke extensively about the 'return' of Tamanui and his son, a version that differed somewhat from that of Te Kani Pere:

When Pikai[,] the cause of the fighting[,] Mangatu was taken. Tamanui then went and lived at Mahia remaining there a few years. Kaumoana came for him and he was brought back to Gisborne. He lived at Toenga where his house was built. While he was living there his son Pera stole a pipe. It was then determined Pera should be killed but that was not done. They lived there for a time when Pera committed adultery. Next day it was proposed to kill him. It was suggested after service in the morning to banish him for a time into the bush. Tamanui went outside Tepene [*sic*] who was to banish Pera stood before Pera and Hone Ahuroa also came. A struggle ensued with Pera. Pera threw Tepene and Hone and they walked outside. Mahuika heard of this and came down. In presence of all Aitanga Mahaki who were in Tamanui's house Waaka said to the people – that is to Tamanui 'Go home to your land with your children' ie to Mangatu. Waaka said to Tamanui 'Go and put your double fire out so as to prevent me from seeing two fires but leave Wheao for visits by your children'. Tamanui replied, 'I thought you were returning the whole of my lands'. Waaka replied 'Go'. Tamanui left for Mangatu. His provisions were taken in three canoes. They found no one living there at Mangatu when they arrived.¹⁵⁷

155. Gisborne minute book 46, pp191–192 (doc A21(c), pt5)

156. Many Ngariki were originally with Wahia, but minutes indicate that they were subsequently represented by Wi Rangihuna with Ngariki Kaiputahi: Gisborne minute book 46, p202 (doc A21(c), pt5).

157. Gisborne minute book 46, pp202–203 (doc A21(c), pt5). The 'service in the morning' mentioned was presumably a Christian service.

Like Ngati Wahia witnesses, Te Hira acknowledged the dual nature of rights in Mangatu. Under cross-examination, he stated:

[Ngati] Wahia had pas there. I can name them – Te Huapiri, Manawaraurakau, Te Pou, Te Mapere – The descendants of Wahia occupied these and are under the Wahia mana today. I never actually saw them living there – but I heard so – they were living as a strong hapu.

Otarapane pa was a Ngariki pa only. [Ngati] Wahia had their own pas. Ngariki lived there under their own right, not as a conquered people.

Land belonged to [Ngati] Wahia. Ngariki and [Ngati] Wahia were practically one. I don't know what happened in old days but in my time they were one.

I have heard of some Ngariki being killed on this land. None of our division of Ngariki were killed. Only section of Ngariki killed were Ngariki Ratoawe [*sic*]. [Ngati] Wahia was always defeating Ngariki – who would fly to Opotiki and on their return they would be defeated.

I don't know if Ngariki Rotoawe had any rights on Mangatu – but they were defeated on Mangatu. I don't know if they had any pa there. From that time [Ngati] Wahia & my section of Ngariki were always associated. [Emphasis in original.]¹⁵⁸

Te Hira thus supported Ngati Wahia evidence of early conquests over sections of Ngariki, although he was careful to state that these conquests were not over his own group, Ngariki Kaiputahi. However, when explaining how Mangatu had been vacated during more recent periods of conflict, Te Hira appears to have supported the view that the land had been taken, even if briefly, by a party to which Waaka Mahuika was affiliated. Although the minutes confuse the recording of questions with answers, the following statement by Te Hira is clear: 'It was Waaka Mahuika's tribe who conquered the land – Taupara, Potiki and other hapus which I cannot name. Waaka returned Tamanui on the land signifying peace between the tribes. Waaka was returning Tamanui to Tamanui's own land.'¹⁵⁹

For Te Hira Te Uatuku, then, Waaka Mahuika had played an important role when Ngariki reactivated their ancestral rights through occupation. We note again, however, that whatever the actual events at the time, the 'return' did not signify an absence of ancestral rights on the part of Ngariki Kaiputahi.

On 7 December 1921, the Native Land Court issued a decision on the relative interests in the Mangatu block. Comments made by the judge reveal something of the animosity that had developed between the different parties:

The intention is that the Court is to allot to each of these three parties the total number of shares the Court may consider it is entitled to under all its rights. This is not the usual method adopted and is not nearly so convenient for the Court, but in this case it is clear

158. Gisborne minute book 46, pp204–205 (doc A21(c), pt5)

159. Ibid, p210

that the parties would fight every step and they themselves have asked that this course be followed.¹⁶⁰

The court established an overall division of shares between Ngati Wahia (who were to receive 58,000 shares), Te Whanau a Taupara (40,000 shares), and the Ngariki group (8000 shares).¹⁶¹ At first sight, the Ngariki share holding appears to have been radically reduced from its original 15,000 shares. However, the number of owners counted as Ngariki had again declined, with many choosing to join the main Ngati Wahia list, or indeed the Taupara list. There were now only 36 individuals defined as Ngariki (previously there had been 46). The descendants of Rawiri Tamanui, Ngariki Kaiputahi, remained part of this Ngariki group, although they were recorded separately as a list of 10 persons.¹⁶²

14.7.3 Native Appellate Court ruling of relative interests, 1922

Almost all parties appealed the 1921 Native Land Court's decision. The Native Appellate Court held a further inquiry between May and June 1922. Its judgment, given on 29 June 1922, declined to increase the 8000 shares allocated to the Ngariki list.¹⁶³ The court stated that:

The addresses by the conductors for appellants appear to us mainly to consist of an attempt to show that the judgment of 1881 was erroneous. This however is not open to them to do. So far as these appellants are concerned they are still bound by that judgment and to obtain any increased award they must be able to show us that under that judgment the Native Land Court did not award them enough shares. This in our opinion they have not done. The judgment of 1881 finds Ngariki to be a conquered and subordinate people, some of whom were replaced on the land by the good will of their conquerors. This applied to all sections of Ngariki proper and it is therefore needless to discuss the confusion that seems to exist as to the different sections.¹⁶⁴

We will return to the implications of this decision presently. The position of Ngariki was also raised in relation to the customary rights held by Te Whanau a Taupara. To cite the judgment again:

Our consideration of the evidence in this case and of the evidence and judgments in the several other cases to which we have been referred renders it impossible for us to say that certain sections of the Whanaua Taupara hapu have not retained any ancestral right in this land and that their only right was under the so called conquest of Te Whiwhi over Ngariki. It

160. Ibid, p 218

161. Ibid, pp 217–222

162. We note that this list is the same as list 30 that had been set up during the 1917 hearings: Gisborne minute book 46, pp 229, 237–238 (doc A21(c), pt 8).

163. Native Appellate Court minute book 21, p 51 (doc A21(c), pt 6)

164. Ibid, p 51

seems to us very doubtful whether the attack on Ngariki by Te Whiwhi had any material effect on the ownership of the land. It was a war of revenge on account of Hirokiroki and his people failing to afford Te Whiwhi assistance in his fighting against Whanau Kai. Ngariki had already been defeated by Ihu and, according to Wi Pere, by Wahia, and were really a subordinate people living on the land by sufferance of the conquerors. If however Ngariki were in fact living there on their own right as co-owners with the descendants of Ihu, then Te Whiwhi's defeat and ejection of them would carry much greater weight than the very small award of the Court in 1881 represents.¹⁶⁵

Unfortunately, this statement left the question of Ngariki Kaiputahi rights in relation to Te Whanau a Taupara yet again unanswered. First, the court was 'very doubtful' about the rights acquired by Taupara at the time of Te Whiwhi. We note that this directly contradicted the 1881 decision, particularly the 'revised' statement that 'mana over the Ngariki and on this land descended from Te Whiwhi'. The appellate court then suggested that, if Ngariki were living as 'co-owners with the descendants of Ihu', their ejection by Te Whiwhi would have carried 'much greater weight'. But the court gave no clear view on this issue either way. Furthermore, the court cited the evidence of Wi Pere to endorse the view that Ngariki were a 'subordinate people living on the land by sufferance of the conquerors'. But as we have seen, Wi Pere was quite clear in his evidence that while portions of Ngariki were defeated, other portions joined with Rangiwhakataiaia and 'were with him in all his fights'.¹⁶⁶ Pere was also clear that Pera Te Uatuku had an independent, 'ancient' right in the land.¹⁶⁷

Our concerns with the unsafe nature of the 1881 decision and the court's failure to differentiate between various Ngariki groups therefore carries through to this decision. We note also the significant compounding negative effect of this decision on the mana of Ngariki Kaiputahi.

There is also a logical problem to the 1917 amendment Act. The Act empowered the Native Land Court to consider Te Whanau a Taupara rights in Mangatu 'according to Maori custom and usage'. And according to the Supreme Court, the Act created a '*tabula rasa*' for Te Whanau a Taupara.¹⁶⁸ Yet, it is clear that Te Whanau a Taupara rights in Mangatu depended, to a certain extent, on evidence of conflict with sections of Ngariki. If Ngariki, and Ngariki Kaiputahi in particular, were unable to go behind the decision of 1881, which declared them conquered, then there was no proper way for the court to test the Taupara argument for such rights. The court would logically be bound by the 1881 decision that Ngariki were conquered. There was no *tabula rasa*, therefore.

165. Native Appellate Court minute book 21, p53 (doc A21(c), pt6)

166. Gisborne minute book 7, p183 (doc A21(b), pt1)

167. Ibid, p184 (doc A21(b), pt1)

168. *In Re Mangatu Nos 1 & 4 Blocks* [1922] NZLR 158, 166 (sc) (doc A21(c), pt4)

The net effect of this for Ngariki Kaiputahi was significant. Having been so wronged by the 1881 decision, Ngariki Kaiputahi were then precluded from arguing that which Taupara were encouraged to argue. Evidence presented to the Native Appellate Court which affirms our view that the 1881 decision was unsafe was unable to be considered by that court. Rather, the court ruled that ‘The addresses by the conductors for appellants appear to us mainly to consist of an attempt to show that the judgment of 1881 was erroneous. This however is not open to them to do.’¹⁶⁹

While the Crown acted properly when it intervened in 1917 to address Te Whanau a Taupara rights (the separation of the Mangatu 4 block from Mangatu 1 was an entirely arbitrary solution to the conflict between Wi Pere and Wi Mahuika), it would have been safer for the Crown to have done so in a manner that opened up the question of rights in Mangatu for all parties. Indeed, rights in Maori land under tikanga derive from the relationship between parties. It is impossible to treat parties separately. And, in this instance, there should have been at least three parties under consideration, each treated equally by the court.

The Native Appellate Court adjusted the proportions given to the Wahia and Taupara parties, stating, ‘a reasonable division . . . would be about $\frac{1}{3}$ for Captain Pitt’s list [Taupara] and $\frac{2}{3}$ for the Wahia list’.¹⁷⁰ This worked out at 32,667 shares for Taupara and 65,333 shares for Wahia. The Ngariki allocation remained unchanged at 8000 shares.

14.7.4 Allocation of shares within lists, 1922–23

The determination of relative interests within the lists was then passed back to the Native Land Court for a yet another round of hearings.¹⁷¹ Groupings in lists were drawn up. Some of these followed the groups established in 1917, while some were new. A struggle also developed between groups within lists. For instance, the Ngariki Kaiputahi party contested the shares allocated to the other 26 members on the Ngariki list. The court gave 3800 shares to Ngariki Kaiputahi and 4200 shares to the rest.¹⁷²

This and other decisions were appealed back to the Native Appellate Court in 1923.¹⁷³ Appeals were considered and a final ruling issued. The Ngariki Kaiputahi group managed to increase their share allocation slightly, from 3800 to 4000 acres. The Native Appellate Court recognised that ‘the rights of Rawiri Tamanui’s family have scarcely been given sufficient recognition while the rights of Mata te Hawa’s party have been overestimated’.¹⁷⁴

169. Native Appellate Court minute book 21, p 51 (doc A21(c), pt6)

170. Ibid, p 55

171. Gisborne minute book 46, pp 224–241B, 258–268, 304–311, 329–331 (doc A21(c), pt8)

172. Ibid, p 268

173. 1923 Native Appellate Court minute book, pp 129–132 (doc A21(c), pt9)

174. Ibid, p 131

14.7.5 Concluding the process

What effect, then, did the re-introduction of Te Whanau a Taupara into Mangatu 1 have on the relative interests of Ngariki Kaiputahi? If we deduct the 6000 acres from the Mangatu 4 block that had been brought into Mangatu 1, we can say that the introduction of Taupara reduced the area originally available to all original owners, both Ngati Wahia and Ngariki, by 26,667 acres. That is about 27 per cent of the original 100,000 acres of Mangatu 1. Following the 1917 allocation and by strict equity, we might expect that all Wahia and Ngariki owners would have had their entitlements reduced by 27 per cent. However, the Ngariki Kaiputahi shareholding fell from 6000 shares to 4000 shares. This is a reduction of approximately 33 per cent. We can therefore say that the reduction experienced by Ngariki Kaiputahi was greater than that experienced by those on the Ngati Wahia list. On an exactly proportionate basis the Ngariki Kaiputahi award should have decreased to 4380 shares. We note also that those 26 individuals who were classed as Ngariki, but who were not Ngariki Kaiputahi, suffered an even greater reduction as they lost shares to Ngariki Kaiputahi because of their lesser rights of occupation.

However, such an analysis assumes that the 1917 court had got it right. We question the 1917 court's reliance on the 1881 decision, which was demonstrably unsafe, but we are unable to say what might have happened if Ngariki Kaiputahi were able to reargue their case in full without the spectre of the 1881 decision hanging over them. The result may have been quite different.

Aside from this reduction in shares, Ngariki, and Ngariki Kaiputahi in particular, suffered a loss of mana. Individuals who were able to affiliate both to Ngariki and to Wahia (and sometimes also to Taupara) chose to shift their affiliation to the latter. But, under tikanga, it should have been perfectly acceptable for individuals to have acknowledged both sides of their whakapapa. Those who could not or would not shift their identity were required to stand by and watch as witness after witness, encouraged by the 1881 decision, stood to confirm their purported 'conquest' and 'subservience'. The table opposite tracks the changing identification of the original owners of the Mantagu 1 block between 1916 and 1922. The decline of identification as Ngariki is clear.¹⁷⁵

In summary, then, the path for Ngariki Kaiputahi, as it was for all other right-holders in the Mangatu 1 and 4 blocks, was tortuous indeed. The lengthy Native Land Court hearing and appeals process pitted hapu against hapu and whanau against whanau, leaving a legacy of bitterness in its wake. Legal costs for all concerned must have been significant, although we have no evidence on this matter.

175. We note that these figures are taken from the court's lists of names. They are not always complete, particularly when recording the members of the whanau of Wi Haronga and Wi Pere.

????????	1916 Mangatu committee list	1917 Native Land Court judgment	1922 Native Land Court judgment
Wahia	51	112	118
Wahia and Ngariki	63	Not listed	Not listed
Ngariki	64	47	26
Ngariki Kaiputahi	Not listed	10 – as part of list number 30	10
Aroha	9	20	Not listed
Taupara	Not on block	Not on block	236

Source: 'Minutes of Owner Meetings at Waihiere and Ownership Lists', Maori Land Court, Gisborne (doc A21(b), pt 5); Gisborne minute book 43, pp 199–211 (doc A21(b), pt 8); Gisborne minute book 46, pp 228–241B (doc A21(c), pt 8)

14.8 TRIBUNAL FINDING AND ANALYSIS

We find that the 1881 judgment by the Native Land Court for the title determination of the Mangatu block was clearly unsafe. The court did little to resolve the conflicting evidence put before it and its written decision was contradictory and unclear. It failed to properly interpret the competing evidence of Wi Pere and Wi Mahuika and it treated all Ngariki as a single, homogeneous group, when evidence was given that clearly indicated that this was not the case. Our concerns here are supported in part by the Native Land Court in 1916 and the Native Appellate Court in 1922.¹⁷⁶ We add our conclusion from the evidence that the community of owners represented by Wi Pere did not subsequently act in a way that suggests that Ngariki were considered by them to be conquered and living in a state of servitude. This is a strong indication that the court in 1881 got its tikanga wrong.

We acknowledge, however, that the Crown was unable to address the problems with the 1881 judgment, as no party asked it to do so. Indeed, from 1881 to 1915, the decision was ignored by the owners. They proceeded to administer the land by 12 trustees, among whom was a representative of Ngariki Kaiputahi, and then by a committee of elected owners under the Mangatu No 1 Empowering Act 1893. A member of Ngariki Kaiputahi was elected to the latter body.

Wi Pere died in 1915. In 1916, the allocation of proportionate interests in the land commenced. In 1917, the Native Land Court awarded 6000 shares to Ngariki Kaiputahi out of a total of 100,000 shares or acres. In doing so, the court took a strangely principled approach, placing the greatest emphasis on evidence of occupation, rather than descent or other customary take. The court also discounted allocations to individuals of Ngariki descent by 100 shares each, presumably because of their 'conquered' status as judged in 1881. This allocation was subsequently overturned, and thus there was no direct material effect on Ngariki Kaiputahi at this stage.

¹⁷⁶ Gisborne minute book 42, p153 (doc A21(b), pt7); Native Appellate Court minute book 21, p53 (doc A21(c), pt6)

However, owing to the court's reliance on the 1881 judgment, a judgment which declared all Ngariki to be conquered, individuals among the wider community of owners began to stress their identity as Ngati Wahia, rather than as Ngariki or as both. As some individuals, including Ngariki Kaiputahi, were either unwilling or unable to take a Ngati Wahia identity, the mana of Ngariki was damaged at this time.

In 1917, the Crown intervened in the affairs of Mangatu. Legislation was passed that allowed the Native Land Court to re-inquire into the customary rights of Te Whanau a Taupara in Mangatu 1. The court could introduce those who had missed out onto the title or increase the shareholding of individuals who had been placed on Mangatu 4. Numerous additional court hearings took place between 1918 and 1923. During this time, Ngariki Kaiputahi suffered both material loss and further damage to their mana. The Ngariki Kaiputahi shareholding set in 1917 at 6000 shares was reduced to 4000 shares. Although the introduction of Te Whanau a Taupara into the title of Mangatu 1 had reduced the shares available to both Ngati Wahia and Ngariki by approximately 27 per cent, the allocation to Ngariki Kaiputahi was reduced by around 33 per cent, a disproportionately greater amount. Furthermore, as occurred in 1917, individuals who could choose to identify as either Ngariki or Ngati Wahia, or as both, chose to identify solely with Ngati Wahia.

We do not dispute the fact that Te Whanau a Taupara had legitimate customary rights in Mangatu 1 which the decision of 1881 failed to properly cater for. Nor do we believe that the Crown acted improperly when it intervened to address this in 1917. Despite the political antagonism between Wi Pere and Wi Mahuika at the time of hearing, the separation of Mangatu 4 from Mangatu 1 was highly artificial, a decision based on pragmatism rather than custom.

Our concern is that, having decided to intervene to address the plight of Te Whanau a Taupara, the Crown should have ensured that the Native Land Court was able to properly consider the customary rights of all parties, rather than tying some parties to the decision of 1881 while at the same time treating the case of Te Whanau a Taupara afresh. As it stood, section 6 of the Native Land Amendment and Native Land Claims Adjustment Act 1917 placed parties with legitimate interests in the land on an unequal footing with one another, heightening existing tensions between owners and, ultimately, enabling Ngariki Kaiputahi to suffer the prejudice just described. We note that the Crown had prior warning of the difficulties posed in reopening the question of customary interests in the Mangatu block. In 1916, Judge Robert Jones spoke of clear inconsistencies in the 1881 decision.¹⁷⁷

That said, we are unable now to say what rights would have been allocated if Ngariki Kaiputahi had been able to properly reargue their case. It is certainly too late to argue for a rearrangement of rights in Mangatu. Our jurisdiction is also constrained. The Tribunal is unable to make recommendations affecting private land, which includes Maori-owned land such as the Mangatu Incorporation's. The same logic applied to Pakeha freehold land must

177. Gisborne minute book 42, pp153–156 (doc A21(b), pt7)

apply to Maori-owned land – a new injustice should not be generated to correct a past injustice.

What we can say is that the process by which relative interests were allocated was flawed. All that is possible today is for the Crown to offer an apology to Ngariki Kaiputahi and to compensate for the significant mana and practical loss suffered by them.

We note that Ngariki Kaiputahi petitions later submitted to Parliament were considered by the Crown, but that staff at the Department of Maori Affairs appeared overawed by the ‘voluminous’ nature of the evidence recorded by the Native Land Court. Staff relied instead on the court decisions of 1881, 1917, and 1922, which repeatedly stated that Ngariki were conquered.¹⁷⁸ This response was not satisfactory in our view.

We sympathise too with the affront Ngariki Kaiputahi must feel by being labelled as ‘conquered’ by the court in 1881, particularly when this label was used by courts subsequently. But while it is clear that Ngariki Kaiputahi had ancestral rights to the land, it is important not to overstate or understate them. The Native Land Court was certainly confused by evidence of different Ngariki groups, most of whom had at different times been bested in battle by Mahaki and his descendants, often intermarrying with the conquerors. However, Wi Pere was equally clear that the direct descendants of Rawiri Tamanui continued to exercise ancestral rights in the Mangatu area, stating, ‘It is through the ancient ancestors that Pera derived his claim’.¹⁷⁹ We see no reason to disagree with him. Nor does evidence suggest that Ngariki Kaiputahi existed in a state of servitude to the hapu of Te Aitanga a Mahaki, although they were admittedly a smaller party when compared to the wider community of owners. Rawiri Tamanui and Pera Te Uatuku fought alongside sections of Te Aitanga a Mahaki at different times. Ngariki Kaiputahi leaders participated in decision-making processes once the Mangatu block passed through the court, being represented on the 12 trustees established in 1881 and later being elected to the committee of management. This does not indicate a position of servitude. Rather, it indicates an ongoing relationship between people of different descent who happen to hold customary rights in a similar area of land.

Finally, we note that Ngariki Kaiputahi today have formed themselves into a whanau trust under Te Ture Whenua Maori Act 1993. As a strategy to increase their influence within the Mangatu Incorporation, they have pooled their shares in the trust.¹⁸⁰ We acknowledge the difficulties described by Owen Lloyd, where the rules of the Mangatu Incorporation preclude trusts from applying for educational grants or kaumatua grants.¹⁸¹ This appears to be a matter that Ngariki Kaiputahi and the Mangatu Incorporation could resolve themselves.

178. EW Williams, deputy secretary, Department of Maori Affairs, to clerk, Maori Affairs Committee, 29 September 1975 (doc A21(d), pt11)

179. Gisborne minute book 7, p184 (doc A21(b), pt1)

180. Document c23, p22

181. Ibid



Fig 21: Makaraka racecourse under flood water, 1950. Photographer unknown.
Reproduced courtesy of the Alexander Turnbull Library, Wellington, New Zealand (F-55265-½).



Fig 22: Flooding, Evans–Nield, 1910. Photographer unknown.
Reproduced courtesy of the Tairāwhiti Museum, Gisborne, New Zealand (1910, WFC1.4-6535).

CHAPTER 15

MANGATU AFFORESTATION

The intention was to establish a protection forest, not a productive one and milling if any would be on a small scale with little profit.

—Commissioner of lands, 12 October 1960

15.1 INTRODUCTION

Today, a major commercial forest is established on Mangatu lands. In this chapter, we examine the process by which the Crown acquired lands in the Mangatu blocks from the Maori owners for afforestation in 1962.

During the years after the Second World War, there was increasing concern at the problems of the Waipaoa River catchment area. The underlying geology of the Waipaoa lands (particularly the crushed argillite and bentonite zones) rendered them susceptible to erosion and soil run-off. This contributed to river aggradation or silt build-up, which increased the risk of flooding in the lower reaches of the river system. Prior to the clearing of the forest cover, the native forest had provided a measure of stability to the soil through its ability to bind the soil by its root structure. Between 1890 and 1920, however, the indigenous forest was cleared to bring the lands into pastoral production. Erosion increased dramatically as a result.

In the 1930s and 1940s, severe flooding caused considerable damage on the Gisborne flats. The Poverty Bay Catchment Board, established in 1944, undertook a major control scheme on the Waipaoa River in 1953. But it realised that flood control was only part of the solution. Land degradation in the catchment area also had to be addressed.

In 1955, at the request of the catchment board, a panel of experts in soil conservation and agriculture was established by the Soil Conservation and Rivers Control Council to report on the erosion situation in the catchment area. The panel found that the most significant erosion problems were attributable to the crushed argillite and bentonite zones in the rock formations. It recommended that the crushed argillite area be retired from farming and afforested, in order to protect the soil from erosion and lessen aggradation in the rivers. It was estimated that protective exotic forest could be established on 7000 acres (2800ha) and productive forest on 6000 acres (2400ha).

Just over half of the crushed argillite area in question formed part of three separately owned farm stations. The panel recommended that the Crown purchase the crushed argillite area of each of these farm stations. The other half of the crushed argillite area was owned by the Mangatu Incorporation.¹ It was recommended that the Crown seek an arrangement with the Maori owners whereby they would retain title to the land and the Crown would finance the afforestation.

From this point on, various Government agencies became involved. In particular, the Forest Service was interested in the commercial potential of the forest.

In August 1959, Cabinet approved in principle the acquisition and afforestation of the crushed argillite lands, and the Government began the process of acquiring 14,000 acres in the upper Waipaoa River. The commissioner of Crown lands began negotiations for the land. The owners of Mangatu acknowledged the need to take action to prevent further damage from erosion in the interests of the wider community. They did not, however, wish to sell their ancestral lands to the Crown, but sought to undertake the afforestation themselves.

In June 1960, the Minister of Forests attended a meeting with the owners of Mangatu to discuss the afforestation scheme. The Minister told the meeting that he would report to Cabinet that the owners and the Mangatu committee of owners had agreed that negotiations would begin for a voluntary sale. Though there is some doubt whether the meeting reached that decision, that appears to be the belief the Minister took away with him. In October 1960, the owners passed a resolution to sell the land. We address below the reasons for this evident change of heart.

The negotiations proceeded with both the Crown and the owners receiving valuation advice. Eventually, the parties reached an agreement on a price of £82,137. The land was sold to the Crown and Mangatu State forest was established. Today, the total commercial forest at Mangatu is 12,200 hectares. The cutting rights were acquired by Rayonier in 1992. The logging rate of 200,000 cubic metres per acre in 1993 was expected to double. The forest has been logged since 1987.

The key issue arising from this is: was the Crown's negotiation process regarding the afforestation of the Mangatu lands fair and transparent?

15.2 THE AFFORESTATION OF MANGATU

Here, we consider the background to afforestation in the Mangatu blocks, and the negotiations between the Mangatu owners and the Crown between 1948 and 1961. In particular, we trace the emergence of apparently different views among the experts who advised the

1. Mangatu blocks 1, 3, and 4 (totalling 48,500 hectares), which had been administered by the East Coast Commissioner since 1917, were returned to the owners in 1947. Fourteen stations, stocked with sheep and cattle, had been established on the land.

Mangatu owners and the Government on the question of the possible commercial potential of the forest. How much of the forest, if any, was to be production as opposed to protection forest?

15.2.1 The geological structure and the loss of indigenous forest cover

It is generally recognised that erosion was, and is, an enduring feature of the landscape in the inquiry district. Dr Brad Coombes, who presented evidence before the Tribunal on behalf of the claimants, stated that ‘research has indicated that deep-seated erosion occurred on the steep hills inland from Poverty Bay prior to any anthropogenic interference.’ Crown witness Ashley Gould concurred. He described flooding caused by high rainfall events as the norm for the Waipaoa flood plain. It is, he said, by its geological nature a flood plain.²

The removal of the forest cover resulted in two distinct but related problems: erosion and aggradation. The forest was replaced by grass cover, which could not hold the soil. The regular rainfall pattern in the catchment area caused sediment, particularly the heavier, less fertile sediment from the crushed argillite zone, to be washed into the waterways. The argillite sediment tended to settle close to its point of origin, only shifting downstream during significant flooding. Because higher levels of river energy are required to transport argillite sediment than to transport other finer mudstone sediment, this led to aggradation. The build up of sediment progressively filled the channels and waterways, decreasing their depth and increasing their width. This further reduced the ability of the waterways to move sediment. The Waipaoa Valley, which was once v-shaped, was now flat bottomed, heavily braided, and prone to flooding.³

15.2.2 Discovering the effects of deforestation

Three reports, written in the late nineteenth and early twentieth centuries, highlighted the effect of forest clearance on the landscape. In 1895 H Hill, in a paper published by the New Zealand Institute, reported that 3.6 per cent of an estimated 29,000 hectares of pasture in the East Coast region had been damaged by erosion. He concluded that ‘Open and improved country appears to have suffered most and bush country least.’⁴ In 1920, CS Slocombe (whose position was officially ‘forest assistant’) stated, in a forest reconnaissance survey of the East Coast and the western Bay of Plenty, that ‘the effects of the removal of the forest cover are so

2. Document F1, p13

3. Document A20, p49

4. H Hill, ‘Denudation as a Factor of Geological Time’, *Transactions and Proceedings of the New Zealand Institute*, vol28, pp666–680, p675 (doc A20, p44; doc F1, p13). We note that Coombes and Gould disagree on the location of the land examined by Hill. We have followed Gould’s more conservative argument, which locates the land on the East Coast in general, rather than in Mangatu specifically.

apparent that the value of forests as protective agents is stressed.⁵ Slocombe recommended that steep slopes already cleared be re-afforested:

As before pointed out, these effects, to a greater or less extent, follow inevitable [*sic*] on the settlement of the country. By the exercise of reasonable precautions however, their action could have been decidedly reduced, and there is still time to prevent, in part, the destruction of wealth it requires no prophet to foresee.⁶

Another report, produced by Henderson and Ongley in the same year for the Ministry of Mines, referred to the soils of the Mangatu region as consisting of three soil types: argillaceous (giving rise to a thin layer of soil capable of carrying excellent pasture), clayey (which quickly crumbles and, except in very steep situations, is soon again covered by pasture), or limestone. Of the latter they said:

the limestone hills of the Mangatu basin, which are formed of hard fissile limestone of Cretaceous age, present surfaces which are apparently nearly destitute of soil. For the reason that the losses due to soil-denudation are not so readily replaced by wastage from the harder claystones and shales . . . the soil on the slopes of hills formed of them tends to become thin and poor.⁷

The report was written to provide the Minister of Mines with technical advice about the possibility of gas, oil or other mineral extraction or formation. The geological information it contained, however, did provide a snapshot of the Mangatu lands at the time.

15.2.3 The beginnings of a national soil conservation programme

A number of factors combined to produce the first Government action on erosion. First, a number of large floods affected the Gisborne region in the 1930s: three in 1936, one in 1937, and seven in 1938.⁸ Secondly, by the late 1930s, research into land deterioration was proceeding under the auspices of the Department of Scientific and Industrial Research Land Utilisation Committee. And, thirdly, the Royal Society of New Zealand urged the Government, in 1938, to set up a royal commission to report on 'the preservation of the vegetation of New

5. Report on Forest Reconnaissance Survey of Huiarau and Raukumara Ranges, 1920, FW3129 1/11/3/2 (doc 18(a), vol12, p8313)

6. Ibid (p8316)

7. H Henderson and M Ongley, 'The Geology of the Gisborne and Whatatutu Subdivision, Raukumara division, *Bulletin no 21*, Geological Survey Branch (Department of Mines, Wellington, 1920), pp79–80 cited in (doc F33, vol4, pp1318–1319)

8. Document F1, p15. These were not the first major floods to have an impact on the district. The first flood for which there is a written record occurred in 1820. There are also documented accounts of floods in 1841, 1847, and 1853. In the 1876 flood, more than half a metre of rain fell following five months of drought. In the early twentieth century, there were substantial floods in 1906, 1910, 1914, and 1916: doc A20, pp58–59.

Zealand, with special reference to forests and the incidence, control and prevention of land erosion'.⁹

Cabinet responded by approving a high-powered committee of inquiry to investigate land deterioration and soil erosion problems. In its 1939 report, the committee first highlighted the importance of adopting measures to combat soil erosion. Secondly, it raised two related issues: soil conservation and land utilisation. Although there was widespread opposition to conservation among farmers, there was also widespread concern about flooding. The Labour Government's draft Rivers Bill became the Soil Conservation and Rivers Control Bill. It was passed in September 1941 and a Soil Conservation and Rivers Control Council was established; its most important function was to establish catchment districts and catchment boards to implement regional soil conservation and rivers control programmes.

Kenneth Cumberland, who became New Zealand's leading geographer, commenced field-work in both the North and South Islands for the newly created Soil Conservation and Rivers Control Council. He noted that on the East Coast the combination of soft, crushed cretaceous sediment rock, the dry summer weather, and the high rainfall pattern 'rendered the region particularly susceptible to erosion'.¹⁰ In Gisborne, he observed 'slow flowage' types of slips, that sometimes involved hundreds of acres. These, he said, were specific to the area:

They are not characteristic of the region [as] a whole; but they strike a serious and dominant note in the steeper valleys tributary to the East Coast from the Waipaoa to the Awatere . . . These forms of erosion – it remains to be demonstrated to what precise extent they constitute soil erosion – are, perhaps, the most impressive and serious and the most disastrous in their ultimate effects of all the forms of erosion occurring in New Zealand, in which man has had some hand.¹¹

15.2.4 First attempts to address problems of erosion and flooding in Turanga

(1) *The Waipaoa River flood control scheme*

In 1945, the Poverty Bay Catchment Board, which had been established the previous year, began to develop a scheme for the lower Waipaoa catchment area. The board was concerned particularly with the area of crushed argillite formations in the Mangatu/Waipaoa catchment area.¹² A long-term project was embarked on to "flood proof" the lower Waipaoa catchment area, by improving the flow and carrying capacity of the riverbed'.¹³ This included removing

9. 'Minutes of the Annual Meeting of the Council', *Transactions of the Royal Society of New Zealand*, vol 68 (1938–1940), p 611 (Michael Roche, *Land and Water – Water and Soil Conservation and Central Government in New Zealand, 1941–1988* (Wellington: Historical Branch of Internal Affairs, 1994), p 35)

10. Document F1, p17

11. KM Cumberland, *Soil Erosion in New Zealand; A Geographic Reconnaissance*, 2nd ed (Wellington, 1947), p 52 (doc F1, p17)

12. Document F1, p15

13. *Ibid*, p18

15.2.4(2)

some of the larger bends in the river and shortening the length and increasing the gradient. According to AD Todd, the chief engineer for the Poverty Bay Catchment Board, the Waipaoa River flood control scheme, which consisted of a series of earthworks, was designed to restrain and redirect the Waipaoa River over the final 45 kilometres of its passage to the sea. In his proposal, Todd stated that, first, the first 27 kilometres from the river mouth would be continuously stopbanked, up to a height of 3.5 metres.¹⁴ Stopbanking would also be constructed some distance up the Te Arai River and Whakaahu Stream in order to manage back-ponding. Secondly, three ox-bows would be eliminated: at Te Wairau bend, Matawhero loop, and at the confluence of the Whakaahu and the Waipaoa Rivers. By channelling the river into a less obstructed course, the energy of the river would be increased. This in turn would result in the river degrading or scouring out its bed, increasing the gravitational force of the water, and ensuring that floodwaters would be carried to the sea with greater velocity.¹⁵ The scheme took many years to construct, and some of the river straightening work was not finalised till the late 1960s.

(2) *The board's experiment at Mangatu*

The Poverty Bay Catchment Board also turned its attention to erosion in the upper catchment area. In 1948, following severe flooding, the board inspected the Te Weraroa area of Mangatu 1, the location of the Tarndale slip.¹⁶

The catchment board recognised the relationship between the conversion of forest cover to pasture, increased run-off, and the development of gully erosion. It also noted that the combination of increased runoff and the 'intrinsically unstable nature of the country' gave 'no possibility of a natural stability being achieved within any reasonable period of time'.¹⁷

In August 1948, the board leased 1158 acres of Te Weraroa from the owners of Mangatu 1 for 'experimental purposes'.¹⁸ It undertook a four-stage plan to ameliorate the downstream effects of the erosion problem, using the leased lands. First, a five-year programme of tree planting, stabilising gullies and stream beds, and stock control would be implemented. Secondly, the sandstone country would be retired from farming. Thirdly, the steep slopes would be retired from farming and the slopes would be afforested. If the preceding stages were unsuccessful, the fourth stage would then come into effect. The whole area would be

14. Document A20, p79

15. 'Waipaoa River Flood Control Proposals', AD Todd, chief engineer, Poverty Bay Catchment Board, 14 July 1964 (doc A20, pp79-80)

16. The Tarndale slip is a 'massive 50ha slip that resembles some immense quarry sprouting planted pine trees along the edge of its wound. Clinging to one barely surviving ridge is a forlorn strip of road. To stop on the edge is to invite instant vertigo': David Young and Bruce Foster, *Faces of the River: New Zealand's Living Water* (Auckland: TVNZ Publishing, 1986), p54.

17. 'Meeting of the Poverty Bay Catchment Board', 9 August 1948, F1/7/6/1, v1, p13 (doc A27, p174)

18. Document A18, pp482-483. 'It was decided to negotiate for a lease since the board considered they had little chance of purchasing the land from the [Maori] owners of Mangatu': 'Meeting of the Poverty Bay Catchment Board', 9 August 1948, F1/7/6/1, v1, p13 (doc A18, p484; doc A27, p174)

retired from farming. It would then either be allowed to revert to bush or afforested, depending on the economy and the local demand for timber.¹⁹

15.3 TOWARDS AFFORESTATION

15.3.1 The panel report, 1955: a summary

In 1955, the Poverty Bay Catchment Board requested the Soil Conservation and Rivers Control Council to appoint an expert panel to evaluate the situation in the Waipaoa catchment area. The board specifically wanted the panel to prescribe 'a practical remedial programme on a catchment plan basis for immediate implementation'.²⁰ The panel was chaired by AL Poole, the Assistant Director of Forestry (New Zealand Forest Service), and comprised senior staff from a number of Government agencies.²¹

The panel reported their findings in the first few months of 1956. They identified the main problems as: first, the 'immature topography'; secondly, the soft rocks throughout the area; thirdly, the intense rains coupled with the effects of 'almost complete deforestation of the catchment'; and fourthly, close grazing of the pasture which replaced the forest. The result of all these factors was, the panel reported, 'unusually severe erosion and aggradation in the upper Waipaoa and many of its tributaries'.²²

The panel identified the two rock formations presenting the greatest problems as the crushed argillite and the bentonitic zones. They agreed that prevention and control of soil erosion must be based on the physical facts. Moreover, the overall management of farmlands should be adapted to balance production and protection. On the basis that three-quarters of the catchment area was farmed and was likely to continue to be so, the panel suggested that the 'greatest contribution towards solving the problems can be made by individual farmers who have the resources, and desire to do so once given a lead'.²³

In the course of their investigation, the panel observed examples of tree planting designed to mitigate the movement and erosion of both bentonitic material and the crushed argillite zone. They contrasted the success of the former with the failure of the latter. The control measures on fertile bentonite soils should, they argued, be continued, and increased. But soil conservation efforts in the crushed argillite area had proved ineffective because of the advanced stage of gulying and slumping, the inability to control heavy flows of mud, and the difficulty of establishing vegetation. The panel believed that 'the whole of this

19. 'Meeting of the Poverty Bay Catchment Board', 9 August 1948, F1/7/6/1, v1, p13 (doc A27, pp174–175)

20. 'Report of a Special Committee Set up by the Soil Conservation and Rivers Control Council', not dated (doc A18(a), vol12, p7821)

21. Ibid (p7830)

22. Ibid (pp7821–7822)

23. Ibid (p7822)

formation constitutes an erosion hazard and warrants as complete protection as possible'.²⁴ Even with rapid reforestation of the argillite, and conservation measures on the bentonite, it would be at least 20 to 25 years before those measures proved effective in preventing further aggradation.

The panel recommended that the whole area of crushed argillite, 14,000 acres, be afforested to achieve erosion protection and lessen aggradation in the river. It would be possible, however, to combine protective forestry with commercial forestry:

From a preliminary survey it is estimated that 6,000 acres would at present carry productive stands of trees. . . . About 7,000 acres would require planting for protective purposes and would in places, need to be accompanied by engineering works. Once stabilization had been achieved, planting for timber production could extend into protection areas. About 1,000 acres of major slips, etc. are at present unplantable.²⁵

It was thought that planting should be completed in 10 years, and that the cost of establishing 6000 acres of production forest would be at least £250,000. The cost of establishing protection forest, plus the cost of the accompanying engineering works, was unknown.²⁶

As well as preventing erosion, afforestation would have the added benefit of supplying the timber needs of the Poverty Bay–East Coast district. Successive governments had been under pressure to begin an afforestation scheme for local supply (it was believed that the region would have to import all its timber from outside the district in a few years). The Government had in fact both approved a scheme and begun negotiating for suitable land.²⁷ It was suggested, therefore, that if these negotiations fell through, the proposed Mangatu afforestation could be an alternative, providing about half the district's timber requirements.

As far as planting for protection was concerned, however, it was not the owners of the land who would benefit. They would lose grazing land which would be planted in trees. Those to benefit would be the inhabitants of the lower reaches of the Waipaoa River and the Poverty Bay flats. It would be hard, therefore, to levy sufficient rates against the owners to contribute to the costs incurred. It would also be difficult to separate the cost of establishing a protection forest from that of planting for production. For these reasons, the panel recommended that the entire scheme be funded by the state.

In considering the question of title to the lands to be afforested, the panel suggested that the work 'would be greatly simplified' if it was acquired by the Crown. The Crown should purchase the privately owned Tawhiti station (3079 acres), Tikitore station (422 acres), and Waipaoa station (1606 acres). If that were not possible, the work could be carried out, as a last

24. 'Report of a Special Committee Set up by the Soil Conservation and Rivers Control Council', not dated (doc A18(a), vol12, p7823)

25. Ibid (p7827)

26. Ibid (p7827)

27. The negotiations were with the Gisborne Harbour Board, for land at Tauwhareparae.

resort, under section 64 of the Forests Act 1949. Under this provision, the owner would retain title but the State would finance all the 'tree establishment and protection work and some agreement would have to be reached about management and sale of the timber and the division of profits'.²⁸

Ideally, the Crown would also acquire title to the land lying in the Mangatu blocks (8893 acres) owned by Maori.²⁹ However, because the panel thought acquisition was unlikely, it recommended using section 64 of the Forests Act, noting that Maori owners had already concluded that afforestation should be carried out and were prepared to undertake it. Maori envisaged a combination of afforestation and farming on the crushed argillite. The panel, however, recommended complete afforestation of the area.³⁰

The panel thus made a strong set of recommendations to the Soil Conservation and Rivers Control Council. In particular, it urged the council to support the Poverty Bay Catchment Board in its conservation work.

The release of the panel's report in February 1956³¹ brought responses from all bodies who had an interest in the Mangatu lands or upper Waipaoa erosion. These indicate a general recognition of the scale of the problems. The resident engineer of the Ministry of Works urged the closure of the pastoral lands: 'It may or may not have been a mistake to turn some of this country from bush to pasture until 1956 but to continue indefinitely in the light of present knowledge is deliberately inviting disaster'.³²

The Director of Forestry, AR Entrican, also supported the panel's report. Writing to the Minister of Forests on 5 April 1956, Entrican noted the view of one of the panel members, the director of the Soil Bureau, that: 'the crushed argillite, would in time, become completely eroded and feed millions of cubic yards of debris into the Waipaoa River. He [the director of the Soil Bureau] was of the opinion that complete and rapid afforestation would bring about the only cure'.³³

Entrican picked up on the panel's views on afforestation of the crushed argillite formation (some 14,000 acres), stating that 'about half of it would carry productive forest and half would have to be planted for protection purposes primarily'.³⁴ His district forest ranger, AM Moore, considered that 43 per cent of the 14,000 acres was suitable for commercial forestry, and 49.5 per cent for protection forestry, while 7.5 per cent was regarded as unplantable.³⁵

28. 'Report of a Special Committee Set up by the Soil Conservation and Rivers Control Council', not dated (doc A18(a), vol12, p7828)

29. Ibid (p7828). We note that it is this land that our inquiry relates to.

30. Ibid

31. There is some doubt about the date of the release. Gould also mentions another source; which puts it in March: doc F1, p51.

32. Resident engineer, Ministry of Works, to engineer, Soil Conservation and Rivers Control Council, 31 January 1956, WF96/1970001 (doc F1, p52)

33. Director of Forestry to Minister of Forests, 5 April 1956, F1 7/7/1, vol1 (doc F33, vol3, p1123)

34. Ibid

35. Moore to Conservator of Forests, 6 February 1956 (doc F1, p54)

Entrican added that the Waipaoa afforestation might therefore be considered as an alternative scheme to the Tauwhareparae area, where negotiations were proving very difficult.³⁶

The Poverty Bay Catchment Board approved the panel's report 'in principle', and recommended to the Soil Conservation and Rivers Control Council that the Crown enter negotiations with the owners of land to be afforested, under section 64 of the Forests Act 1949.³⁷ It did not support the panel's suggestion that the Crown deal with European owners and Maori owners differently. It considered that such an approach might have 'widespread repercussions' on the board's relations with owners in the upper Waipaoa catchment area:

The continued co-operation of these Farmers is essential, so that erosion control measures will be undertaken by them on the major part of the Catchment to reverse the present conditions of accelerating erosion and increasing silt and shingle load to the river. To this end the approach to both Maori and European land owners should be on the same basis.³⁸

The catchment board set up a subcommittee, which met with representatives of lands recommended for acquisition (Tawhiti station, Te Rata station, Waipaoa station, Mangatu blocks, and Te Hua station) to gauge their initial reaction to the proposals.

15.3.2 Mangatu Incorporation initiatives

The Mangatu Incorporation had for some time been considering the prospect of the afforestation of parts of its land, even before the completion of the panel's report.³⁹ The owners accepted the need for afforestation of the crushed argillite zone owing to erosion and, as the panel of experts noted, were prepared to undertake it themselves.⁴⁰ At that time, they envisaged that it would be possible to combine afforestation and farming.⁴¹

The Mangatu committee of management met with Mr Metsers, soil conservator of the catchment board, as early as July 1955, to discuss erosion control work for a small portion of Te Hua station. Metsers provided a report to the committee in December 1955, in which he recommended that 140 acres be afforested the following year. Within 40 years, 5000 to 6000 acres would be afforested, by which time, he said, the first year's crop would be ready for milling. Metsers emphasised the commercial potential of the forest. His figures showed an 'ultimate net profit of £5–£8 an acre, spread over 40 years'. The committee agreed to adopt

36. Director of Forestry to Minister of Forests, 5 April 1956, F1 7/7/1, vol1 (doc F33, vol3, p1123). Negotiations for Tauwhareparae, near Tolaga Bay, were being conducted with the Gisborne Harbour Board.

37. Soil Conservation and Rivers Control Council, Waipaoa Catchment: Report of Special Committee, Agenda Item No 6, November 1956, AATE W3404, 96/1970001, pt1, Archives NZ (doc F33, vol1, p0139)

38. Soil Conservation and Rivers Control Council, Waipaoa Catchment: Report of Special Committee, Agenda Item No 6, November 1956, AATE W3404, 96/1970001, pt1, Archives NZ (doc F33, vol1, p0140)

39. Document F1, p 49

40. Document A18, p 486

41. Document F1, p 49; doc A18, p 486

Metsers' plan in principle and to recommend beginning afforestation the following year.⁴² In the wake of the release of the panel's report, discussions between the Mangatu Incorporation and the Poverty Bay Catchment Board began almost at once.⁴³ At a Mangatu committee meeting on 24 April 1956, reference was made to the catchment board's suggestion that 'it might be in the best interests of the Body Corporate and of the owners of land on the Poverty Bay flats that Te Hua should be closed down and completely re-afforested'.⁴⁴ At this meeting, Mr Keiha raised the question 'as to whether or not the Crown would be in a position to offer lands in exchange for lands of the Body Corporate, which might be taken exclusively for forest work'.⁴⁵ From this time, further discussions between the Poverty Bay Catchment Board and the committee of management took place.⁴⁶

At the outset, Turanga Maori became aware that experts differed in their views as to the nature of the proposed forest on their lands. The Mangatu committee met with the district forest ranger, AM Moore, on 26 June 1956. They asked him a number of questions about the financial viability of the forestry scheme, particularly if they made use of section 64 of the Forests Act 1949, which would allow them to retain title to their lands. Both the committee minutes and the notes taken by Moore demonstrate that the committee was aware that afforestation was necessary but they wanted reassurance that the scheme would benefit the owners. Their concerns included the loss of production, the delay till any revenue was produced from forestry, and possible costs they might have to meet. Moore stated that he did not think afforestation would be an economic timber proposition. He disagreed with Metsers' estimation that '70% of the area would be productive forest in the first cycle of afforestation'.⁴⁷

The owners were unwilling to part with the land, the option favoured by the Crown, but they did raise the possibility of an exchange of land, either inside or outside the district. Moore, however, stated that such an exchange, though possible, would be 'exceptionally difficult' to arrange.⁴⁸

Moore's views clearly weighed with the Mangatu committee of management. On 6 July 1956, the committee met with the chairman and conservator of the Poverty Bay Catchment Board to discuss the panel's proposals. The incorporation's solicitors wrote to the chairman of the catchment board's committee on 6 August, expressing their doubts that afforestation was an economically viable proposition. While the scheme would benefit the Waipaoa River flood control scheme and the landowners on the flats, return on the investment in forestry was far from certain. The solicitors noted that the committee were prepared to give further consideration to the matter when more information was made available and were 'far from

42. Ibid, p50

43. Ibid

44. 'Minutes of Committee of Management, Mangatu Incorporation, Gisborne', not dated (doc F1, p59)

45. Ibid

46. Document F1, p59

47. 'Minutes of Committee of Management, Mangatu Incorporation, Gisborne', not dated (doc F1, p62)

48. Ibid (pp61-62)

unmindful of the urgency for action and any proposition put forward as a means to arrest erosion would be sympathetically considered'.⁴⁹

15.3.3 The Government's response

In November 1956, the Soil Conservation and Rivers Control council resolved to recommend that the Minister obtain Cabinet approval of the recommendation of the panel. By March 1957, it was considering land acquisition, and suggested that valuations of Tawhiti, Waipaoa, and Mangatu block stations be sought.⁵⁰ On 24 July 1957, the Valuation Department provided valuations of the land to be taken for re-forestation, defining the area as 16,118 acres. The value of 8646 acres of land included in the three Mangatu stations was given as £56,595. For 4502 acres of Tawhiti station, the figure was £45,590, and for 2970 acres of Waipaoa station, £20,795.⁵¹

On 5 February 1958, the chairman of the Soil Conservation and Rivers Control Council, ER McKillop, provided the Minister of Works, Hugh Watt, with a copy of the panel report and strongly endorsed its recommendation that the crushed argillite lands (14,000 acres) be afforested.⁵² McKillop also outlined to the Minister the cost of the project, and indicated that the afforested area would have commercial value:

Based on a recent Government valuation, the cost of acquiring this property would be in the order of £140,000. To this must be added the cost of planting and managing the area which should be under the control of the State Forest Service. It is believed that the area will ultimately be of commercial value, although the nature of the country and its topography are such as to place restrictions on forestry operations within it.⁵³

Around the same time, on 14 February 1958, the Director of Forestry, AR Entrican, reported to his Minister on the urgency of the erosion problem and the need to afforest the argillite zone of 14,000 acres. He added that the primary aim of the forest would be protection, but 'about half of the area' might carry production forest.⁵⁴

Later that year, in October, however, an estimate of the projected costs of afforestation (prepared by the Forest Conservancy at Rotorua) reassessed the production to protection ratio as: 12,000 acres production forest (75 per cent), and 2500 acres protection forest (16 per cent). The remaining 9 per cent or 1500 acres was considered unplantable.⁵⁵ AN Sexton, the

49. Soil Conservation and Rivers Control Council, Waipaoa Catchment: Report of Special Committee, Agenda Item No 6, November 1956, AATE W3404, 96/1970001, pt1, Archives NZ (doc F33, vol1, p0142)

50. Document F1, pp 68–69

51. Ibid, p71

52. Ibid

53. Chairman, Soil Conservation and Rivers Control Council, to Minister of Works, 5 February 1958, AATE W3404, WF96/197000/1, Archives NZ (doc F33, vol1, p0119)

54. Director of Forestry to Minister of Forests, 14 February 1958, FW3129, 1/11/3/2 (DOC18(a), vol12, p8290)

55. Document F1, p79

conservator, thought it probable that part of the ‘protection forest’ could fulfil a dual protection and production role.⁵⁶ He suggested that 1000 acres be planted annually, and expected the forest to yield ‘approximately 450,000 cu ft of thinnings per annum within 20–25 years and 2 million cu ft per annum within 30–35 years or £2000 and £8000 per annum at a minimum stumpage of 1d per cu ft’.⁵⁷ The total cost of the afforestation scheme was estimated at £1,115,000 over a 30-year period.⁵⁸

On the basis of Sexton’s report, Entrican proposed that the Crown acquire and plant 16,000 acres of the crushed argillite zone of the Waipaoa River catchment area. In his proposal, he rehearsed the history of deforestation, the impact of severe flooding on the Gisborne flats, the exceptional fertility of these lands, and the need to protect both them and the catchment board’s expensive stop-banking scheme. He emphasised the importance of restoring the forest cover. Entrican included Sexton’s figures, showing that a ‘surprisingly large proportion of the area could be used for commercial afforestation’. He estimated the cost of acquiring the necessary land (‘some two thirds’ of it Maori owned) at £140,000, and suggested it might ‘even be necessary’ to take the land under the Public Works Act. Entrican believed that the Forest Service, rather than the Soil Conservation Council, should administer the proposed Waipaoa project. It was, he said, clearly the responsibility of the Forest Service, for it involved ‘both production and protection forestry’. He sought support from the Ministry of Works before approaching the Minister of Finance for an increase in the Forest Service vote’.⁵⁹

(1) *The Minister of Forests visits Turanga*

Between 1958 and 1959, Ministers of the Crown visited Turanga on three different occasions. Eruera Tirikatene, the Minister of Forests, visited the Waipaoa catchment area in March 1958, accompanied by catchment board officials and the district forest ranger.⁶⁰ Tirikatene indicated that a detailed study of the position would be undertaken with his Cabinet colleagues. During his visit, he attended the opening of Te Ngawari Marae, on the Mangatu papakainga. The marae had been moved to higher ground as it was being overwhelmed by floods and riverbed aggradation.⁶¹

(2) *The Minister of Works and the Minister of Lands visit Turanga*

On 29 and 30 April 1959, Hugh Watt (the Minister of Works) and CF Skinner (the Minister of Lands) visited Turanga and met with deputations from the interested parties: the Poverty

56. Conservator of Forests to secretary, Soil Conservation and Rivers Control Council, 23 October 1958, AATE w3404, WF96/197000/1, Archives NZ (doc F33, vol3, p1090)

57. Ibid

58. Document A18, p489

59. Entrican to Minister of Forests, 9 Feb 1959, FW3129 1/7/6/1, Archives NZ (doc 18A vol12, pp8270–8271)

60. Document F1, p77

61. Oral history of Rutene Irwin (doc A27, p187)

Bay Catchment Board and those who owned land in the affected area.⁶² The Mangatu Incorporation was represented by Hetekia Te Kani Te Ua, George Brown, Reta Keiha, and Hera Te Kani.

On 30 April, the representatives from the Mangatu Incorporation presented their submission to the two Ministers. George Brown told the Ministers that the owners wanted an assurance not just from the catchment board and the Soil Conservation and Rivers Control Council 'but from all the experts' that afforestation was necessary. Mangatu was practically the last of their Maori lands and there were determined to hold it for future generations. Furthermore, it would be preferable, in their view, if the total area to be taken was to come from just one of the incorporation's stations, rather than from three different stations.⁶³ Brown said that if the scheme was absolutely necessary, the owners would prefer a land-for-land exchange.⁶⁴

Te Ua, who indicated the committee of owners' approval of the scheme, presented a submission which reiterated the concerns expressed by George Brown. He pointed out that the proposed scheme would not benefit Mangatu farms as much as it would non-Mangatu lands.⁶⁵ The Ministers were then taken to inspect areas of erosion, and Forestry and catchment board officials emphasised the importance of forestry to good control of the lower reaches of the river and erosion control in the catchment area. The local benefit of a producing forest in the region was referred to.

The Minister of Lands told the delegation, in response, that the Government would be very sympathetic and would make sure the Maori landowners retained their holdings 'if possible'. If not, the Government would try to find suitable land for exchange. The Minister thought the Government would be in favour of placing money in trust for the purchase of land. Hugh Watt told the delegation that the Government would not take any more land than was necessary for the job.⁶⁶

(3) *The visit of the Prime Minister*

Three weeks after the visit to Gisborne by the two Ministers, the Prime Minister, Walter Nash, also visited the region, toured the erosion area, and spoke with the Mangatu owners at the wharenuī at Whatatutu. It was an important occasion for the area, and his visit was fully reported in the local press. The *Gisborne Herald* reported that the Prime Minister had

62. The Minister of Works had been flown over the area in June 1958 and subsequently asked his officials to prepare a report on the control of the upper Waipaoa catchment area.

63. Notes of Minister of Works and Minister of Lands, along with the owners of Mangatu blocks at Gisborne, 30 April 1958 (doc F33, vol3, p1096) The Government was proposing to take 8,500 acres from Mangatu, 5,000 acres from Te Kura, 800 acres from Dome, and 1500 acres from Tarndale.

64. Notes of Minister of Works and Minister of Lands, along with the owners of Mangatu blocks at Gisborne, 30 April 1958 (doc F33, vol3, p1096)

65. Document F1, p84

66. Notes of Minister of Works and Minister of Lands, along with the owners of Mangatu Blocks at Gisborne, 30 April 1958 (doc F33, vol3, p1096)

emphasised the commercial viability of the afforestation scheme: 'Mr Nash commented that although re-afforestation would not provide a marketable crop for perhaps 30 years, the yield could be counted on more surely than profits from farming on lands which left to the mercy of erosion, would eventually become useless.'⁶⁷ He also spoke of his intention to begin tackling the problem urgently:

We will have to sit down around a table and decide what is the right thing to do. When we have made that decision, groups of scientists and engineers will determine how to do it . . . Then we will make a start with something that has to be done.⁶⁸

He assured the Mangatu owners that whatever was done, it would be 'fair and just' to them, and reminded them that it was his responsibility as Minister of Maori Affairs to ensure that this was the case.⁶⁹

Eruera Tirikatene had written to the Prime Minister just before he (the Prime Minister) left for Turanga, emphasising that erosion was a major problem.⁷⁰ The solution, he thought, was clear. 'The longer this [the planting of trees] is delayed the more grave the position must become.'⁷¹ The cost was significant. However, the fact that 75 per cent of the forest could be used for commercial purposes meant that the Government would recoup the expense:

The land is eminently suitable for growing trees and some seventy-five per cent of it would grow commercial forest. Commercial forests are urgently needed in the Poverty Bay East Coast area so the scheme would fit in well with requirements. The total cost is high – something over one million pounds – but this expenditure would be spread over a period of about thirty years, by which time the forest would be revenue earning. Later it should pay its way handsomely.⁷²

(4) *The Government moves to a decision*

After Nash's visit, events moved quickly. On 17 June 1959, the Prime Minister, noting that the situation 'is justly causing concern and warrants immediate attention', instructed the Minister of Lands in conjunction with the Minister of Forests and Minister of Works to prepare a submission and recommendations for Cabinet.⁷³

The Minister of Forests prepared a report for submission to Cabinet the following month. The main points were:

67. *Gisborne Herald*, 21 May 1959 (doc F33, vol3, p929)

68. Ibid

69. Ibid

70. Although the date is illegible, Tirikatene's wording indicates that he was writing just before the Prime Minister's departure.

71. Minister of Forests to Prime Minister, May 1959 (doc 18(a), vol12, p8252)

72. Ibid

73. Prime Minister to Minister of Lands, 17 June 1959, LS22/1185, vol1, Archives NZ (doc F33, vol1, p0342)

- ▶ The primary purpose of this project was to protect the valleys and flats down to Gisborne.
- ▶ The first type of cover would result in the planting of some commercial trees, from which there would be a direct financial return.
- ▶ Second, trees of a purely protective nature would be planted, from which there would be no financial return.⁷⁴

On the same day, the Minister of Lands, CF Skinner, wrote to the Minister of Works. While he agreed with the recommendations for the proposed scheme, he was anxious that:

- ▶ the position be reviewed over time so that land might be returned to pastoral production when appropriate;
- ▶ the catchment board encourage farmers to assist with stabilisation by doing their own planting; and
- ▶ owners of the land not be given tax concessions because he did not wish to create a precedent, given that they were being forced off their lands by flooding, not by the Crown.

Finally, he stated categorically that, in respect of Maori land, there was 'no Crown land available to offer in exchange'.⁷⁵ He emphasised the lack of Crown land by pointing to the fact that, since the start of the Rehabilitation Land Settlement Scheme, the Land Settlement Board itself had to 'acquire 1,600,000 acres of privately owned land for development, subdivision and settlement'.⁷⁶

At its meeting on 3 August 1959, Cabinet made a number of important decisions relating to the afforestation scheme. The acquisition and afforestation of 16,000 acres in the upper Waipaoa catchment area was approved in principle. The cost was estimated at £1.24 million, consisting of £140,000 for acquisition of land and £1.1 million for re-afforestation and silviculture. Cabinet also directed that efforts be made to reduce, if possible, the cost of acquiring the land.⁷⁷

15.3.4 Negotiations for the purchase of Mangatu lands

A series of meetings followed Cabinet's decision. On 17 September 1959, following discussions with Treasury, the Director of Forestry asked the Lands and Survey Department to start negotiations on their behalf.⁷⁸ Mr FW Brown, the commissioner of Crown lands for the Gisborne district, was to be responsible for the acquisition of the land. It was decided that negotiations to acquire Tawhiti station should be first, since the owners were reported to be 'anxious to for an early settlement'. It was also expected that negotiations for Maori land

74. Document F1, p93

75. Minister of Lands to Minister of Works, 23 July 1959, LS22/1185, vol1. Archives NZ (doc F33, vol1, p0336)

76. Ibid

77. Document A27, p189; doc A18, p494; doc F1, p94

78. Document A18, p494

on the Mangatu blocks could be protracted.⁷⁹ The commissioner also noted that 1600 acres of Tawhiti station not needed for afforestation which would nevertheless be acquired by the Crown 'could materially assist in negotiations with Mangatu Blocks Incorporated on an exchange basis.'⁸⁰ A land swap was, therefore, still an option.

On 21 October 1959, the commissioner of Crown lands, and a Lands and Survey Department representative, met with the Mangatu committee of management. The commissioner noted that the body corporate had previously agreed that afforestation was necessary, and asked whether the committee was agreeable to selling 8600 acres to the Crown and would make an offer to the Crown for the area sought. The Crown was anxious to buy the whole area quickly, but would lease back areas not required for immediate planting. According to the minutes, it was stated that the Crown would prefer a voluntary acquisition, but compulsory acquisition might be an alternative. The commissioner told the Mangatu committee that the Government had no improved land available for exchange, but that a portion of Tawhiti station might be considered on a 'land for land basis'. The Crown was keen to resolve the matter as quickly as possible.⁸¹

The Mangatu committee, on the other hand, was more cautious. The committee members suggested that a site visit to Tawhiti station should first take place. Moreover, before any final decision could be made, a special annual general meeting had to be held, and the owners had to agree.⁸² The members asked the commissioner a number of questions: how much land would be taken each year, how much compensation would be paid for buildings on the affected lands, and how much notice would be given. The committee stressed its preference for 'land for land', and suggested a stipulation that sale money should be placed in trust for the purchase of other lands. The special annual general meeting was held on 13 November 1959.

An additional issue was the divisions within the Mangatu committee itself.⁸³ By the end of the year, the commissioner of Crown lands was aware of the problem. Following the resignation of HK Ngata as chairman, Brown wrote that there 'may be a tussle as to who is to be Chairman out of the remaining 4 members & this could bring a deadlock'. There had been, he was told, a 'lack of harmony' at the special annual general meeting, and the committee had been accused of offering to sell Te Hua to the Crown.⁸⁴ In the commissioner's view, this meant that the two 'factions' were very cautious about committing to a sale of ancestral lands.⁸⁵

79. Commissioner of Crown lands to Director-General of Lands, AADY W3564 6/2/108, box 15 (F33, vol 2, p 526; doc 18(a), vol 18, p 12021)

80. Document A18, p 495; doc F33. p 526

81. Document F1, p 96

82. Ibid, pp 95–97; doc A27, pp 190–191

83. We have discussed the origins of those deep-seated rifts in detail in chapter 14.

84. Commissioner Brown's handwritten file notes, 2 December 1959. BANF5694, 86B, LSG4/883, vol 1, Archives NZ (doc F1, p 101)

85. Document A27, p 191 We deal with the divisions within the Mangatu Incorporation in chapter 14

On 13 January 1960, the commissioner of Crown lands (Brown), the conservator (AP Thomson), the assistant conservator of forests (PW Mapleston), and the district forest ranger (Moore) met to discuss progress. They discussed the continuing internal strains within the Mangatu committee: being without a chairman, the committee could only make day-to-day decisions. It was again noted that the owners were not willing sellers for a number of reasons:

- (a) the general Maori objection to losing any land
- (b) the loss of face by the faction which has the controlling representation on the committee at the time of any sale
- (c) the disruption to their farming organisation

They [the owners] may even *ask* for it to be taken under [the] Public Works Act. By this, honour would be satisfied. [Emphasis in original.]⁸⁶

Two suggestions were made at the end of the meeting. Again it was suggested that a land-for-land exchange might be possible, using part of the Tawhiti station, and second, that the commissioner seek to negotiate purchase of the Te Weraroa experimental area.⁸⁷

Two weeks later, on 29 January 1960, the commissioner of Crown lands reported to the Director of Lands on the progress of negotiations with the Mangatu owners. The commissioner advised the director of the internal conflict amongst the owners and of their possible preference that the Crown seek to compulsorily acquire the land:

As stated the meeting on 20 February will consider my request that the land be offered to the Crown. Indications are that this is not likely to find acceptance and that the meeting may then consider whether the Crown should be asked to go ahead and exercise its powers of compulsory acquisition. From what I can gather the owners appreciate that the land has got to go, but it is the method of handing it over that will cause the greatest exercise.⁸⁸

On 20 February, a special general meeting was held to discuss the proposed sale of land to the Crown. It was attended by 84 owners and three of the then four committee members.⁸⁹ The commissioner of Crown lands and a number of other officials attended on behalf of the Crown. The commissioner spoke to the meeting and then responded to a number of

86. PW Maplesden, Assistant Conservator's notes on discussion of land acquisition of the Waipaoa catchment area, with Mr Brown, commissioner of Crown lands, 16 February 1960, AADY W3564 6/2/108, box 15 (doc A18(a), vol18, p12018). The emphasis is in the original. Note that although this document is dated 16 February 1960, it specifically states that it is the record of a meeting held on 13 January 1960.

87. PW Maplesden, Assistant Conservator's notes on discussion of land acquisition of the Waipaoa catchment area, with Mr Brown, commissioner of Crown lands, 16 February 1960, AADY W3564 6/2/108, box 15 (doc 18(a), vol18, p12018). The latter suggestion was made because it seemed unlikely that the Crown would acquire any large areas of land for planting in the current year.

88. Brown to Director-General of Lands, 29 January 1960, BANF5694 866 LSG4/883, Archives NZ (doc F33, vol2, p0513)

89. Document F1, p103–105

questions. He was asked why the Crown would not take a lease of the land required? Why couldn't the scheme go ahead without the owners having to sell the lands? Could they not undertake an afforestation scheme themselves? What was the taxpayer putting into the scheme?

The owners acknowledged the good intentions and purposes of the scheme but expressed their distress at the prospect of losing their ancestral lands. They were also critical of the Crown's failure to provide them with a copy of the 1955 panel's report and of the Prime Minister's failure to have a round-table conference with them.⁹⁰ When was he going to meet them?

In reply to this last point, the commissioner stated that the newspaper report of the Prime Minister's comments could be construed 'as meaning a conference of officials'. He stated that a lease would have to be 'in perpetuity', so that the owners would lose possession of their land. On the other hand, a sale at the present time would be in the owners' best interests, because their asset was diminishing in value.

[The] Crown is prepared to purchase whole area now at today's value and purchase money could with Government approval be used to purchase the farmable lands which would be revenue producing. In any case if Section 64 of Forests Act is used there could be a loss as a large area is to be protective forest. Would owners be prepared to share a loss?⁹¹

Nor was it feasible for the owners to undertake an afforestation scheme because: 'No owner could finance the cost involved.'⁹²

The commissioner's notes of the meeting record that:

The owners maintained the attitude that the Crown representatives would never convince them or persuade them to sell their land. The Government if it wanted their land would have to take their land from them but they would be unwilling to let it go. . . . this was ancestral land and if the Crown wanted it it would have to take it.⁹³

Five days after the meeting, the secretary of the Mangatu committee, AR Gardiner, wrote to the commissioner of Crown lands to inform him officially of the owners' decision. 'There was', he wrote, 'a unanimous decision against the motion' that the land be sold to the Crown. As he put it to the commissioner:

You were yourself present at the meeting and as the discussion was almost wholly in the Maori Language, you probably found it as difficult to follow as I did. The meaning I took out of it was that these were not lands that could be bought or sold. They were inherited from ancestors and have to be passed on intact to descendants. No owner present at the

90. Ibid, p105; doc A18, p499

91. Commissioner of Crown lands' notes on special general meeting with Mangatu Incorporation, 20 February 1960, BANF5694, 86B LS4/883, vol1, Archives NZ (doc F33, vol2, p0507)

92. Ibid

93. Ibid

meeting wished to have it charged against him that he had been a party to the sale of ancestral lands. If the Government decided it was in the national interest that the land be compulsorily acquired for re-forestation and did so, it appeared to me that this action would be accepted provided satisfactory compensation was arranged in the Maori Land Court.⁹⁴

15.3.5 The possibility of compulsory acquisition

Given the failure on the part of the Crown to negotiate a deal, the commissioner concluded that the only possibility was for the Crown to compulsorily acquire the land under the Public Works Act. The owners, he stated, were aware that this could be the next step, but it was not possible at the general meeting 'to obtain any expression of opinion . . . either as to whether they would agree to the land agreement or that their Committee be instructed not to oppose a notice of intention to take'.⁹⁵ But they would not acquiesce in the taking of the land.

The commissioner expressed some concern about the small number of owners who attended the meeting (84 owners). However, he considered the outcome of another meeting would likely be the same owing to 'the involved nature of Mangatu politics and the situation that no section wishes to place themselves in the position later of being charged with having offered to sell their lands'.⁹⁶

At this point, there were two alternatives to compulsory acquisition, other than sale: leasing, or administration under section 64 of the Forests Act 1949. The commissioner spelt out the difference between them to the director general. The owners, he said, would be in favour of leasing, as it would not involve giving up their land. However, a leasehold title would probably not be acceptable to the Forest Service 'as the lease would need to be in perpetuity it hardly seems to be in the interests of the owners'. The other possibility was section 64. While the commissioner believed that the owners would be in favour of administration under section 64 of the Forests Act (they would not have to give up ownership of the land), he concluded that the owners would be better off selling the lands and purchasing other revenue-producing lands.⁹⁷ After considering the alternatives, the commissioner proposed a submission be made to Cabinet recommending compulsory acquisition of the land.

On 21 March 1960, DNR Webb, the Director-General of Lands, referred the matter to Entrican, the Director of Forestry. He stated that there was little chance of negotiating a sale, and observed that in general Maori attitudes towards sales of land were 'hardening'. He requested that the three alternative options of compulsory taking, lease, and section 64

94. Secretary, Mangatu Incorporated, to commissioner of Crown lands, 25 February 1960, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F33, vol2, p0508)

95. Commissioner of Crown lands to Director-General of Lands, 1 March 1960, ABWN6095, W5021, LS22/1185, vol1, Archives NZ (doc F33, vol1, p0326; doc 18(a), vol12, pp8059-8060)

96. Ibid (doc F33, vol1, pp0326-0327)

97. Ibid (p0327)

administration therefore be considered.⁹⁸ Minutes on the file copy of this letter suggest that Forestry officials favoured compulsory acquisition but that the Minister, Eruera Tirikatene, would not pursue this course. Compulsory acquisition could not proceed without involvement of ‘the Minister of Maori Affairs, and perhaps Cabinet’.⁹⁹

Entrican replied to the Director General of Lands, on 8 April 1960, and agreed that there was no possibility of negotiating a sale of the Mangatu lands. In his view, the options of lease and section 64 administration both amounted to confiscation of the land. A lease would have to be in perpetuity. Due to the cost to the Crown of developing the forests the lease would also require special compensation clauses to deter attempts to force land resumption by the owners. The Director of Forestry considered that the compensation due to the Crown would be beyond the means of the owners. He also noted that the rent paid during the first crop would be based on the deteriorating productive capacity of the land and ‘would not therefore be very remunerative to the owners’.¹⁰⁰

Entrican also considered a suggestion that action might be taken under section 35 of the Soil Conservation and Rivers Control Amendment Act 1959. Under this approach, the Poverty Bay Catchment Board would give notice to the owners that trees were to be planted and the Forest Service would carry out the work for the owners who would be compensated, if such action was possible and approved. However Entrican considered that ‘the magnitude of the cost of Forest development, £11/4 million, is beyond being gifted to any minor group of people’.¹⁰¹

The director concluded that the only way to proceed with the soil conservation scheme was to take the land under the Public Works Act. The Forest Service was able and willing to carry out the work of afforestation, but it could do nothing until the land became Crown land.¹⁰²

By this time, the Soil Conservation and Rivers Control Council was also in favour of compulsory acquisition. On 20 April 1960, the council reported to the Director General of Lands that ‘methods of planting the area [the upper Waipaoa catchment area] other than by compulsory acquisition had been considered, but none were practicable’.¹⁰³ In light of this advice, the council resolved that ‘the Government should be urged to proceed with the compulsory acquisition of the land, in order to give effect to the Cabinet decision CM59(31) of 3 August 1959, that this urgent work should be undertaken’.¹⁰⁴

98. Director-General of Lands to Director-General of Forestry, 21 March 1960, ABWN6095, W5021, box 571, LS22/1185, vol1, Archives NZ (doc F33, vol1, p0325)

99. Ibid (doc F1, p110)

100. Director of Forestry to Director-General of Lands, 8 April 1960, WF96/197000 (doc F33, vol3, p1065)

101. Ibid.

102. Ibid

103. Secretary, Soil Conservation and Rivers Control Council, to Director-General of Lands, 20 April 1960, ABWN6095 W5021, LS22/1185, vol1, Archives NZ (doc F33, vol1, p0308)

104. Ibid

15.3.6 The owners' meeting with the Minister of Forests

By mid-April, the issue of Waipaoa erosion control, and the perceived attitude of the Mangatu owners, were being aired in the *Gisborne Herald*. Concern was expressed that the Forest Service was unable to proceed with planting because the owners would not agree to sell. Comments by the chairman of the Mangatu committee of management were recorded in the press, to the effect that the owners 'were not opposed in any way whatever to the acquisition of the land by notice to take with compensation conditions fixed by the Maori Land Court.'¹⁰⁵ This led to correspondence between the Minister of Lands and the chairman, as the Minister sought clarification of the chairman's comments, and asked whether he had been correctly reported. If so he would advise Cabinet to proceed on that basis.¹⁰⁶

The committee responded on 4 May 1960, advising the Minister that he had correctly stated the owners' views. A land-for-land exchange was still preferred to money-for-land, but the Crown Lands Department had told them that the Crown had no land to offer.

The committee also wrote to Eruera Tirikatene, Minister of Forests, expressing the owners' concerns at the way that the media had portrayed them. The owners had understood that by resolving not to consent to a sale at the special general meeting of 20 February 1960, the next step would undoubtedly be compulsory acquisition by the Government. This they had accepted, and they expected the Maori Land Court to protect them in respect of compensation. The committee expressed the owners' frustration that they had been portrayed poorly, when the fault, they believed, lay with officials who had misrepresented the likely progress on the afforestation scheme to the wider public.

It would appear that the Officials concerned were too hasty in leading the general public to believe that they would be able to commence tree planting this season. They evidently anticipated the land purchase negotiations would be completed in time for this to be done. These calculations went wrong, the tree planting operations cannot be commenced yet, the public is raising an outcry, and the Mangatu people are being made the scapegoats.¹⁰⁷

On 1 June 1960, a further special general meeting of Mangatu owners was held at Tirikatene's request. The chairman, six committee members, and 150 owners attended the meeting. Tirikatene represented the Government, accompanied by the commissioner of Crown lands and other officials.

The chairman reiterated that:

105. *Gisborne Herald*, 12 April 1960, BANF86B, LSG4/883, vol1, Archives NZ, Auckland (doc F1, p112)

106. Office of the Minister of Lands to Dennis, 28 April 1960, BANF5694 866 4/883, Archives NZ (doc F33, vol2, p0481)

107. Secretary, Mangatu Incorporation, to Minister of Forests, 29 April 1960, AATE W3404, WF96/19000, Archives NZ (doc F33, vol3, p1063)

the owners were not in favour of selling . . . the owners were of the opinion that the government would in any case exercise its powers of taking under the Public Works Act in which case the present owners would be cleared of any future blame by their descendants of having sold their inheritance.¹⁰⁸

The official party assured the owners that the only way to protect their lands was to place the eroding lands in the ownership of the Government for afforestation. The owners were encouraged to enter a voluntary agreement with the Government. They were told that they should accept the value of their lands in money and use it for purchase of other land. The Minister would support the committee in efforts to secure land for land or value for value.¹⁰⁹ The Director of Forestry also advised the owners to authorise the committee to negotiate a sale with the Crown. He told the meeting that it 'would cost the Government about six times the present value of the land to arrest the erosion and protect the area outside the scheme for the owners'.¹¹⁰

The Minister of Forests spoke about the threat that continuing erosion posed to the flat lands and the city of Gisborne:

The Officers of the Crown and other responsible experts have decided that the scheme proposed is the best that can be devised.

The cost of implementing these proposals is beyond the financial resources of the Body Corporate and it would be better for the State to assume this responsibility . . .

He understood and endorsed their feeling with respect to ancestral lands. We have certain ancestral respects and indeed we should and I must admit as I am a Maori myself that this affects our judgment at all times, that we are forced under such circumstances to hold on to our lands if possible because they belonged to our ancestors. Today we have to look much further than this.

The Government is not taking this land for themselves but only doing this to protect you my people. To do this they must have your full cooperation.¹¹¹

The Minister made it clear that he wanted a quick decision, and that a negotiated sale would be preferable to compulsory acquisition. He wanted to be able to report to his colleagues in Cabinet that the owners and management committee had agreed that negotiations now be started with the Lands Department for a voluntary sale.¹¹²

JK Hunn, the acting secretary for Maori Affairs, also recorded that 'The meeting resolved unanimously to authorise the Committee to negotiate a sale to the Crown on the best possible

108. Notes by E Tirikatene on meeting at Mangatu Incorporation, 1 June 1960, AADY W3564, 6/2/108, p12, 2 June 1960 (doc A27, p196)

109. Minutes of Mangatu Incorporation, Gisborne (doc F1, p119)

110. Ibid (p121)

111. Ibid (p120)

112. Ibid (pp119–120)

terms.¹¹³ In fact, there was no formal resolution that the owners agreed to the committee negotiating a sale.¹¹⁴

The *Gisborne Herald* reported that a decision had been made by the owners to enter negotiations with the Crown, on 2 June 1960.¹¹⁵ HK Ngata, a committee member, later disputed this report.¹¹⁶

On 7 June 1960, Cabinet approved negotiations between the Crown and the Mangatu committee of management for the acquisition of land in the upper Waipaoa catchment area. The Minister of Forests advised Cabinet that the owners had resolved to sell the land, though they did not wish to, and to leave the matter of the negotiations with the committee of management. At a subsequent meeting with the committee, it was agreed that negotiations would be taken up by the committee with the Lands Department.¹¹⁷

Correspondence from Government officials from this point on appears to have proceeded on the basis that the owners had resolved to sell.

15.3.7 The Mangatu owners decide to negotiate

In fact, it took many months before the Mangatu owners reached a decision to negotiate. During this period, issues of land exchange, a possible shareholding arrangement for Mangatu owners, and compulsory acquisition were all discussed.

Initially, Ngata, who had been re-elected chairman on 14 June 1960, reminded the commissioner that no decision had actually yet been taken to sell the land.¹¹⁸ At a meeting on 19 July 1960, attended by the commissioner and Mr Moore of Forestry, Ngata said, however, that, on the assumption that a sale 'may eventuate', the incorporation had engaged a valuer, and they had begun to consider the impact of sale on their farming policy.¹¹⁹

Mr Allan, the incorporation's valuer, gave his assessment of the lands in question at the next committee meeting. He suggested that there were some matters the committee and owners might wish to keep confidential. These included the existence of between 1400 and 1500 acres of 'really bad land' in the riverbed, as well as 'moving and cracked land'.¹²⁰ Allan also noted the financial ramifications of the loss of 8500 acres from Mangatu, for farming policy on the remaining lands.¹²¹

113. JK Hunn, 'Acting Secretary's Record of the Minister's Meeting on 1 June 1960', MA1 box 85, 3/5/159, Archives NZ (doc F33, vol1, p0202)

114. Mangatu Incorporated minute book, special general meeting, 1 June 1960 (doc A27, p197)

115. Document F1, p123

116. Ibid, p118. We note that Ngata had been replaced as chairman at this time. He was re-elected on 4 June 1960.

117. Document F1, pp125–126

118. Ibid, p128

119. Commissioner of Crown lands, file note of a meeting on 17 July 1960, BANF5694, 86B, LS4/883, vol1, Archives NZ (doc F33, vol2, p0479)

120. Document F1, p132

121. Ibid, pp132–133

Subsequently, on 1 October 1960, 40 owners, members, and staff of the Poverty Bay Catchment Board, Mr Brown, the commissioner of Crown lands, and Mr Moore of the Forest Service, inspected the upper Waipaoa area. A meeting was held following the inspection. It then became apparent that the committee still did not consider it had a clear mandate to begin negotiations with the Crown, as there were some owners who had not had the opportunity to comment. The commissioner pointed out that it was nearly a year since the Government had given approval, that the rate of erosion was accelerating and that he would ensure that the owners had the use of the lands until they were required for planting. He then asked the owners to avoid further delay and 'give the Committee the authority which they were now requesting to continue negotiations'.¹²²

The assembled owners asked a number of questions on matters similar to those raised in earlier meetings. Some owners repeated the expressed preference for 'land for land'. The commissioner repeated that the Crown did not have sufficient resources for an exchange, and recommended that the purchase money be placed in a trust for the purchase of a suitable property. He reiterated that he believed the owners could expect a better deal by negotiated sale, rather than compulsory acquisition, but the decision was in their hands.¹²³

The critical meeting for owners was the annual general meeting held on 21 October 1960. The chairman emphasised the seriousness of erosion in the catchment area, and the views of experts that only an extensive tree-planting programme could halt further erosion. The chairman asked the owners for authority to negotiate with the Crown, and 'mentioned it was in the interests of the owners that the land be sold providing the price is acceptable'.¹²⁴

A crucial question was put to the commissioner of lands, who was present with other Crown officials, as to whether the Crown would consider a partnership with the owners retaining the land, the Crown doing the planting, and the profits being shared. The commissioner replied that if this were offered the owners should take it. But he believed that the Government would not enter into such a partnership because the costs of establishing a forest would be high. The commissioner told the meeting that any profit from the forest 'would be very small and a long time in coming'. He emphasised that 'the intention was to establish a protection forest not a productive one and milling if any would be on a small scale with little profit'.¹²⁵ It was a 'pity that the forest cover had ever been removed at all, and once new forest was established, care would be taken that it was not removed again'.¹²⁶

The commissioner reiterated that the Crown would not accept any shareholders.¹²⁷ In regard to a possible compulsory acquisition by the Crown, he referred to a statement by the

122. Commissioner's report on the 1 October 1960 tour of inspection with the owners and committee members, BANF5694, 86B, LS4/883 vol1, Archives NZ (doc F33, vol2, p0466)

123. Ibid (pp0466-0467)

124. Mangatu Incorporation, annual general meeting minutes, 21 October 1960 (doc F1, p139)

125. Commissioner of Crown lands' minutes of Mangatu Incorporated annual general meeting, 21 October 1960 (doc F1, p140)

126. Ibid (p141)

127. Ibid

Minister of Works that the Government would take the land if necessary. But ‘the Government did not wish to resort to compulsory taking.’¹²⁸

After the Crown officials left the meeting, the owners considered the resolution before them:

That the Committee of Management be given authority to negotiate with the Crown with a view to selling some 8500 acres, more or less, of that part of the Mangatu lands required by the Forestry Service for re-forestation providing the terms and conditions are acceptable to the Committee.¹²⁹

The resolution was passed.

15.3.8 The Mangatu negotiations are finalised

It would be another year before negotiations between the Mangatu owners and the Crown were finalised. From this point, the price of the land assumed importance in the negotiations

The committee considered a special Government valuation on the land (8646 acres) of £61,515 at its meeting on 7 November 1960. Their own valuer, Mr Allan, advised that the committee should not accept the Crown’s figure. In his view, if the land was retained for 10 years it would return a profit of £90,000, and the Body Corporate would still have the land. Allan advised that the committee add ‘sentimental value’ to his valuation of £92,296 and negotiate at no less than £100,000. The committee resolved that the land be offered to the Crown for £112,000.

The committee’s price of £112,000 was communicated to the commissioner by letter of 7 November 1960. The chairman observed that the incorporation stations from which land was to be taken were providing high returns for the owners and were projected to continue doing so. He added:

While appreciating the importance to the district as a whole of the proposed afforestation scheme the Committee’s primary duty is to the Mangatu Owners. The latter have shown a marked reluctance to sell; an attitude which is in striking contrast to the keen desire of the Crown to buy. The owners said they did not wish to lose part of a heritage which had been handed down to them by their forbears. This objection was finally overcome only after the greatest difficulty, and largely as a result of the proposal that the proceeds of a sale be set aside to buy other land.¹³⁰

128. Commissioner of Crown lands’ minutes of Mangatu Incorporated annual general meeting, 21 October 1960 (doc F1, p141)

129. Chairman, Mangatu Incorporated, to commissioner of Crown lands, 7 November 1960, AADY W3564, F6/6/108, Archives NZ (doc F33, vol1, p0283)

130. Chairman, Mangatu Incorporated, to commissioner of Crown lands, 7 November 1960, ABWN6095 W5021, 22/1185/2 (doc 18(a), vol12, pp8016–8017)

Accordingly, the committee considered £61,515, the valuation provided by the commissioner, to be inadequate.¹³¹ On 17 November 1960 the commissioner informed the director that the committee did not accept the Government's valuation.¹³²

From this point, the committee and the commissioner began serious negotiations. At a committee meeting on 14 November, the commissioner asked for the basis for the figure asked by the committee. The committee disclosed that their land valuation was £75,140. A second valuer appointed by the committee advised that his value for the land was £57,750, not taking into account the Te Weraroa lease or the Tawhiti fencing area. In his view the Government made a very fair offer and an agreement at £75,000 would be a good offer.¹³³

On 12 December 1960, the committee met and agreed unanimously on £10 per acre as the minimum price they would accept. The commissioner was called in and made a revised Crown offer of £78,300, or £9.1.1 per acre. After the commissioner withdrew from the meeting the committee took advice from their first valuer, Mr Allan:

Mr Allan: Suggests stick strongly to the figures placed by him on Te Hua and Tarndale buildings. Insists that buildings are superfluous to reduced requirements. Thinks we have a very good case to get £81,000. Cannot increase his own figures of £91,000. Is of opinion the body Corporate should consider £81,000 rather than go to Court. [The Maori Land Court] Considers it would be very difficult to get £91,000 if we go to Court. Use the words without prejudice in submitting offer. Quote verbally without prejudice at £9/10/- per acre. He would rather see the Body Corporate accept £9/10/- per acre than take it to Court.¹³⁴

The committee resolved to ask the commissioner for a price of £9 10s per acre and advised the commissioner by telephone of this decision. On 16 December 1960, the chairman informed the commissioner that this was their offer as to price only; matters such as boundaries, lease-back arrangements, and rights of access remained to be discussed before final agreement could be reached.¹³⁵

Three days later, the commissioner of Crown lands wrote to the Director-General of Lands advising that the price of £9 10s per acre was 'a little on the high side but not unreasonably so' and should be accepted.¹³⁶ The owners were unwilling sellers and 'in agreeing to sell they are bowing to the weight of public opinion.' The commissioner considered the price to be a fair one in the special circumstances.¹³⁷

131. Document F1, p143; doc A18, p512

132. Document A18, p512

133. Document F1, pp150–151

134. Minutes of committee meeting, 12 December 1960 (doc F1, p152)

135. Document F1, pp152–153; doc A27, p198

136. Commissioner of Crown lands to Director-General of Lands, 19 December 1960, AADY W3564, box 15, 6/2/108 (doc F33, vol1, p59)

137. Commissioner of Crown lands to Director-General of Lands, 19 December 1960, AADY W3564, box 15, 6/2/108 (doc F33, vol1, p59)

The election in 1960 saw the departure of the Labour Government, and the Holyoake-led National Government took office. The Director-General of Lands wrote to Treasury on 20 February 1961, providing details of the Government valuation and negotiations with the committee. He reiterated that he considered the asking price of £9 10s fair, and that it was reasonably in line with the price paid for Tawhiti station.¹³⁸

Treasury did not agree. Based on its reassessment, including a comparison with the price of Tawhiti station, the secretary of the Treasury considered the price of £82,137 for the Mangatu lands was too high, by £6,000.¹³⁹ The secretary invited comments from the director on whether a lower price than £82,137 could be negotiated with the owners, and whether it considered that the court would be likely to fix a lower price than £82,137 if the land were taken compulsorily.¹⁴⁰ The commissioner replied that, in his view, the owners were unwilling sellers and furthermore he thought that 'the incorporation had accepted a lower price than he had thought possible to negotiate'.¹⁴¹

Some months passed before the Mangatu committee met with the new Minister of Maori Affairs, Ralph Hanan. Hanan visited the area on 12 May 1961, inspected the erosion, and listened to the committee's view on the proposed afforestation scheme. The Minister told the owners that the matter would come before cabinet soon, and that he would speak for them when that happened. He agreed to look into the owners' concern that too much land was being taken. Privately, he asked the commissioner of Crown lands after the meeting to sound out Mr Ngata as to whether the committee would accept a downpayment, with later instalments to follow. Those members of the committee whom Ngata was able to speak to did not think this was appropriate.

Subsequently, on 15 May 1961, Cabinet approved the purchase of 8,646 acres from the Mangatu Incorporation for £82,137.¹⁴² The commissioner had successfully discouraged the suggestion made in Cabinet that the payment be made in instalments.¹⁴³ The decision reached the press a week later, on 22 May, after the Minister of Forests made an announcement that the Crown had concluded the purchase. On 2 June, the commissioner of Crown lands was asked to proceed with the acquisition.¹⁴⁴ On 20 June, the Board of Maori Affairs approved Crown negotiations for the purchase of 8646 acres at a price 'of not less than £9 10s od per acre'.¹⁴⁵

138. Document F1, pp153–154

139. Ibid, p155

140. Secretary to Treasury and Director-General of Lands, 1 March 1961, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F1, p155)

141. Commissioner of Crown lands to Director-General of Lands, 9 March 1961, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F1, pp155–156)

142. Teleprint message, 26 May 1961, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F33, vol1, p279)

143. Document F1, p161

144. Ibid, p162

145. Director-General of Lands to commissioner of Lands, Gisborne, 28 June 1961, notifying approval of the Board of Maori Affairs and including a copy of the board paper, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F33, vol2, p408)

The proposed terms and conditions of the purchase were discussed the same day at a Mangatu committee meeting, attended by the commissioner of Crown lands and representatives of the Lands and Forestry Departments. As both parties had agreed on price, discussion turned to details such as the need to secure Maori Land Court approval for the sale, the planting programme (planned to start in 1962), and the lease back to the body corporate of areas not immediately required for planting. The chairman stated, in respect of the Mangatu River boundary, that the owners did not wish to lose riparian and access rights. He also sought a condition in the agreement that the body corporate be given the right to buy other land. The response of the committee's legal adviser, Kenneth Gillanders Scott, was that the money might have to be paid out to the owners. The Crown could not say whether the body corporate could be given the right to buy other lands.¹⁴⁶

As both parties moved towards a draft agreement, the committee's solicitor wrote to the commissioner explaining that in light of the owners' reluctance to offer the land for purchase, the offer to buy the land should come from the Crown: 'the general feeling is that neither the Committee of Management nor the incorporated owners are inclined to offering the land for purchase.'¹⁴⁷

On 6 September 1961, the commissioner sought approval from the Director-General of Lands to make an offer to the incorporation. The main points of the agreement were set out. The price would be £9 10s per acre. The settlement date was to be 30 March 1962, with part of the land to be leased back to the owners for five years. One point which the solicitors wished to exclude from the actual offer was the undertaking that the owners be permitted to purchase other land. The solicitors preferred to have the undertaking in the form of a letter. They were concerned, according to the commissioner, that a Maori Land Court judge might take 'umbrage' at such a provision, and not all owners supported the proposal.¹⁴⁸ The commissioner was still advising the Director-General that if the Crown failed to gain the support of the owners or the court to the purchase and lease in the current form proposed, 'the only alternative will be a compulsory acquisition if Forestry is to adhere to its planting programme.'¹⁴⁹

At the 13 September 1961 committee meeting, the solicitors for the incorporation explained the draft agreement for sale of land and advised that it was now in the form of an offer by the Board of Maori Affairs. The solicitors advised it be presented to the owners for acceptance and then to the Maori Land Court for consent.

The crucial annual general meeting of owners was held on 13 October 1961. The committee had decided to recommend to the owners that the funds from the sale of lands be held for

146. Document F1, pp165–168

147. Gillanders Scott and Wilson, solicitors, to commissioner of Crown lands, 16 August 1961, BANF5694, 86B, LS4/883, vol1, Archives NZ (doc F33, vol2, p0400)

148. Commissioner of Crown lands to Director General of Lands, 6 September 1961, AADY W3564, 6/2/108, box 15, Archives NZ (doc F33, vol1, pp0270–0271)

149. Commissioner of Crown lands to Director-General of Lands, 6 September 1961, AADY W3564, 6/2/108, box 15, Archives NZ (doc F33, vol1, p0271)

further development of remaining Mangatu lands. The chairman provided the meeting with a summary of the course of the negotiations and told the owners that it was now up to them to decide whether the Crown's offer would be accepted. Of the 10 owners who spoke after the chairman, only one, Panapa Tuhoe, was not in favour of accepting the offer. Panapa Tuhoe preferred that the land be compulsorily acquired. The following resolution was passed, with only one dissident:

That this Annual General Meeting of the incorporated Owners approves and authorises and directs the acceptances of the offer of the Crown to purchase from the Body Corporate an area of approximately 8,626 acres 36.6 perches being part Mangatu No1 Block required by the Crown for afforestation at the price and upon the terms more particularly set out in a written offer executed by the Board of Maori Affairs on behalf of Her Majesty and dated the 2nd day of October, 1961 submitted to this meeting *and Further* that this Annual General Meeting approved authorises and directs the acceptance of the offer of the Crown to lease back to the Body Corporate the lands more particularly set out in the Clause 12 . . . and executed by the Commissioner of Crown Lands on behalf of Her Majesty submitted to this meeting. [Emphasis in original.]¹⁵⁰

The lone dissident, WS Black, asked that his opposition be recorded.

The committee executed the deed at its meeting on 16 October 1961. The deed was subject to a Maori Land Court order at some point between October 1961 and 23 January 1962.¹⁵¹

15.3.9 Proposals for the proceeds of the purchase

The sole remaining issue to be addressed by the committee and owners was what was to be done with the proceeds of the sale. At a committee meeting on 27 March 1962, which was attended by a representative group of owners, the disposal of the proceeds from the sale of lands was discussed informally. The three options proposed were:

Should all money be retained?

Should all money be paid out?

Should half be paid out and half retained?¹⁵²

The chairman reminded the owners that their position had changed considerably since the discussions with the Crown began. First, they had refused to sell, then they had negotiated on a land-for-land basis, and finally they had decided that the sale should be for cash. There were,

150. 'Copy of Resolution by owners of Mangatu Blocks, Signed by Mangatu Incorporation and the Secretary AR Gardener', 13 October 1961, BANF5694 86B, 4/883, Archives NZ (doc F33, vol2, p0373)

151. Solicitors for the Mangatu Incorporation to commissioner of Crown Land, 23 January 1962, BANF5694, 86B, LSG4/883, vol1, Archives NZ (doc F1, p178)

152. Ngata, chairman, minutes of committee meeting, 27 March 1962 (doc F1, p179)

he said, other factors to take into consideration. If they were to farm the land they retained, then they would have to reorganise so as to avoid a reduction in revenue. The committee was therefore thinking of recommending the following:

- (a) That 10/- per share be paid out now, and balance retained.
- (b) That there be no further payment by way of dividend until the annual meeting when profits are known.
- (c) That the purchase money retained be used for the purchase of other land if suitable land can be found.¹⁵³

The minutes of the meeting recorded a range of opinions. Some of the owners wanted to retain all the money so that land could be purchased. Others wanted the money to be distributed. The majority favoured the retention of either the whole or part.¹⁵⁴

The question of how to deal with the proceeds from the sale was next raised at a special general meeting on 13 April 1962. The committee recommended that 10 shillings per share be paid out to the owners of Mangatu 1, the block from which the sold lands came. This would expend £42,225 of the proceeds (£80,957.16.3), and the committee recommended the balance be retained for development of remaining lands or purchase or lease of other lands. After some discussion, the meeting passed a motion that 10 shillings per share be paid to the owners of Mangatu 1 from the proceeds of the sale to the Crown.¹⁵⁵

We turn now from the events that led to the sale of the Mangatu lands to the Crown and claimant arguments.

15.4 THE CROWN AND CLAIMANT CASES

Crown counsel submitted five arguments. First, counsel argued that in its negotiations with the Mangatu Incorporation, the Crown acted reasonably and in good faith throughout. Secondly, the scale of the erosion problem meant that the solution had to be publicly funded. It was not reasonable, counsel argued, for private landowners to have to pay for the afforestation required to halt the erosion on their farmland.¹⁵⁶ Thirdly, counsel rejected any suggestion that the Crown applied undue pressure on Maori owners to sell their lands, or that Maori landowners were targeted in any way.¹⁵⁷ The Crown agreed that pressure was applied but argued that it was not undue or untoward pressure, and moreover, that it was applied equally to both the Maori and European owners of the lands in the crushed argillite zone in order to secure their

¹⁵³. Ibid (p180)

¹⁵⁴. Document F1, p180

¹⁵⁵. Ibid, p181

¹⁵⁶. Document H14 (26), p17

¹⁵⁷. Ibid, p18

agreement.¹⁵⁸ Fourthly, counsel submitted that the owners were consulted throughout the process.¹⁵⁹ Counsel referred to a number of examples of consultation, including: the visit by the Prime Minister in 1948; Hamilton and Kelman consultation with the Mangatu Incorporation for their 1952 report; and the ‘ongoing relationship’ between the incorporation Committee representatives and the Poverty Bay Catchment Board.¹⁶⁰ Fifthly, counsel admitted that alternatives to Crown ownership of the land to be afforested were put forward by representatives of the Mangatu Incorporation. These included using section 64 of the Forests Act 1949, compulsory acquisition, leasing, and a land-for-land exchange. Counsel submitted that these were considered by the Crown, though admittedly ‘not in great depth’, but rejected for sound reasons.¹⁶¹

Claimant counsel submitted four arguments. First, that the Crown failed to consult adequately with owners either about the development of the afforestation scheme,¹⁶² or when the decision was made to purchase the land. Secondly, that the Crown pressured them into selling their lands by threatening to either compulsorily acquire the land, or to impose stringent requirements on the landowners to undertake costly erosion control.¹⁶³ The Crown, counsel argued, did not apply a similar level of pressure to the European owners of the Tawhiti block.¹⁶⁴ Thirdly, the Crown failed to consider alternatives such as leasing or allowing the owners to afforest the lands themselves, which would have allowed the owners to retain ownership of their ancestral lands. Fourthly, counsel submitted that the commissioner was not forthright with the owners in terms of the expected profits from the forest, or the proportion of the forest that would be production forest.¹⁶⁵ Furthermore, information on these issues was not made available to the owners.

15.5 TRIBUNAL ANALYSIS AND FINDINGS

We now turn to our key question: Was the Crown’s negotiation process regarding the afforestation of the Mangatu lands fair and transparent?

15.5.1 What were the Crown’s obligations in the acquisition of the Mangatu lands?

We accept that the scale of the erosion in the Waipaoa catchment area and the impact of erosion on the Poverty Bay flats was such that special steps needed to be taken, and that this

158. Document H14 (26), p18

159. Document G7, pp35–36, doc H14 (26) p21

160. Document H14 (26), p21

161. *Ibid*, pp5, 13–14

162. Document H1, pp117–118

163. *Ibid*, p116

164. *Ibid*, pp116–117

165. *Ibid*, p116

was reflected in the consideration by the Crown of the compulsory acquisition option. It certainly justified the Crown exploring options for the establishment of a forest in the lands most at risk.

Compulsory acquisition is a significant step and not, as we have already noted, something to be done lightly. We repeat the findings of the Turangi Township report: 'The power of compulsory acquisition for a public work should be exercised only in exceptional circumstances and as a last resort in the national interest'.¹⁶⁶

In the event, the land was acquired by purchase and compulsory acquisition proved unnecessary. Even so, the Crown owed particular obligations both as reasonable Treaty partner and as a result of the massive land loss Te Aitangi a Mahaki had suffered in the previous 80 years. Those obligations required the Crown to be scrupulously fair, even-handed, open, and honest in their negotiations with them over the purchase of these lands. Most particularly, they required the Crown to explore, to a reasonable level, the alternatives to sale of these lands. This standard is high, but not unfairly so. It is to be remembered that Te Aitanga a Mahaki had expressed in strong terms that they did not wish to sell any part of their remaining land base, which had so recently been returned to their control after 30 years' management by the East Coast Commissioner.

We now consider whether the negotiation process undertaken by the Crown was fair and transparent. Were the Maori owners adequately consulted and were alternatives suggested by the owners fully explored? Finally, were the owners given full access to technical and official information as to the intended use of their lands (and we refer here to the production forest issue) so as to make a commercially informed decision?

15.5.2 Alternatives to sale

As we have said, the owners of the Mangatu lands repeatedly stated that they did not wish to sell their lands. They did, however, express willingness to consider other options.

The owners consistently argued for a land exchange:

- ▶ at a committee meeting on 24 April 1956;
- ▶ at a meeting with the district forest ranger on 26 June 1956;
- ▶ at a meeting with the Minister of Forests in 1958;
- ▶ at a meeting with the Minister of Works and Minister of Lands on 30 April 1959;
- ▶ in discussions with the commissioner of Crown lands in October 1959;
- ▶ at a meeting of Mangatu owners attended by the commissioner of Crown lands on 20 February 1960; and
- ▶ in a letter from the committee to the Minister of Lands on 4 May 1960.

Government Ministers and officials were well aware of the owners' views. Moreover, the committee repeatedly expressed a wish also for the following options:

¹⁶⁶ Waitangi Tribunal, *Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p285

- ▶ leasing the land to the Crown;
- ▶ afforesting the land themselves;
- ▶ using the provisions under section 64 of the Forest Act 1949; and
- ▶ forming a partnership with the Crown, in which they would become shareholders.

Ashley Gould, the Crown historian, conceded that the Crown did not investigate these suggestions very seriously. He stated before us that he was ‘concerned’ that he had not uncovered evidence of the Crown’s exploration of other options ‘particularly in terms of the leasing and joint venture type arrangements’.¹⁶⁷ We share Dr Gould’s concern. Although it was 1962 before the Forest Service and the Department of Maori Affairs began to work together to develop policies for the afforestation of Maori land, and to ensure that there was statutory provision for longer leases for this purpose¹⁶⁸, the tools clearly already existed to allow the Crown to develop forests with the owners as agent and owner. There was plenty of room within section 64 of the Forests Act 1949 for funding and profit-sharing arrangements. Though these options were put forward, the Crown dismissed them on various grounds. More specifically, it argued that the forest should not be a commercial proposition but that it should be a protective forest. It stood to make a loss, not generate benefits to the owners. It is in this crucial area that, in our view, the Crown let the owners down badly. We turn now to consider that matter.

15.5.3 Production versus protection forest

(1) *Production forest becomes a reality*

It is clear from the evidence presented to us that, at some point during the negotiation process, the Crown decided to use the Mangatu lands, at least in part, to plant a commercial forest operated for profit. This was the result of a significant shift in the Government’s approach to the whole issue of commercial forestry in New Zealand. During the late 1950s, there was considerable discussion as to how forest production could be expanded.¹⁶⁹ Two factors – the recognition that New Zealand’s indigenous timber supplies were diminishing and the identification of an export market in forest products – contributed to this. Towards the end of the 1950s, export markets for sawn timber, log, newsprint, and kraft pulp and paper had already been established.¹⁷⁰ In 1960, the Government decided to increase the export target threefold (to 800,000 hectares by 2000), and to increase the national planting rate to between 8000 and 12,000 hectares.¹⁷¹ This was the result of a significant shift in the State’s approach to the whole issue of State forestry in New Zealand. The planting of a commercial forest in the Waipaoa catchment area was therefore in line with current Government thinking.

167. Document 4.18, p59

168. Poole to Hunn, Hunn to Poole, 28 June 1962, MA58/1, W2490, pt1, Archives NZ

169. Roche, p326

170. Bunn, p153

171. Ibid, p153–154

The significant dates in terms of the development of specific Government policy in respect of the Waipaoa catchment area are as follows:

- ▶ February–March 1956: the expert panel recommended that 43 per cent of the forest planted be commercial.
- ▶ 13 April 1956: Entrican, the Director of Forestry, advised his Minister that negotiations for the Tauwhareparae block had stalled and that Mangatu could be used instead.
- ▶ 14 February 1958: Entican advised the Minister that ‘about half’ of the proposed forest could be production forest.
- ▶ 23 October 1958: the Conservator of Forests reported the cost of planting 75 per cent production forest and 16 per cent protective forest.
- ▶ May 1958: the Minister of Forests reiterated this to the Prime Minister.

By 1958, then, the Crown had decided that the forest planted at Mangatu would be largely productive. The question we then have to ask is whether this decision was communicated to the owners. Did the owners eventually decide to sell in the knowledge that their land had such commercial potential?

(2) *Uneven discussions*

We note that officials frequently discussed the Mangatu issue between 1956 and 1961. Having considered the evidence, we make two observations. First, that while there were numerous meetings, the owners had limited opportunity to discuss the issues with Government officials. Furthermore, those that they did talk to constantly changed. This was particularly so once the Department of Forests took a more prominent role. In 1955, for example, the Mangatu committee of management met with representatives of the Poverty Bay Catchment Board on two occasions to discuss the issue of afforestation. The next year, they were briefed by the catchment board on the panel’s findings and, on two separate occasions, met with the district forest officer and the soil conservator. Mr Tirikatene met with the committee in 1958. In 1959, the owners made submissions to the Deputy Prime Minister and Minister of Lands and Agriculture, C F Skinner, and, later in the year, met with the Mr Brown, the commissioner of Crown lands, and Mr Cunningham, of the Department of Lands and Survey.

In April 1959, Mr Tirikatene again met with the owners, who stated that they had not been consulted over the erosion control scheme.¹⁷² This comment is, we think, telling. Despite Dr Gould’s assertion that the comment is at variance with his reading of the evidence, the comment indicates how the owners viewed the process. In their view, it was inadequate. Official discussions were happening around them, but they did not feel they were part of the loop. Nowhere is the owners’ feeling of exclusion more apparent than in their disappointed reaction to the discovery that Nash’s ‘round table’ did not include them.

172. Document F1, p 80

(3) *Did the Crown disclose all relevant information?*

The owners of the Mangatu lands had, at the outset, considered the economic potential of commercial forestry. As we have noted, in July 1955 the soil conservator recommended that 140 acres be planted in production forest the next year, and that 5000 to 6000 acres be afforested over the next 40 years. The Mangatu committee agreed to adopt the plan. The Poverty Bay Catchment Board indicated that it might assist financially.

It seems that the owners got caught in something of a patch war. In Ashley Gould's opinion, 'alarm bells' sounded in the Forest Service once it realised that the Poverty Bay Catchment Board was taking the initiative in terms of the expert panel's recommendations.¹⁷³ The chairman of the Soil Conservation and Rivers Control Council had, after all, said that the catchment boards were not authorised to plant commercial forests.¹⁷⁴ The Director of Forestry, AR Entrican, agreed.

For the owners, a significant turning point was a meeting held in June 1956, at which the Mangatu committee asked AM Moore a number of questions. At this point, as we have indicated, the panel had made its recommendations, and the Government's negotiations with the Tauwhareparae block had stalled. Commercial production was therefore on the agenda. There are two records of that meeting: Moore's own report and the committee minutes. They differ significantly in the way they record Moore's answer to the question of the commercial viability of such an operation. According to Moore's report to his superiors, he said to the meeting with the owners that there was insufficient information to either confirm or deny the economic viability of production forest. According to the minutes of the Mangatu committee, Moore said that he did not think afforestation would be an economic proposition.¹⁷⁵ The difference is puzzling. Its effect, however, was immediate. The incorporation advised the catchment board that it doubted afforestation was commercially viable.

The profitability of the forest was, of course, absolutely crucial to the owner's attitude and the whole question of sale. Though they made it clear throughout that they did not wish to relinquish title, they knew that they could not afford to retain a large asset which was prevented by the erosion scheme from being effectively and profitably utilised. On the other hand, if erosion protection had been undertaken in a manner which produced an income stream, they would have been far less willing to sell.

By 1958, the Forest Service was now basing its planning on ratios as high as 75 per cent production forest in the Waipaoa catchment area, alongside a much smaller planned protection forest. Dr Gould admitted that he could not state with certainty whether the owners saw key 1958 reports containing the new plan. When asked whether he had found any reference in

173. Document F1, p55

174. Ibid

175. Ibid, pp61-62

the correspondence between the parties and minutes of their meetings to the production to protection ratio, he replied, 'No, I saw no reference to those figures'.¹⁷⁶

Instead of being appraised of the Crown's altered intention for their lands, the Mangatu owners were consistently told by officials, first, that the forest would be predominantly protective and, second, that any milling would be on a small scale, with little profit. As late as October 1960, at the annual general meeting of Mangatu owners, the commissioner emphasised that the forest was to be a protective, not a productive, one. This at a time when officials were considering planting 75 per cent of the land in production forest.

At best, officials withheld information which was highly material to the owners' consideration of their options. At worst, they were lied to.

15.5.4 Findings

It is clear that the Crown's conduct in the negotiations over the acquisition of the Mangatu forest has failed to comply with the required Treaty standard.

- ▶ The owners did not want to sell
- ▶ The conduct and negotiation processes were uneven and the owners did not feel they had been fully informed of the process and options.
- ▶ The owners sold because the Crown offered them no other option.
- ▶ A key factor in this decision was that they thought that their lands could not have been continued to be utilised profitably if they had retained them.
- ▶ While the Crown was developing plans for a high proportion of profitable production forest, officials and Ministers were constantly advising the owners that this scenario was not possible.

The Crown was far from scrupulously fair, even-handed, and honest. Quite the reverse. In addition, there appeared to be no serious consideration of the alternatives to sale: particularly the possibility of a lease arrangement or a form of partnership.

We find, therefore, that the Crown failed to act reasonably and with the utmost good faith when it acquired the Mangatu forest lands from the Maori owners. The Crown breached the principles of the Treaty of Waitangi accordingly.

176. Transcript 4.18, p49

CHAPTER 16

HEI WHAKAMAHUTANGA: THE HEALING

Whakamoea nga patu ki nga patu rakau, kia whanau ko te pai

Put to sleep the evil words and weapons of war so that goodness can prevail.

We begin this concluding chapter by drawing together some of the key themes in our report. We focus on the importance in the Treaty of three important ideals. They are: 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–Pakeha relations throughout the nineteenth and early twentieth centuries in Turanga. They have consistently informed our analysis. We go 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 express the hope that in promoting Treaty education, the Government will address this unmet need.

We then turn to address matters relating to future negotiations. We offer our view of who the Crown should negotiate with, the comparative size of the Turanga claims that are well founded, and the relativities between the claimant groups in Turanga.

16.1 THE TREATY ESTABLISHED A NATION BASED ON THE RULE OF LAW

kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana

Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects . . .

In article 1 of the Treaty, the chiefs and tribes transferred to the British Crown ‘all the rights and powers of sovereignty’ or ‘te kawanatanga katoa’ over these islands. The Queen in the Treaty’s preamble declared herself anxious, in the exercise of these newly acquired powers, to end the lawlessness that had and would continue to characterise relations between Maori and

Pakeha. She proposed to do this by introducing a settled form of civil government. But these powers of Government were subject to two key constraints. First, they were subject to the promises made to Maori in articles 2 and 3. Secondly, and equally importantly, they were subject to the rules of the constitution brought with the Crown from Great Britain and introduced through article 1 of the Treaty. Foremost among those constitutional rules was that the Crown, as the embodiment of executive government, is subject to the law and has no power to act outside it. That is, the Crown both rules in accordance with the law, and is itself ruled by the law. Yet, in the history of Crown–Maori relations in Turanga, we were struck time and again by the Crown’s willingness to disregard its own law where this was politically expedient. Here are some of the examples we found:

- ▶ the illegal military attack on a defensive pa at Waerenga a Hika (containing 800 men, women, and children) in which 71 defenders were killed;
- ▶ the illegal arrest, deportation, and detention on the Chatham Islands of 123 Turanga prisoners (close to a quarter of the adult male population of the district) together with the families who decided to accompany them, for two years without charges being brought, trials held, or convictions obtained;
- ▶ the illegal military pursuit and harassment of Te Kooti’s Whakarau as they attempted to travel inland prior to Matawhero in which between eight and 14 members of that group were killed;
- ▶ the illegal execution without charge, trial, or conviction of between 86 and 128 unarmed prisoners at Ngatapa;
- ▶ the unlawful threat to withhold the Crown’s protection from Turanga unless ‘loyal’ Turanga Maori ceded the entire district of 1.195 million acres to the Crown;
- ▶ the unlawful confiscation, through the mechanism of the Poverty Bay Commission, of the property rights of hundreds of Turanga Maori, alleged (but not found) to be rebels, without charge, trial, or conviction;
- ▶ the unlawful refusal to allow Te Kooti free passage to his home in 1885, despite his having been granted a royal pardon, and his subsequent false arrest and imprisonment.

These actions were not just arbitrary or capricious. They were brutal, lawless, and manipulative, and they were committed in the name of the Crown in New Zealand. We hasten to add that we have not lost sight of the brutal murders committed by Te Kooti and the Whakarau at Oweta and Matawhero. We do not for a moment seek to diminish the pain Te Kooti caused both the Maori and Pakeha communities in Turanga. This is pain which, though considerably dulled, is still felt to this day. But Oweta and Matawhero cannot explain the Crown’s prior abuses. Nor, in our view, can the desire for retribution after Te Kooti’s raid provide any justification for the Crown’s actions at Ngatapa. While it is entirely understandable that individuals would feel a strong need for vengeance, the Crown was in a quite different position. As we have said, the moral authority of the Crown to require its subjects to comply with a standard of conduct prescribed by law depends on the Crown itself adhering to that

standard. The Crown had to be above revenge. How else could it claim to govern in the name of all New Zealanders? If we are truly a country respectful of the rule of law, these matters must be acknowledged and put to right.

Ko te waka hei hoehoenga mo koutou i muri i ahau, ko te ture. Ma te ture ano te ture e aki.

The canoe that you must paddle when I am gone, is that of the law. Only the law can be pitched against the law.

—Te Kooti Rikirangi, Ohiwa, April 1893

16.2 THE TREATY STOOD FOR JUST AND FAIR GOVERNMENT

Ko Wikitoria te Kuini o Ingarani i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga me to ratou wenua

Her Majesty Victoria . . . regarding with her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order

It was not enough that the Crown would govern in accordance with the rule of law. It was implicit in the language and the spirit of the Treaty that government in New Zealand would be just and fair to all. There ought to have been no room for laws or policies calculated to defeat Maori interests in order to favour settler interests. On the contrary, the Crown expressed the intention in the Treaty of protecting Maori rights. Yet, in addition to the unlawful acts committed by the Crown which we have set out above, the Crown set about devising policies and promoting laws that led to the destruction of Maori society and the extinguishment of Maori title in Turanga. Since there are too many examples of this in our report to provide a comprehensive list, we set out below what we consider to be the leading examples of such laws and policies:

- ▶ The wrongful and unfair procurement under duress of Maori ‘consent’ to the cession of over one million acres of Maori land.
- ▶ The creation by proclamation of the Poverty Bay Commission to (among other things) award titles at English law to ‘loyal’ Maori in order to destroy customary tenure.
- ▶ The creation and operation of the Native Land Court in Turanga in order to usurp the right of Maori communities to decide their own questions of title.
- ▶ The introduction of a new system of land tenure designed specifically to facilitate wholesale land alienation at extremely low prices by:
 - restricting Maori engagement in land-based commerce to engagement by sale or lease only;

- individualising the process of sale or lease so as to exclude normal Maori community decision-making;
- enacting a system of Maori land transfer which was so unwieldy as to artificially suppress prices well below fair market values;
- introducing a system of safeguards for Maori in land dealings which was ineffective because it was: under-resourced; improperly applied; able to be overridden by the system of protections for settler titles; and incapable of ensuring that Maori retained sufficient lands for their future needs;
- the widespread use, by Crown purchase officers, of unfair tactics designed to pressure Maori into selling their lands.

Can it really be said that these more insidious forms of Treaty breach were less grievous than direct Crown action against people and property, particularly in light of the fact that their effect covered more land and affected more people? In the end, the lasting effect of the Poverty Bay Commission and the Native Land Court on the lives of Turanga Maori was, in economic terms at least, worse than that of the conflicts which led to their arrival.

Our view in this regard was echoed by Professor Ward in a more general study of the same phenomenon. He wrote: 'It was the sordid, demoralising system of land-purchasing, not war and confiscation, which nearly brought the Maori people low.'¹

16.3 THE TREATY ENSURED THAT THE CROWN WOULD RESPECT MAORI AUTONOMY

Ko te Kuini o Ingarani ka wakarite ka wakaee ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forest Fisheries and other properties which they may collectively or individually possess.²

As has been said many times by many Tribunals in the past, the cession of kawanatanga to the Crown was not unconditional.³ It was subject to a reciprocal promise by the Crown to utilise that new power in a manner which fostered and protected the autonomy which the tribes had exercised from time immemorial. This promise must have given the chiefs great comfort

1. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Canberra: 1974), p 267

2. Article 2 of the Treaty. English translation from IH Kawharu, ed, *Waitangi; Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford: Oxford University Press, 1989), app, p 317.

3. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 388; Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 5

when deciding whether to sign the Treaty. As it happened, because Turanga was remote with no substantial settler population, Turanga Maori were left to their own devices from 1840 to 1865. The autonomy promised in the Treaty was a reality on the ground, but it was not the Crown's intention that this should continue. In November 1865, the Crown acted on its intentions. Rather than foster and protect Maori autonomy, the Crown adopted policies and enacted laws specifically designed to destroy it. The Crown had come to fear that continued Maori autonomy would compromise both the process of settlement and its own authority. There are more instances of such laws and policies in the history of Turanga than can be fully summarised here. It is sufficient to reiterate but a few of the more obvious examples:

- ▶ the attacks on Waerenga a Hika and the Whakarau;
- ▶ the arrest and deportation of close to a quarter of the adult male population of Turanga;
- ▶ the forced deed of cession;
- ▶ the detribalised titles of the Poverty Bay Commission;
- ▶ the detribalised titles of the Native Land Court; and
- ▶ the refusal to make provision in the law to allow Maori to manage their lands as communities until it was too late.

As Professor Murton argued before us, the impoverishment of Maori communities occurs when they become excluded from decisions in respect of their entitlements. That is when they are stripped of their former power to act as communities in the protection and promotion of their rights. In the context of the native title system, for example, this occurred long before the land was alienated and the modest proceeds were dissipated by individualised right-holders. The importance of fostering the autonomy of Maori communities as promised in the Treaty cannot be overstated. It is the single most important building block upon which to re-establish positive relations between the Crown and Maori. That was true in nineteenth-century Turanga and it remains true today.

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.⁴

16.4 THE TURANGA STORIES MUST BE TOLD

The story of contact and conflict between the Crown and Maori in Turanga in the 30 years from 1865 contains some of the darkest and most dramatic moments in our history as a

4. Waitangi Tribunal, *Taranaki Report*, pp5–6

country. In some cases, the fault for these events lay with the Crown. In others, it lay with Maori. Yet, there was throughout a measure of cautious mutual respect between the protagonists – an acceptance on each side that the other was a worthy adversary. In time, the Crown and Maori did learn to cooperate as Maori, such as Pere and Carroll, came to participate in Government, and Pakeha such as Rees, came to contribute to Maori economic development.

We cannot help but think that the unsettled state of relations between Maori and Pakeha in this country is in part due to the fact that these stories are remembered only by tangata whenua and a few historians who specialise in New Zealand history. While only one side remembers the suffering of the past, dialogue will always be difficult. One side commences the dialogue with anger and the other side has no idea why. Reconciliation cannot be achieved by this means. Thus, it seems no more than common sense that if stories such as those from Turanga were more widely known in the community, particularly local communities more directly affected, the need to heal the wounds of the past before moving forward would be better understood by all. There is, in our view, an enormous unmet need for community education in the history of race relations in New Zealand, particularly in the local communities where the settlement of historical grievances has real meaning and practical effect for all. We say the need is unmet because, first, this kind of education is necessary to foster good relations within our communities; and, secondly, because, in our experience, there is a great demand at the grass roots for such programmes.

Nowhere is this need greater than in Turanga. The stories of Rukupo and McLean; of Te Kooti, Biggs and Wahawaha; and of Rees and Pere, need to be retold to the people of modern Poverty Bay where they resonate. We were struck for example by the diametrically opposed perceptions of Te Kooti in the Maori and Pakeha communities of Turanga. On one side, he was often seen as a freedom fighter: on the other, a bloodthirsty murderer.

It is by being constantly reminded of the price a young country once paid for oppressive laws and racist attitudes that we avoid repeating the mistakes of the past. But there is also a positive legacy. Turanga reminds us, secondly, of the ability of Maori and Pakeha, given time and the right incentives, to work out their differences and cooperate to their mutual advantage.

We can do no more than express the great hope that the Government will ensure that the officers of the Treaty of Waitangi Information Unit, or such other agencies as may be appropriate, will undertake the work we describe here.

Whakamoea nga maunga, kia whanau ko te pai

Only good can result, when great mountains are joined

—Proverb about peacemaking

16.5 WHO CAN SETTLE?

The Crown has requested that we provide guidance to the parties on the level at which settlements should be made and the groups with which the Crown should engage. We are prepared to offer our view on these issues, though we do so with considerable caution and in the knowledge that the political landscape extant when we completed our hearings in 2002 may have shifted somewhat. We will therefore restrict our comments to general observations and first principles.

In chapter 2, we discussed the relationships and distinctions between claimant groups. In particular, we emphasised the high level of both formal and informal cooperation amongst claimant groups. That cooperation was in large part responsible for the expedition with which we completed our hearings. We do not here seek to diminish in any way the important distinctions between claimant groups, but district-wide cooperation was achieved in Turanga to an unprecedented level. It is appropriate therefore that we commence our consideration of these matters by pointing out that fact and by commending the various claimant groups for it.

As we mentioned in chapter 2, Te Runanga o Turanganui a Kiwa (TROTAK) advanced a district-wide claim which was restricted, for our purposes, to environmental matters. We have not dealt in detail with those issues, though, at some point in the future, it may be necessary to revisit them. TROTAK advanced its environment claim with the consent and assistance of the constituent Turanga iwi and hapu. It claimed no mandate to prosecute or settle historical Treaty claims in Turanga.

Setting aside, for present purposes, the TROTAK claims, it would still be our preference, and no doubt the Crown's, for the claimant iwi and hapu to negotiate the settlement of the Turanga claims in a single district-wide negotiation process if that is at all feasible. The advantages of this approach to the Crown and claimants are obvious and significant. For the Crown there is the advantage of a single set of negotiations without the usual problems of boundary disputes (at least for the iwi and hapu represented within the district). There can be significant gains in both time and cost for the Crown. For the claimants, there is the additional leverage on the crucial question of quantum, which a single district-wide claimant table can bring to the negotiation. A negotiating panel on which all settling groups are represented also has the advantage of transparency between claimant groups. This can reduce the potential for claimants to be distracted by internal competition over the size and nature of their respective settlement packages. Disputes over dividing the pie can be resolved more easily by using collective efforts to enlarge it first. In addition, there are significant advantages to claimants in being able to pool skills and expertise. In every district, there will be only a few individuals with experience in negotiation in the highest levels of government and with the networks to call on where necessary. It produces far better results for all if those few can be engaged for the common good, rather than to advantage one group over the others.

That is not to say that a single negotiation would produce a single settlement package. On the contrary, we would fully expect a single negotiation to result in the creation of several settlement packages in accordance with the wishes of the claimants. It is the single negotiation that produces the advantages, not necessarily the single settlement.

Whether this approach is feasible we cannot say, but it ought to be carefully considered for the benefits that it can bring to all sides. At the very least, the claimants should give consideration to a single negotiation of quantum for the whole district, even if each claimant group would prefer to negotiate its own particular settlement package.

We turn now to the particular claimant groups and our view of the levels at which they should settle however the negotiations are ultimately structured. The hapu and iwi claims are advanced by:

- ▶ Te Aitanga a Mahaki and its close affiliates Te Whanau a Kai and Ngariki Kaiputahi;
- ▶ Rongowhakaata; and
- ▶ Ngai Tamanuhiri.

It is our view that the Mahaki cluster (our phrase for want of a better one) should negotiate a single settlement, though we do not discount the possibility that the result would include separate packages for each of Te Whanau a Kai and Ngariki Kaiputahi. In the end, although Te Whanau a Kai and Ngariki Kaiputahi have a number of distinctive claims, they are both so closely bound up in the Mahaki complex that the claims they share with their whanaunga outweigh, in our view, those which are distinct. That includes, we hasten to add, Ngariki Kaiputahi's separate Mangatu claim.

Finally, in this respect, we note that the multiple Ngariki Kaiputahi claims do not warrant separate whanau settlements. Within the Mahaki cluster there can be only one resolution of the Ngariki claims. Similarly, since we have found against the Wi Pere whanau in relation to the individual property claims of Wi Pere, any wider entitlements that whanau might have arise by virtue of their membership of Te Aitanga a Mahaki and Te Whanau a Kai and will be settled in that context.

As for the Rongowhakaata claims, they include the separate claim by Te Kooti's line, Nga Uri o Te Kooti. Except to the extent that these claims are personal to Te Kooti – that is, in respect of his personal effects, land interests, and reputation – this claim should be settled as a part of a single Rongowhakaata claim.

Finally, in relation to Ngai Tamanuhiri, the individual claims by Sue Te Huinga Nikora and Te Atauoterangi III fall to be dealt with within the Ngai Tamanuhiri claim to the extent that either of those individuals can demonstrate appropriate descent.

Thus, in our view, the historical claims in Turanga should, as a preference, be negotiated at a single district-wide table, or, if that is not possible, then in three separate negotiations with the Mahaki cluster, Rongowhakaata, and Ngai Tamanuhiri.

16.6 LOSS AND REPARATIONS

In this report, we have considered 13 claim categories in detail. They are Waerenga a Hika, Te Kooti and the Whakarau, the deed of cession, the Poverty Bay Commission, the Native Land Court, the Turanga trusts, Hamiora Pere, Te Hau ki Turanga, Mangatu title, Mangatu Forest, Public Works Act acquisitions, and rating. In all but rating claims, we have made findings. Here, we briefly summarise the findings that we have made together with an assessment of which hapu and iwi were particularly affected in each category. The substantive findings and assessments of effects are to be found in the relevant chapters of this report.

In addition to those matters, we received a number of submissions from claimant communities complaining of environmental degradation in Turanga as a result of the acts or omissions of central or local government. We also received an extensive, though preliminary report on environmental history from Dr Brad Coombes of the University of Auckland.⁵ After considering this material, we have decided that the subject is too wide and complex for us to report in any useful way on it at this stage. Instead, we propose to reserve leave for parties to make further submissions to us on whether, following this report, it will be necessary to proceed with the environmental aspects of the Turanga claims and, if so, how they should be progressed. Leave is reserved accordingly. We turn now to our summary of findings and effects.

16.6.1 Waerenga a Hika and aftermath

We found in relation to Waerenga a Hika and its aftermath that:

- ▶ Turanga Maori were not in rebellion in 1865 and the Crown acted unlawfully and in breach of the Treaty in attacking the Pai Marire defensive position at Waerenga a Hika and killing 71 of its inhabitants.
- ▶ The Crown acted unlawfully and in breach of the Treaty in arresting, detaining, and deporting 113 of the men captured at Waerenga a Hika, together with those of their families, to Wharekauri.
- ▶ The hapu and iwi most affected by Waerenga a Hika and its aftermath were the Mahaki cluster and Rongowhakaata.

16.6.2 Te Kooti and the Whakarau

We found in relation to Te Kooti and the Whakarau that:

- ▶ The Crown acted unlawfully and in breach of the Treaty in pursuing and harassing Te Kooti and the Whakarau after their escape from Wharekauri and return to the mainland.

5. Document A20

16.6.3

- ▶ While they were entitled to take military action in self-defence or where the actions of the Crown made their situation intolerable, Te Kooti and the Whakarau committed unjustified acts of rebellion when they attacked the Turanga settlements of Matawhero, Patutahi, and Oweta.
- ▶ In attacking the settlements without discriminating between civilian and military targets, the actions of the Whakarau were dishonourable, unlawful, and in breach of their Treaty responsibilities.
- ▶ While the Crown was entitled to take military action against the Whakarau after the latter's attack on Turanga:
 - the retaliatory action at Ngatapa made no attempt to discriminate between the Whakarau and their innocent prisoners and was in breach of the principles of the Treaty; and
 - the execution without trial of between 86 and 128 unarmed prisoners was brutal, unlawful, and in breach of the principles of the Treaty of Waitangi.
- ▶ The treatment of Te Kooti following his pardon in 1883 and, in particular, his arrest at Opotiki and imprisonment, was unfair and in breach of the principles of the Treaty of Waitangi.

Apart from the effect of these events on Te Kooti himself, the hapu and iwi most particularly affected by these events were Rongowhakaata and the Mahaki cluster.

16.6.3 Deed of cession

We found in relation to the deed of cession that:

- ▶ The purported cession of 1.195 million acres to the Crown by deed, dated 18 December 1868, was obtained under duress, in breach of the principles of the Treaty, and was ineffective in extinguishing Maori title.
- ▶ In any event, the adhesion of the signatures of 279 'loyal' Maori was ineffective in extinguishing the rights of several hundred 'rebels' who had not signed.
- ▶ There was no agreement between the Crown and Maori over the amount of land to be retained by the Crown out of the deed of cession. Maori agreed (albeit under duress) to cede 15,000 acres in three blocks to the Crown. The Crown agreed to accept those three blocks and a larger but imperfectly defined hill-country block.
- ▶ Since the retention was in substance a confiscation, it was for the Crown properly to record the concessions in writing and to ensure that the correct groups consented. To the extent that the Crown failed properly to record the transactions or secure necessary consents, the Crown breached the principles of the Treaty in retaining to itself an area of land between 35,000 and 40,000 acres larger than that which Maori consented (albeit under duress) to give up.

- ▶ The Crown purported to cover up or 'fix' the irregularities on the record as a result of the failure of officials to properly record the terms of the agreement over retained lands between the Crown and Maori. Such attempts to cover up irregularities on the record were in breach of the principles of the Treaty of Waitangi.
- ▶ The 10 October 1950 'settlement' of the Patutahi claim, for £38,000, did not settle either of the claims of Rongowhakaata or Te Whanau a Kai.
- ▶ Rongowhakaata and Te Whanau a Kai were particularly affected by these events, although Te Aitanga a Mahaki also suffered in the loss of Te Muhunga.

16.6.4 Poverty Bay Commission

We found in relation to the operation of the Poverty Bay Commission that:

- ▶ The Crown acted unlawfully and in breach of the principles of the Treaty of Waitangi in empowering the Poverty Bay Commission to try 'rebels' and confiscate their lands without due process or appropriate safeguards.
- ▶ The Crown acted in breach of the principles of the Treaty of Waitangi by failing to ensure, through the Poverty Bay Commission, that 'loyal' Maori were compensated for land interests lost within the Crown retained lands.
- ▶ The Crown acted in breach of the principles of the Treaty of Waitangi in failing to ensure that the form of title awarded following investigation by the Poverty Bay Commission was not prejudicial to Maori interests.

While all iwi and hapu were affected to some extent by the operation of the Poverty Bay Commission, the interests of Ngai Tamanuhiri and Rongowhakaata were particularly affected thereby.

16.6.5 Native Land Court

We found in relation to the Native Land Court and the new native title system that:

- ▶ Although Maori were very interested in 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 on 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 1874. This breached the Crown's fiduciary and active protection obligations.

All iwi and hapu were affected to a significant degree by the operation of the Native Land Court.

16.6.6 The Turanga trusts

In relation to the Tauranga trusts, we found as follows:

- ▶ 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.
- ▶ 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 for which the Crown cannot be held responsible
- ▶ 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.

- As to the East Coast Native Trust Lands Board, we found that the Crown was aware from various sources before the date of its formal intervention in 1902, both of the nature of the problem faced by the Carroll Pere trust and the implication of its own title system in it. The failure to intervene earlier resulted in an escalation of the trust debt and 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 trust 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.

All claimant iwi and hapu lost to some extent in the failure of the Turanga trusts, but Ngai Tamanuhiri lost considerably in the sale through the trusts of their Maraetaha and Pakowhai lands and Te Whanau a Kai lost heavily in the sale of their Tahora blocks.

16.6.7 Te Hau ki Turanga

In respect of the wharenuī called Te Hau ki Turanga which is held by Te Papa in Wellington, the Crown accepted that wharenuī had been acquired in breach of the Treaty. We considered further that there is a real question about whether Te Papa ever acquired legal title to Te Hau ki Turanga at all.

Rongowhakaata was most affected by this claim.

16.6.8 Hamiora Pere

In respect of the trial and execution of Hamiora Pere, we expressed doubts about whether the decision to execute him was made for proper reasons and in accordance with appropriate principle. In light, however, of the limitations in our expertise in criminal matters, we made no specific finding. Instead we recommended that the Attorney-General review the record with a view to determining whether our doubts have substance.

Te Whanau a Kai was most affected in this claim.

16.6.9 Mangatu title determination

We found in respect of the Mangatu title determination of the Native Land Court that:

- The 1881 judgment by the Native Land in respect of title to the Mangatu block was unsafe.
- When the Crown introduced legislation in 1917 to allow Te Whanau a Taupara to reargue the question of the rights of that hapu in the Mangatu block, it should have allowed

16.6.10

Ngariki Kaiputahi to make the same argument and to that extent the Crown breached the principles of the Treaty of the Waitangi.

- The effect of the decision of the court and the subsequent Crown breach was that the myth that by conquest Ngariki Kaiputahi lost all but its occupation sites has been perpetuated and their rights in Mangatu reduced disproportionately.
- 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.

16.6.10 Mangatu Forest

In respect of the Crown's acquisition of approximately 8500 acres of the Mangatu lands for Mangatu State Forest, we found that the Crown failed to disclose to the Maori owners that it planned to plant the lands acquired in commercial production forest. Instead, the Crown led the owners to believe that the land would be planted in a non-income-earning protection forest regime. This misrepresentation led directly to the owners' decision to reverse their stance from one of implacable opposition to sale. We found that the way in which the Crown conducted itself during the negotiations breached its obligations to act reasonably and with utmost good faith.

Te Aitanga a Mahaki were directly affected by these matters.

16.6.11 Public works and rates claims

In respect of these matters, we were unable to make comprehensive findings because the evidence was insufficient to justify such findings or because, in the context of the claims, findings were not appropriate.

16.7 VALUES AND COMPARISONS**16.7.1 Overall quantum**

That brings us to an assessment of the comparative value of the Turanga claims and the relativities amongst the claimant groups. We commence by observing that the settlement for Turanga should be substantial. We say this deliberately, and after careful consideration of the matters we think relevant to the question. In particular we have taken account of the following:

- ▶ The large number of Turanga Maori unlawfully attacked, imprisoned, and or deported by the Crown. For example, approximately a quarter of the adult male population of Turanga was imprisoned on Wharekauri after Waerenga a Hika.⁶
- ▶ The unprecedented number of Turanga Maori killed in Crown–Maori conflict. Between 1865 and 1869, we estimate that approximately 240 adult Turanga males were killed in battle with Crown forces.⁷ Using Wardell’s estimate of the 1861 Turanga population at 1500 – and the likely number of adult males from that figure of around 540⁸ – we estimate that 43 per cent of the adult male population of the area was killed in war with the Crown between 1865 and 1869. This figure does not include the women and children who died through sickness, dislocation, or direct attack. Nor does it include the 20 to 40 Maori killed by Te Kooti and the Whakarau at Matawhero and Oweta.
- ▶ The unprecedented number of Maori executed by the Crown and the manner of those executions – that is between 86 and 128 of all those killed.
- ▶ The 1.195 million acres of land initially confiscated unlawfully by the Crown in the purported deed of cession.
- ▶ The unquantified but substantial area of land unlawfully confiscated from Turanga ‘rebels’ by the Poverty Bay Commission in the name of the Crown, and without due inquiry.
- ▶ The unquantified but significant area of land lost to ‘loyal Maori’ through the provision by the Poverty Bay Commission of defective titles in the name of the Crown.
- ▶ The approximately 56,000 acres of land retained by the Crown by duress from ‘loyal’ and ‘rebel’ Maori alike.
- ▶ The imposition of a defective land tenure system which envisaged Maori participation in the colonial economy only through land alienation.
- ▶ The unquantified but large area of land lost to Turanga Maori through the pressure which the Native Land Court title and transfer systems placed on owners to sell their lands individually and at less than fair market values.
- ▶ The refusal of the Crown to introduce appropriate mechanisms to provide for community management of Maori lands.

6. Resident Magistrate Wardell estimated the Turanga population to be 1500 in 1861. Using that as a rough guide, about 540 of that number would have been adult males: Ian Poole, *Te Iwi Maori: A New Zealand Population, Past, Present and Projected* (Auckland: Auckland University Press, 1991) p102, and see also the ratios in AJHR, 1878, G-2, p22. The 123 Turanga prisoners represented 23 per cent of that adult male population.

7. Our calculations are as follows: 71 killed at Waerenga a Hika; approximately 50 killed between the return of the Whakarau and the commencement of the siege at Ngatapa; and approximately 120 killed at Ngatapa itself. These figures are lower than the casualty figures used in our substantive analysis (65 up to Ngatapa and between 150 to 194 at Ngatapa, itself including the executions); the difference is explained by our estimate that about 25 per cent of those engaged and killed were not from Turanga but belonged to Tuhoe or Ngati Kahungunu – hence the reduction in overall figures attributable to Turanga men.

8. See doc A20

- The failure to acknowledge or address the long-term impact of the defective system which, through fragmentation and fractionation, rendered residual Maori lands in the twentieth century unable to be utilised, occupied, or managed effectively and profitably.

While the confiscation aspect of the claim was not as large as those of Taranaki and Waikato, the treatment of the people in Turanga was, in our view, significantly worse. The illegal imprisonment of a quarter of the adult male population on Wharekauri is bad enough. But the loss in war of an estimated 43 per cent of the adult male population of Turanga, including the illegal execution of a third to a half of that number, is a stain on our national history and character. To this must be added the long term debilitating effect of the Poverty Bay Commission and the Native Land Court. The fact that Turanga Maori made numerous unsupported attempts to avoid the constraints of unfair laws and extract fair value from their lands aggravates matters in our view.

Reparations must be of a dimension that reflects the enormity of the loss that the iwi and hapu of Turanga have suffered in people and in land since 1865.

16.7.2 Relativities

In an effort to encourage the claimants to focus on the overall value of a Turanga settlement rather than engage in divisive internal competition over comparative settlement values, we cautiously suggest the following division in the overall settlement sum for Turanga:

- Te Aitanga a Mahaki: 46 per cent. Of that proportion, 3 per cent should go to Ngariki and 7 per cent to Te Whanau a Kai, should it be agreed that those kin groups will administer separate settlements. That would leave 36 per cent to Te Aitanga a Mahaki itself. We consider that Te Whanau a Wi Pere should be compensated as a part of Te Aitanga a Mahaki and/or Te Whanau a Kai depending on the issue, since Wi Pere had strong claim to both lineages.
- Rongowhakaata: 36 per cent. We consider that Nga Uri o Te Kooti should be compensated for their historical losses as part of Rongowhakaata except where the claims relate to Te Kooti's personal effects and reputation. While there may be costs in respect of the settlement of these matters, we apprehend that none of them will result in direct monetary compensation. Nor, as we understood the claims by Te Kooti's whanau, was compensation sought. We are aware that Kooti was left substantially landless in Turanga – the exception was the award of a small share in the Tahora blocks under the less well known name Te Turuki Te Rangi Patahi. The Crown may see that it is appropriate to grant lands in Turanga to Te Kooti's descendants today. If that is done, it should not be debited from the Rongowhakaata settlement. It should be seen as a single one-off item, personal to Te Kooti rather than a component of the Turanga land claim settlements.

- Ngai Tamanuhiri: 18 per cent. We consider that the individual claims of Sue Te Huinga Nikora and Te Atauoterangi III should be treated as a part of the Ngai Tamanuhiri claim to the extent that either of those individuals is able to demonstrate appropriate descent.

The overall impact of this apportionment is that Te Aitanga a Mahaki (excluding Te Whanau a Kai and Ngariki) and Rongowhakaata are to be treated as equivalent in quantum. Ngai Tamanuhiri's claims would be valued at half of that benchmark. Equally we consider that, within the quantum to be made available to Te Whanau a Kai and Ngariki, Te Whanau a Kai's settlement should be more than twice that of Ngariki. We consider that this approach properly reflects a fair apportionment bearing in mind the nature of the various claims, the extent of loss in land and other injury suffered by claimant groups, and the size of the modern communities who carry the burden of these claims.

16.8 HEI KAPINGA KORERO

We finally wish the claimants and the Crown well in navigating their way through the difficult process of negotiating the settlement of these long-standing grievances. They have been left unanswered for far too long and the people of Turanga and Poverty Bay need to put these matters behind them so that they can begin to move forward. We are well aware of how difficult it has been for all sides to get even this far, yet in many ways the job has only just begun. It is time now to galvanise claimant communities for the push toward settlement. With luck it will be as a single body with many distinctive voices but much in common. It is time also for the Crown to galvanise its negotiating teams and its political will, to demonstrate to claimants that momentum need not be lost amongst the day-to-day issues of executive government as it so easily can be. We express the fervent hope that the benefits to accrue to claimant communities as a result of the settlement of the Turanga claims will outweigh the strains of the process.

Leave is reserved to all claimant and crown parties to apply for further direction if necessary.

Ki a koutou ngā purapura o o koutou mātua tīpuna i whakaupa ai koutou i ngā tau e maha, ko te wai o ā ratau kupu, kua takoto i a koutou ki te takapau kōrero e kiia nei he rīpoata. Tā tēnā, tā tēnā whakaaro o Tūranga tangata, o Tūranga whenua, kua pūtahi i raro i ngā mana o o koutou rangatira kia tata ai te pae tawhiti.

Ōwhiti, tūturu whakamaui kia tīna, tīna! Hui e! Tāiki e!

Dated at Wellington this 8th day of October 20 04



J V Williams, presiding officer



M C Bazley, member



J W Milroy, member



A Parsonson, member



APPENDIX I

RECORD OF INQUIRY

RECORD OF HEARINGS

TRIBUNAL MEMBERS

The Tribunal constituted to hear the Gisborne claims comprised Chief Judge Joseph Williams (presiding), Dame Margaret, Professor Wharehuia Milroy, and Dr Ann Parsonson.

COUNSEL

The following counsel appeared for the claimants: Prue Kapua and Geoffrey Melvin (Te Aitanga a Mahaki), Layne Harvey and Spencer Webster (Rongowhakaata and Te Uri o Te Kooti); Shane Anderton, Paul Radich, and Damien Stone (Ngai Tamanuhiri) Tom Bennion and Geoffrey Melvin (Ngariki Kaiputahi); Kim Bellingham and Richard Boast (Te Whanau a Kai); John Bunbury and John Egan (Te Whanau a Pere); Tevaki Afeaki and Charl Hirschfeld (Robert Cookson and Sue Nikora); David Sharp (TROTAK); and Peter Andrew, Rachel Ennor, and Craig Linkhorn for the Crown.

THE HEARINGS

First hearing, 19–23 November 2001

The first hearing, which was cooperatively run, was held at Whakato Marae. Submissions and evidence were heard from the following: Judith Binney, Brad Coombes, Vincent O'Malley, Taranaki Paratene, Darcy Ria, Bruce Stirling, Tokorua Tekani, Petera Tupara, and Paora Whaanga.

Second hearing, 10–14 December 2001

The second hearing was held at the offices of the Mangatu Incorporation, Gisborne. It concerned the principal Te Aitanga a Mahaki claimant group. Submissions and evidence were heard from the following: Rutene Irwin, Prue Kapua, Merata Kawharu, Geoffrey Melvin, and Charlie Pera (10

December); Vincent O'Malley, Geoffrey Melvin, and Katherine Rose (11 December); Katherine Rose (12 December); Jacqueline Haapu, Maata Keiha, and Brian Murton (13 December); and Brad Coombes, Brian Murton, and John Ruru.

Third hearing, 28 January–1 February 2002

The third hearing was held at Rongopai Marae and Mangatu Marae. It concerned Te Whanau o Wi Pere, Te Whanau a Kai (Rongopai Marae), and Ngariki Kaiputahi (Mangatu Marae). Submissions and evidence were heard from the following: John Bunbury, John Egan, Joe Pere, and Tom Smiler (28 January); Richard Boast, Bryan Gilling, and Tui Gilling (29 January); Martin Baker, Gary Clapperton, David Hawea, Jo Ihimaera, Witi Ihimaera, Rhys Johnson, Pukepuke Peawini, Tom Smiler, and Ngapo Wehi (30 January); Tom Bennion, David Brown, Kathy Ertel, and Owen Lloyd (31 January); and Bernadette Arapere, Joseph Brown, Bryan Gilling, Irene Renata, John Robson, and Sid Tamanui (1 February).

Fourth hearing, 25 February–1 March 2002

The fourth hearing was held at Manutuke Marae. It concerned Rongowhakaata and Te Uri o Te Kooti. Submissions and evidence were heard from the following: Layne Harvey, Lewis Moeau, Darcy Ria, Scott Riki, Bruce Stirling, and Paora Whaanga (25 February); Fiona Small and Bruce Stirling (26 February); David Alexander, Taranaki Paratene, Ruby Smith, Taharakau Stewart, Heni Sunderland, Petera Tupara, and Tony Walzl (27 February); Charlie Pera, Layne Harvey, Harold Brookes Kirk, Elizabeth Moeau, Maever Moeau, Peter Moeau, Rikirangi Moeau, and Maewa Thornton (28 February); and Judith Binney, Lewis Moeau, Puka Moeau, Stan Pardoe, and Petera Tupara (1 March).

Fifth hearing, 2–6 April 2002

The fifth hearing was held at Muriwai Marae. It concerned Ngai Tamanuhiri. Submissions and evidence were heard from the following: Peter McBurney, Warren Pohatu, Paul Radich, and Pera Riki (2 April); Rose Thompson (read by daughter Rachel Forester), Dr Keith Pickens (3 April); Lee Martell, Kathy Orr-Nimmo, and Jody Balneavis Wyllie (4 April); Brian Murton and Tutekawa Wyllie (5 April); and Tevake Afeaki, Robert Cookson, Brad Coombes, Bryan Gilling, and Sue Nikora (6 April).

Sixth hearing, 15–19 April 2002

The sixth hearing was held at the offices of the Mangatu Incorporation, Gisborne. It concerned the Crown's case. Submissions and evidence were heard from the following; Peter Andrews,

Cecilia Edwards, and Craig Linkhorn (15 April); Cecilia Edwards and Paul Goldstone (16 April); John Battersby, Cecilia Edwards, and Kerry Pollock (17 April); Paul Goldstone and Robert Hayes (18 April); and Robert Hayes (17 April).

Seventh hearing, 21–23 May 2002

The seventh hearing was held at the offices of the Mangatu Incorporation, Gisborne. It concerned the Crown's case. Evidence was heard from the following: Cecilia Edwards, Paul Goldstone, and Brent Parker (21 May); Cecilia Edwards and Paul Goldstone (22 May); and Robert Hayes and Kerry Pollock (23 May).

Eighth hearing, 27–30 May 2002

The eighth hearing was held at the offices of the Mangatu Incorporation, Gisborne. It concerned the Crown's case. Evidence was heard from the following: Robert Hayes and Brent Parker (27 May); Michael Macky and Brent Parker (28 May); Gary Hawke and John Waugh (29 May); Ashley Gould, Robert Hayes, and Michael Macky (30 May).

Ninth hearing, 24–30 June 2002

The ninth hearing was held at Gisborne Boy's High. Closing submissions were heard from the following: Prue Kapua (Te Aitanga a Mahaki); Shane Anderton, Paul Radich, and Damien Stone (Ngai Tamanuhiri); Layne Harvey and Spencer Webster (Rongowhakaata and Nga Uru o Te Kooti); Kim Bellingham and Richard Boast (Whanau a Kai); John Bunbury and John Egan (Wi Pere Whanau); Tom Bennion (Ngariki Kaiputahi); Tavake Afeaki (Robert Cookson); Charl Hirshfeld (Sue Nikora); David Sharp (TROTAK); Kiri Rikihana (Te Papa); and Peter Andrew, Rachel Ennor, and Craig Linkhorn (the Crown).

RECORD OF PROCEEDINGS

1. PARTICULARISED STATEMENTS OF CLAIM

SOC1 Wai 274, Wai 283

Wai 274 is a claim by Eric John Tupai Ruru concerning the Mangatu block, 21 February 1992

Wai 283 is a claim by Eric John Tupai Ruru and others representing Te Aitanga a Mahaki concerning East Coast raupatu, 13 March 1992

soc2 Wai 323

A claim by Joseph Anaru Hetekia Te Kani Pere concerning the Waitawaki block, 10 November 1992

soc3 Wai 499, Wai 507

Wai 499 is a claim by Tanya P Rogers concerning the Mangatu 1 block (now known as the Mangatu 1, 3, and 4 blocks), 24 March 1995

Wai 507 is a claim by Owen R Lloyd concerning the Mangatu block, 11 March 1995

(a) Addition to Wai 507 claim 1.1, 31 August 1995

soc4 Wai 684, Wai 337, Wai 351

Wai 684 is a claim by Stanley Joseph Pardoe concerning land and resources in Rongowhakaata rohe, 2 July 1997

Wai 337 is a claim by Rapiata Darcy Ria concerning Watson Park and the Awapuni 1A, 1F, and 1E blocks, 16 December 1992

Wai 351 is a claim by Janette Waitai and others concerning Te Puni Kokiri mortgage portfolio, 27 May 1993

(a) Amendment to Wai 351 claim 1.1, 1 June 1993

soc5 Wai 856

A claim by Puka Moeau and others, representing the descendants of Te Kooti Rikirangi, concerning Nga Uri o Te Kooti Rikirangi, 2 May 2000

soc6 Wai 874

A claim by David Brown, representing Te Iwi Ngariki, concerning the Mangatu 1 block, undated

soc7 Wai 878

A claim by Taranaki Paratene and another concerning wastewater and social services, 26 July 2000

soc8 Wai 892

A claim by David Thomas Hawea concerning Patutahi, Muhunga, and other lands and resources (Te Whanau-a-Kai), 27 November 2000

soc9 Wai 895

A claim by Joseph Anaru Hetekia Te Kani Pere, representing the descendants of Wi Pere, concerning the Pouparae block, 16 March 2001

SOC10 Wai 896

A claim by Robert Kotuku Cookson concerning the Te Karaka Maori reservation, 12 September 2000

SOC11 Wai 917

A claim by Reweti Ropiha and others, representing Ngai Tamanuhiri, concerning prejudice suffered by the iwi of Ngai Tamanuhiri, 27 April 2001

SOC12 Wai 129

A claim by Sue Te Huinga Nikora and others concerning East Coast lands and waters, undated

2. PAPERS IN PROCEEDINGS

2.1 Direction from Tribunal authorising Chief Judge Williams to conduct a conference, 2 March 2000

2.2 Direction from Tribunal scheduling judicial conference, 20 March 2000

2.3 Memorandum from counsel for Crown Forestry Rental Trust concerning 8 May 2000 judicial conference, undated

2.4 Memorandum from Wai 499 claimant counsel concerning 8 May 2000 judicial conference, undated

2.5 Memorandum from Wai 507 claimant counsel concerning 8 May 2000 judicial conference, undated

2.6 Memorandum from Wai 301 claimant counsel concerning 8 May 2000 judicial conference, undated

2.7 Submission from Wai 506 claimant counsel concerning 8 May 2000 judicial conference, undated

2.8 Memorandum from Wai 684 claimant counsel concerning 8 May 2000 judicial conference, undated

2.9 Memorandum from Wai 272 claimant counsel concerning 8 May 2000 judicial conference, undated

- 2.10 Memorandum from Wai 274, Wai 283, and Wai 766 claimant counsel concerning 8 May 2000 judicial conference, undated
- 2.11 Memorandum from Crown counsel concerning 8 May 2000 judicial conference, undated
- 2.12 Memorandum from representatives from Wai 703 concerning 8 May 2000 judicial conference, undated
- 2.13 Direction from Tribunal concerning Wai 129 and access to research for Gisborne claims, 12 May 2000
- 2.14 Submission from Wai 129 claimant counsel setting out core claim for Wai 129, undated
- 2.15 Memorandum from counsel for Ngariki Kaiputahi in response to paper 2.13, 22 May 2000
- 2.16 Memorandum from counsel for Te Whanau-a-Kai in response to paper 2.13, 22 May 2000
- 2.17 Memorandum from Crown counsel in response to paper 2.13, 22 May 2000
- 2.18 Memorandum from Wai 323 claimant counsel in response to paper 2.13, 22 May 2000
- 2.19 Memorandum from counsel for Ngariki Kaiputahi concerning Te Aitanga a Mahaki research and access arrangements, 29 May 2000
- 2.20 Memorandum from counsel for Te Whanau-a-Kai concerning Te Aitanga a Mahaki research and access arrangements, 12 June 2000
- 2.21 Direction from Tribunal following 8 May 2000 Gisborne conference, 3 July 2000
- 2.22 Direction from Tribunal registering Wai 856 claim, 10 July 2000
- 2.23 Notice of statement of claim for Wai 856, 14 July 2000
- 2.24 Direction from Tribunal registering Wai 337 claim, 26 February 1992
- 2.25 Direction from Tribunal registering Wai 274 claim, 13 March 1992
- 2.26 Notice of statement of claim for Wai 274, 18 March 1992

- 2.27 Direction from Tribunal registering Wai 283 claim, 15 May 1992
- 2.28 Notice of statement of claim for Wai 283, 20 May 1992
- 2.29 Direction from Tribunal registering Wai 323 claim, 19 January 1993
- 2.30 Notice of statement of claim for Wai 323, 22 January 1993
- 2.31 Direction from Tribunal registering Wai 351 claim, 2 June 1993
- 2.32 Notice of statement of claim for Wai 351, 2 June 1993
- 2.33 Direction from Tribunal registering amendment to Wai 351 claim, 9 June 1993
- 2.34 Memorandum from Crown counsel for Wai 351 concerning transfer of mortgage portfolio, 30 June 1993
- 2.35 Direction from Tribunal registering Wai 499 claim, 19 April 1995
- 2.36 Direction from Tribunal registering Wai 507 claim, 16 May 1995
- 2.37 Notice of statement of claim for Wai 507, 17 May 1995
- 2.38 Direction from Tribunal registering addition to claim, 4 October 1995
- 2.39 Direction from Tribunal releasing document A2, 8 March 1996
- 2.40 Direction from Tribunal releasing document A3, 27 March 1997
- 2.41 Direction from Tribunal registering Wai 684 claim, 24 September 1997
- 2.42 Notice of statement of claim for Wai 684, 25 September 1997
- 2.43 Direction from Tribunal registering Wai 766 claim, 8 January 1999
- 2.44 Notice of statement of claim for Wai 766, 13 January 1999
- 2.45 Direction from Tribunal releasing document A1, 27 August 1999

- 2.46 Direction from Tribunal registering Wai 828 claim, 17 April 2000

- 2.47 Notice of statement of claim for Wai 828, 2 May 2000

- 2.48 Letter from Wellington Regional Legal Aid Unit in response to Tribunal direction of 5 July 2000, 21 July 2000

- 2.49 Memorandum from Wai 129 claimant counsel concerning representation, 24 July 2000

- 2.50 Memorandum from counsel for Crown Forestry Rental Trust in response to Tribunal direction of 5 July 2000, 27 July 2000

- 2.51 Tribunal memorandum concerning Crown Forestry Rental Trust funding, 3 August 2000

- 2.52 Memorandum from counsel for Crown Forestry Rental Trust in response to paper 2.51, 10 August 2000

- 2.53 Joint memorandum from Wai 323 claimant counsel and counsel for Te Whanau-a-Kai in compliance with Tribunal direction of 5 July 2000, undated

- 2.54 Paper renumbered document A8

- 2.55 Memorandum from Wai 499 claimant counsel in response to Tribunal direction of 5 July 2000, 14 August 2000

- 2.56 Direction from Tribunal releasing document A6, 16 August 2000

- 2.57 Memorandum from deputy chairperson concerning responses to Tribunal direction of 5 July 2000, 24 August 2000.

- 2.58 Memorandum from Wai 507 claimant counsel concerning research and Crown Forestry Rental Trust funding, 1 September 2000

- 2.59 Memorandum from Wai 129 claimant counsel concerning report by Bryan Gilling, 15 September 2000

- 2.60 Direction from Tribunal convening judicial conference to consider casebook and claimant readiness to proceed to conferencing process, 29 September 2000

- 2.61** Memorandum from counsel for Te Whanau a Kai seeking extension for filing of claimant evidence, 15 September 2000
- 2.62** Memorandum from counsel for Ngai Tamanuhiri in response to papers 2.50, 2.51, and 2.52, 25 September 2000
- 2.63** Memorandum from counsel for Rongowhakaata in response to papers 2.50, 2.51, 2.52, and 2.62, 3 October 2000
- 2.64** Joint memorandum of Wai 499 and Wai 507 claimant counsel in response to papers 2.57 and 2.60, undated
- 2.65** Direction from Tribunal registering Wai 874 claim, 24 October 2000
- 2.66** Notice of statement of claim for Wai 874, 26 October 2000
- 2.67** Memorandum from Wai 507 claimant counsel concerning Gisborne casebook, 31 October 2000
- 2.68** Memorandum from Crown counsel concerning 31 October 2000 judicial conference, undated
- 2.69** Memorandum from Wai 874 claimant counsel, 28 November 2000
- 2.70** Direction from Tribunal registering Wai 878 claim, 24 November 2000
- 2.71** Notice of statement of claim for Wai 878, 5 December 2000
- 2.72** Record of conference and memorandum from deputy chairperson, 12 December 2000
- 2.73** Memorandum from Crown counsel in response to paper 2.72, 13 December 2000
- 2.74** Joint memorandum of counsel for Ngariki Kaiputahi claims concerning mandate, undated
- 2.75** Memorandum from counsel for Te Whanau a Kai seeking extension for filing of claimant evidence, 8 November 2000
- 2.76** Notice concerning Gisborne claims, 18 December 2000

- 2.77** Memorandum from counsel for Te Aitanga a Mahaki seeking leave for filing date, 18 December 2000
- 2.78** Memorandum from counsel for Te Whanau a Kai in response to paper 2.72, 18 December 2000
- 2.79** Memorandum from counsel for David Brown, 20 December 2000
- 2.80** Memorandum from counsel for Rongowhakaata in response to paper 2.72, 20 December 2000
- 2.81** Memorandum from counsel for Ngai Tamanuhiri concerning document A30, 20 December 2000
- 2.82** Memorandum from counsel for Ngai Tamanuhiri in response to paper 2.72, 21 December 2000
- 2.83** Memorandum from deputy chairperson concerning paper 2.73, 21 December 2000
- 2.84** Memorandum from deputy chairperson extending date for filing of document A30, 4 January 2001
- 2.85** Memorandum from Wai 499 and Wai 507 claimant counsel, 24 January 2001
- 2.86** Memorandum from deputy chairperson in response to paper 2.85, 24 January 2001
- 2.87** Memorandum from counsel for Ngai Tamanuhiri concerning filing date for document A35, 29 January 2001
- 2.88** Memorandum from deputy chairperson in response to paper 2.87, 31 January 2001
- 2.89** Memorandum from Wai 878 claimant counsel concerning research, 31 January 2001
- 2.90** Memorandum from Wai 856 claimant counsel concerning filing of casebook evidence, 15 February 2001
- 2.91** Memorandum from deputy chairperson concerning Wai 856, Wai 878, and casebook, 28 February 2001

- 2.92** Memorandum from counsel for Rongowhakaata seeking extension for filing of evidence, undated
- 2.93** Memorandum to Tribunal on behalf of Ngai Tamanuhiri concerning completion of document A35, 13 March 2001
- 2.94** Notice of 2 April 2001 judicial conference, 14 March 2001
- 2.95** Direction from deputy chairperson registering Wai 892 claim, 7 March 2001
- 2.96** Memorandum from deputy chairperson concerning extensions for documents A31 and A35 and serving of parties, 15 March 2001
- 2.97** Notice of statement of claim for Wai 892, 16 March 2001
- 2.98** Memorandum from counsel for Te Whanau a Kai seeking extension of for filing of amended statement of claim, 19 March 2001
- 2.99** Memorandum from Wai 390 claimant counsel advising Tribunal of authority to act and seeking leave to appear at Wai 814 hearings by way of watching brief, 15 March 2001
- 2.100** Memorandum from Paul Harman seeking leave to withdraw as counsel, 15 March 2001
- 2.101** Memorandum from deputy chairperson, 20 March 2001
- 2.102** Memorandum from counsel for David Brown, 29 March 2001
- 2.103** Direction of deputy chairperson registering Wai 895 claim, 28 March 2001
- 2.104** Notice of statement of claim for Wai 895, 29 March 2001
- 2.105** Direction of deputy chairperson registering Wai 896 claim, 28 March 2001
- 2.106** Notice of statement of claim for Wai 896, 29 March 2001
- 2.107** Memorandum from Wai 129 claimant counsel, 29 March 2001
- 2.108** Memorandum from Wai 896 claimant counsel, 29 March 2001

2.109 Memorandum from Crown counsel concerning Tribunal's approach to hearing of Gisborne claims, 30 March 2001

2.110 Memorandum from Wai 301 claimant counsel concerning 2 April 2001 judicial conference, 2 April 2001

(a) Letter to Tiopira Te Rauna Hape from Te Iwi o Rakaipaaka Incorporated, 31 March 2001

2.111 Memorandum from counsel for Ngai Tamanuhiri concerning common and conflicting issues between claimants, 2 April 2001

2.112 Memorandum on behalf of Ngai Tamanuhiri concerning filing of amended statement of claim, 6 April 2001

2.113 Memorandum to the Tribunal on behalf of Ngai Tamanuhiri concerning Crown policy, 6 April 2001

2.114 Memorandum from deputy chairperson concerning extension of filing date for counsel for Te Aitanga a Mahaki and Ngai Tamanuhiri, 12 April 2001

2.115 Memorandum from deputy chairperson following 2 April 2001 judicial conference, 12 April 2001

2.116 Memorandum from Wai 878 claimant counsel seeking extension for filing, 18 April 2001

2.117 Memorandum from Wai 301 claimant counsel, 10 April 2001

2.118 Memorandum from deputy chairperson concerning extension of filing date for counsel for Te Runanga o Turanganui a Kiwa, 20 April 2001

2.119 Direction from Tribunal registering Wai 129 claim, 31 May 1990

2.120 Notice of statement of claim for Wai 129, 18 June 1990

2.121 Letter to registrar from Wai 129 claimant counsel concerning prejudicial effects and relief sought, undated

2.122 Memorandum from Wai 878 claimant counsel concerning extension of filing date for amended statement of claim, 23 April 2001

- 2.123** Direction from Tribunal registering Wai 163 claim, 28 September 1990
- 2.124** Notice of claim for Wai 163, 4 October 1990
- 2.125** Memorandum from Tribunal appointing Wilson and Te Heuheu, 31 May 1991
- 2.126** Direction from Tribunal concerning combined inquiry, 21 June 1991
- 2.127** Memorandum from Wai 323 claimant counsel concerning proposed conference between Te Aitanga a Mahaki, Te Whanau-a-Kai, Ngariki Kaiputahi, and Te Whanau a Wi Pere, 30 April 2001 (Wai 323, 2.9)
- 2.128** Memorandum from Wai 499 and Wai 507 claimant counsel concerning mandate issues between Ngariki Kaiputahi and Te Aitanga a Mahaki, 30 April 2001
- 2.129** Memorandum from Wai 892 claimant counsel concerning progress of negotiations between parties, 30 April 2001
- 2.130** Memorandum from Wai 274 claimant counsel to Tribunal concerning issues of representation, 1 May 2001
- 2.131** Notice to answer interrogatories for the Crown from Wai 878 claimant counsel, 21 May 2001
- 2.132** Memorandum from Wai 856 claimant counsel concerning filing of evidence, 1 June 2001
- 2.133** Memorandum from Wai 507 and Wai 499 claimant counsel concerning representation and mandate issues between Ngariki Kaiputahi and Te Aitanga a Mahaki, 5 June 2001
- 2.134** Joint memorandum of Wai 507, Wai 499, and Wai 874 claimant counsel concerning representation and mandate issues between Wai 507 and Wai 874 claims, 5 June 2001
- 2.135** Memorandum from Wai 892 claimant counsel concerning negotiations between Te Whanau a Kai, Te Aitanga a Mahaki, Te Whanau a Wi Pere, and Ngariki Kaiputahi, 7 June 2001
- 2.136** Memorandum from Wai 323 claimant counsel concerning proposed conference between Te Aitanga a Mahaki, Te Whanau a Kai, Ngariki Kaiputahi, and Te Whanau a Wi Pere, 8 June 2001

- 2.137 Memorandum from Wai 274 and Wai 283 claimant counsel concerning progress on discussions between parties, 11 June 2001

- 2.138 Memorandum from Wai 274 and Wai 283 claimant counsel concerning Wai 274 and Wai 283 second amended statement of claim, 12 June 2001

- 2.139 Direction from Tribunal registering Wai 917 claim, 12 June 2001

- 2.140 Notice of statement of claim for Wai 917, 15 June 2001

- 2.141 Memorandum from deputy chairperson concerning progress of negotiations between Te Aitanga a Mahaki, Ngariki Kaiputahi, Te Whanau a Kai, and Te Whanau a Wi Pere, 15 June 2001

- 2.142 Memorandum from Wai 274 and Wai 283 claimant counsel in response to paper 2.141, 18 June 2001

- 2.143 Memorandum from Wai 892 claimant counsel in response to paper 2.141, 19 June 2001

- 2.144 Memorandum from Wai 499 and Wai 507 claimant counsel in response to paper 2.141, 19 June 2001

- 2.145 Direction of Tribunal registering Wai 129 first amended statement of claim, 15 June 2001

- 2.146 Notice of amendment of Wai 129 claim, 26 June 2001

- 2.147 Memorandum from Crown counsel concerning Crown's first statement of response, 27 June 2001

- 2.148 Memorandum from Crown counsel in response to paper 2.141, 27 June 2001

- 2.149 Notice of 5, 6 July 2001 judicial conference, 25 June 2001

- 2.150 Memorandum from Wai 895 claimant counsel concerning special judicial conference, undated

- 2.151 Joint memorandum of Wai 507, Wai 499, and Wai 874 claimant counsel in response to paper 2.148, 29 June 2001

- 2.152** Memorandum from Wai 274 and Wai 283 claimant counsel in response to paper 2.148, 2 July 2001
- 2.153** Memorandum from Wai 323 and Wai 895 claimant counsel concerning Crown presence at special judicial conference, 2 July 2001
- 2.154** Memorandum from deputy chairperson concerning progress of negotiations between parties, 4 July 2001
- 2.155** Memorandum from Wai 323 and Wai 895 claimant counsel concerning Crown statement of response, 3 July 2001
- 2.156** Joint memorandum of counsel concerning general issues arising from Crown statement of response, 4 July 2001
- 2.157** Memorandum from counsel for Wai 917 concerning Crown statement of response, 4 July 2001
- 2.158** Memorandum from Wai 274 and Wai 283 claimant counsel concerning Crown statement of response, 5 July 2001
- 2.159** Memorandum from Wai 301 claimant counsel concerning Crown statement of response, 4 July 2001
- 2.160** Memorandum from Wai 896 claimant counsel concerning Crown statement of response, 4 July 2001
- 2.161** Memorandum from Wai 129 claimant counsel concerning Crown statement of response, 4 July 2001
- 2.162** Memorandum from Wai 684 claimant counsel concerning Crown statement of response, undated
- 2.163** Memorandum from Wai 507 and Wai 499 claimant counsel concerning Crown pleadings, undated
- 2.164** Memorandum for Wai 892 claimant counsel concerning Crown statement of response, 2 July 2001

2.165 Memorandum from deputy chairperson following 5 July 2001 judicial conference, 10 July 2001

(a) Crown Forestry Rental Trust, 'Turanganui a Kiwa Contemporary Socio-Economic Profile, 1981–2000', project brief, undated

2.166 Memorandum from Wai 892 claimant counsel in response to paper 2.148, 2 July 2001

2.167 Joint memorandum of counsel concerning deferral of socio-economic cause and effect issue, 12 July 2001

2.168 Memorandum from Wai 274 and Wai 283 claimant counsel in response to issues arising out of 5 July 2001 judicial conference, 12 July 2001

2.169 Memorandum from Wai 323 and Wai 895 claimant counsel concerning boundaries and cause and effect, 11 July 2001

2.170 Memorandum from Wai 129 claimant counsel in response to paper 2.165, 12 July 2001

2.171 Memorandum from Wai 896 claimant counsel in response to paper 2.165, 12 July 2001

2.172 Memorandum from Wai 301 claimant counsel in response to paper 2.165, 12 July 2001

2.173 Memorandum from Wai 684 claimant counsel seeking extension to hearing district boundary, 12 July 2001

2.174 Memorandum from Wai 917 claimant counsel in response to paper 2.165, 12 July 2001

2.175 Memorandum from Wai 892 claimant counsel concerning extension of boundaries of Gisborne inquiry district, 12 July 2001

2.176 Memorandum from Wai 892 claimant counsel on cause and effect issue, 12 July 2001

2.177 Memorandum from Wai 892 claimant counsel concerning extension of boundaries of Gisborne inquiry district, 19 July 2001

2.178 Memorandum from Wai 507 and Wai 499 claimant counsel concerning matters arising out of 5 July 2001 judicial conference, undated

- 2.179** Memorandum from Wai 684 claimant counsel on boundary issues raised by other claimants, 19 July 2001
- 2.180** Memorandum from Wai 917 claimant counsel in response to memoranda filed by counsel on boundary, 19 July 2001
- 2.181** Memorandum from Wai 301 claimant counsel concerning boundaries, 20 July 2001
- 2.182** Second statement of response by Crown to claims in Gisborne regional inquiry, 24 July 2001
- 2.183** Memorandum from Crown concerning proposed extension of Gisborne inquiry district, 26 July 2001
- 2.184** Notice of judicial conference to be held 20 August 2001, 30 July 2001
- 2.185** Memorandum from Wai 323 claimant counsel and Wai 895 claimant counsel concerning draft statement of issues, 20 August 2001
- 2.186** Memorandum from counsel for Te Runanga o Turanganui a Kiwa concerning 20 August 2001 judicial conference, undated
- 2.187** Memorandum from Wai 684 and Wai 856 claimant counsel, undated
- 2.188** Memorandum from Wai 274 and Wai 283 claimant counsel concerning 20 August 2001 judicial conference, 20 August 2001
- 2.189** Memorandum from counsel for Tuhoe concerning application to extend boundaries of Gisborne inquiry district, 17 August 2001
- 2.190** Memorandum from Wai 684 and Wai 856 claimant counsel concerning various interlocutory matters, 22 August 2001
- 2.191** Memorandum from Wai 892 claimant counsel concerning supplementary research, 22 August 2001
- 2.192** Memorandum from Wai 878 claimant counsel concerning jurisdiction of Tribunal and other issues, 22 August 2001

- 2.193** Memorandum from counsel for Ngai Tamanuhiri concerning issues raised at 20 August 2001 judicial conference, 22 August 2001

- 2.194** Memorandum from Crown counsel concerning issues raised at 20 August 2001 judicial conference, 24 August 2001

- 2.195** Memorandum from Wai 129 claimant counsel, 22 August 2001

- 2.196** Memorandum from Wai 301 claimant counsel, 22 August 2001

- 2.197** Memorandum from Wai 896 claimant counsel, 22 August 2001

- 2.198** Memorandum from Wai 507, Wai 499, and Wai 874 claimant counsel in response to issues raised at 20 August 2001 judicial conference, 27 August 2001

- 2.199** Memorandum from counsel for Ngai Tamanuhiri concerning issues raised at 20 August 2001 judicial conference, 22 August 2001

- 2.200** Memorandum from Crown counsel concerning issues raised at 20 August 2001 judicial conference, 28 August 2001

- 2.201** Memorandum from counsel for Ngai Tamanuhiri concerning issues raised at 20 August 2001 judicial conference, 4 September 2001

- 2.202** Statement of issues for claims in Gisborne inquiry district, 12 September 2001 (2 vols)

- 2.203** Notice of 24 September 2001 judicial conference, 14 September 2001

- 2.204** Joint memorandum of counsel concerning hearing timetable, 13 September 2001

- 2.205** Memorandum from counsel for Museum of New Zealand Te Papa Tongarewa seeking leave to appear as interested party, 18 September 2001

- 2.206** Memorandum from deputy chairperson concerning registration of statements of claim, 19 September 2001

- 2.207** Memorandum from Wai 878 claimant counsel concerning matters arising from paper 2.202, 20 September 2001

- 2.208** Memorandum from Crown counsel concerning Te Hau ki Turanga, 21 September 2001
- 2.209** Memorandum from Wai 323 claimant counsel concerning evidence called, 24 September 2001
- 2.210** Memorandum from counsel for Te Aitanga a Mahaki in response to issues arising out of judicial conference and paper 2.202, 24 September 2001
- 2.211** Memorandum from counsel for Rongowhakaata concerning 24 September 2001 judicial conference, 24 September 2001
- 2.212** Memorandum from Wai 856 claimant counsel concerning 24 September 2001 judicial conference, 24 September 2001
- 2.213** Memorandum from counsel for Ngai Tamanuhiri concerning 24 September 2001 judicial conference, 24 September 2001
- 2.214** Memorandum from Wai 878 claimant counsel concerning 24 September 2001 judicial conference, 24 September 2001
- 2.215** Memorandum from counsel for Te Whanau a Kai concerning hearing timetable and evidential matters to be addressed at 24 September 2001 judicial conference, 24 September 2001
- 2.216** Memorandum from Wai 129 claimant counsel estimating time of hearing and listing witnesses, 21 September 2001
- 2.217** Memorandum from Wai 896 claimant counsel estimating time of hearing and listing witnesses, 21 September 2001
- 2.218** Direction from Tribunal following 24 September 2001 judicial conference, 25 September 2001
- 2.219** Memorandum from Wai 129 claimant counsel advising of witnesses required for cross-examination, 25 September 2001
- 2.220** Memorandum from Wai 917 claimant counsel concerning cross-examination of witnesses, 25 September 2001

2.221 Memorandum from Wai 274 and Wai 283 claimant counsel in response to paper 2.218, 1 October 2001

2.222 Memorandum from Wai 684 claimant counsel, 2 October 2001

2.223 Memorandum from deputy chairperson in response to paper 2.219, 4 October 2001

2.224 Memorandum from deputy chairperson in response to application from Wai 300 and Wai 301 claimant counsel concerning representation, 4 October 2001

2.225 Memorandum from deputy chairperson constituting Tribunal for Gisborne inquiry, 19 October 2001

2.226 Memorandum from Wai 684 claimant counsel in response to paper 2.218, 2 October 2001

2.227 Memorandum from Crown counsel concerning cross-examination of technical witnesses, 8 October 2001

2.228 Memorandum from counsel for Museum of New Zealand Te Papa Tongarewa, 8 October 2001

2.229 Joint memorandum from counsel concerning environmental overview day, 9 October 2001

2.230 Memorandum from Wai 129 claimant counsel advising that cross-examination of Small, Cleaver, Orr-Nimmo, and Walzl will not be required, 9 October 2001

2.231 Statement of response by Museum of New Zealand Te Papa Tongarewa to matters concerning Te Hau ki Turanga in first amended statement of claim for Rongowhakaata (soc4), 19 October 2001

2.232 Memorandum from counsel for Te Aitanga a Mahaki concerning environmental issues day, 23 October 2001

2.233 Memorandum from Ngati Porou claims committee, 23 October 2001

2.234 Joint memorandum from counsel concerning environment overview day, 29 October 2001

- 2.235** Notice of first hearing, 30 October 2001
- 2.236** Memorandum from counsel for Ngai Tamanuhiri concerning questions for clarification, 5 November 2001
- 2.237** Memorandum from counsel for Te Whanau a Kai concerning questions for clarification by expert witnesses, 5 November 2001
- 2.238** Written questions from Crown counsel for witnesses to be heard in overview hearing week, 6 November 2001
- 2.239** Memorandum from counsel for Ngai Tamanuhiri concerning questions of clarification, 7 November 2001
- 2.240** Memorandum from Wai 506 claimant counsel concerning Tahora 2C2 and Tahora 2C3 blocks, 29 October 2001
- 2.241** Memorandum from counsel for Ngariki Kaiputahi concerning questions of clarification for witnesses, undated
- 2.242** Application by Crown seeking directions for access to archives of Bank of New Zealand, 9 November 2001
- 2.243** Affidavit of Michael Macky supporting Crown application for access to archives of Bank of New Zealand, November 2001
- 2.244** Memorandum from Wai 507 and Wai 499 claimant counsel concerning general evidence relating to Native Land Court, 13 November 2001
- 2.245** Memorandum from presiding officer concerning hearing timetable, human rights, and Native Land Court, 16 November 2001
- 2.246** Memorandum from Wai 36 claimant counsel concerning Urewera and Gisborne districts, 30 October 2001
- 2.247** Memorandum from Wai 917 claimant counsel concerning evidence for environmental hearing day, 16 November 2001

- 2.248** Application by Te Whanau a Kai seeking directions for access to archives of Bank of New Zealand (filed with consent of Te Aitanga-a-Mahaki, Ngai Tamanuhiri, Rongowhakaata, and Ngariki Kaiputahi), 16 November 2001
- 2.249** Notice of second hearing, 26 November 2001
- 2.250** Memorandum from Tribunal concerning questioning of witnesses, 27 November 2001
- 2.251** Memorandum by Bank of New Zealand in response to application by Crown seeking access to bank archives, 20 November 2001
- 2.252** Memorandum by Bank of New Zealand in response to application by Te Whanau a Kai seeking access to bank archives, 20 November 2001
- 2.253** Memorandum from counsel for Te Whanau a Kai seeking extension for filing of document A32, 27 November 2001
- 2.254** Memorandum from Crown counsel concerning directions sought for access to archives of Bank of New Zealand, 28 November, 2001
- 2.255** Memorandum from Crown counsel in response to paper 2.253, 28 November 2001
- 2.256** Paper renumbered document B17
- 2.257** Memorandum from counsel for Te Whanau a Kai concerning questions of clarification for Te Aitanga a Mahaki expert witness, 29 November 2001
- 2.258** Memorandum from counsel for Apirana Tuahae Mahuika seeking leave to undertake watching brief, 5 December 2001
- 2.259** Direction concerning central North Island claims and Urewera district boundaries, 14 December 2001
- 2.260** Memorandum from deputy chairperson granting leave for Wai 272 claimant counsel to appear by way of watching brief, 7 December 2001
- 2.261** Memorandum from deputy chairperson granting extension for filing of document A32, 7 December 2001

- 2.262** Memorandum of deputy chairperson concerning access to archives of Bank of New Zealand, 13 December 2001
- 2.263** Notice of third hearing, 23 January 2002
- 2.264** Memorandum from Wai 896 claimant counsel seeking extension for filing of evidence, 11 February 2002
- 2.265** Notice of fourth hearing, 12 February 2002
- 2.266** Memorandum from Wai 129 claimant counsel seeking extension for filing of evidence, 11 February 2002
- 2.267** Memorandum from Crown counsel seeking extension for filing of evidence, 19 February 2002
- 2.268** Memorandum from counsel for Ngai Tamanuhiri concerning extension for filing of evidence, 20 February 2002
- 2.269** Memorandum from counsel for Rongowhakaata requesting that report by Kieran Barry be included on Wai 814 record of inquiry, 21 February 2002
- 2.270** Memorandum from counsel for Apirana Tuahae Mahuika concerning evidence of Judith Binney, 25 February 2002
- 2.271** Memorandum from deputy chairperson establishing further week of hearing, 8 March 2002
- 2.272** Memorandum of deputy chairperson setting timeframe for response of claimant counsel, 12 March 2002
- 2.273** Notice of fifth hearing, 22 March 2002
- 2.274** Joint memorandum from counsel concerning presentation and cross-examination of Crown evidence, 20 March 2002
- 2.275** Memorandum from Crown counsel in response to paper 2.274, 21 March 2002
- 2.276** Memorandum from Crown counsel in response to paper 2.271, 12 March 2002

2.277 Memorandum from counsel for Te Iwi o Rakaipaaka concerning Gisborne inquiry boundary, 18 March 2002

2.278 Memorandum from counsel for Museum of New Zealand Te Papa Tongarewa concerning Te Hau ki Turanga, 28 March 2002

2.279 Notice of sixth hearing, 8 April 2002

2.280 Memorandum from counsel for Te Aitanga a Mahaki concerning outstanding matters, 26 March 2002

2.281 Memorandum from Crown counsel concerning evidence on Validation Court, 9 May 2002

2.282 Notice of seventh hearing, 13 May 2002

2.283 Notice of eighth hearing, 13 May 2002

2.284 Memorandum from Crown counsel concerning evidence of Dr Brad Coombes (Wai 814 ROI, doc A20) and letter from Gisborne District Council, 20 May 2002

2.285 Notice of ninth hearing, 17 June 2002

2.286 Nga tapaetanga hei tono whakaaetanga mo te tuku i etahi atu korero taunakitanga, 13 June 2002

2.287 Memorandum from counsel for Te Whanau a Kai concerning introduction of new evidence by Crown counsel, 21 June 2002

2.288 Memorandum from deputy chairperson in response to paper 2.284, 14 June 2002

2.289 Memorandum from counsel for Te Aitanga a Mahaki concerning schedule of transcripts, 27 June 2002

3. RESEARCH COMMISSIONS

3.1 Direction from Tribunal commissioning Carol Morgan to prepare a report for Wai 337, 28 June 1995

- 3.2** Direction from Tribunal commissioning William Te Aho to prepare a report for Wai 351, 29 June 1995
- 3.3** Direction from Tribunal extending research commission of William Te Aho, 9 November 1995
- 3.4** Direction from Tribunal commissioning Michael Nepia to prepare a report on the East Coast, 7 May 1996
- 3.5** Direction from Tribunal commissioning Dion Tuuta to prepare a report for Wai 337, 29 June 1999
- 3.6** Direction from Tribunal commissioning Dr Keith Pickens to prepare a report concerning Ngai Tamanuhiri lands, 15 November 1999
- 3.7** Direction from Tribunal cancelling research commission of Siân Daly, 12 April 2000
- 3.8** Direction from Tribunal extending term of commission 3.6, 7 July 2000
- 3.9** Direction from Tribunal commissioning Bernadette Arapere to prepare a report concerning Ngariki Kaiputahi issues from 1840 to the twentieth century, 5 July 2000
- 3.10** Direction from Tribunal commissioning Dr Keith Pickens to prepare a report concerning the Ngai Tamanuhiri alienation claim, 9 November 2000
- 3.11** Direction from Tribunal commissioning Dr Suzanne Doig to prepare a report, 22 September 1997
- 3.12** Direction from Tribunal extending term of commission 3.11, 25 August 1998

4. HEARING TRANSCRIPTS

- 4.1** Transcript of part of first hearing (cross-examination of Vincent O'Malley, Bruce Stirling, Judith Binney, and Brad Coombes), undated
- (a)** Written amendments to cross-examination of Judith Binney
- 4.2** Transcript of part of second hearing (cross-examination of Vincent O'Malley, Maata Keiha, Jacqueline Haapu, Brian Murton, and John Ruru), undated

- 4.3 Transcript of part of second hearing (cross-examination of Kathryn Rose), undated
- 4.4 Transcript of part of third hearing, undated
- 4.5 Transcript of part of third hearing (cross-examination of Owen Lloyd, John Robson, Bryan Gilling, and Bernadette Arapere), undated
- 4.6 Transcript of part of fourth hearing (cross-examination of Lewis Moeau), undated
- 4.7 Transcript of part of fifth hearing (cross-examination of Dr Brad Coombes), undated
- 4.8 Transcript of part of sixth hearing (cross-examination of Cecilia Edwards, issues 2 and 4), undated
- 4.9 Transcript of part of sixth hearing (cross-examination of Cecilia Edwards, issue 4), undated
- 4.10 Transcript of part of sixth hearing (cross-examination of Cecilia Edwards, issue 27), undated
- 4.11 Transcript of part of sixth hearing (cross-examination of John Battersby, issue 3), undated
- 4.12 Transcript of part of sixth hearing (cross-examination of Paul Goldstone, issues 12 and 13), undated
- 4.13 Transcript of part of sixth hearing (cross-examination of Paul Goldstone, issue 6), undated
- 4.14 Transcript of part of sixth hearing (cross-examination of Kerryn Pollock, issue 10), undated
- 4.15 Transcript of part of sixth hearing (cross-examination of Bob Hayes, issue 11), undated
- 4.16 Transcript of part of seventh hearing (cross-examination of Paul Goldstone, issue 6; Bob Hayes, issue 14; and Kerryn Pollock, issue 23), undated
- 4.17 Transcript of part of seventh hearing (cross-examination of Paul Goldstone, issues 12 and 13; Brent Parker, session retention maps; Cecilia Edwards, issues 5, 7, 8, 9; and Bob Hayes, issue 16), undated

- 4.18** Transcript of part of eighth hearing (cross-examination of Bob Hayes, issue 17; Ashley Gould, issue 26; John Waugh, issues 26, 30; and Gary Hawke, capital and finance), undated
- 4.19** Transcript of part of eighth hearing (cross-examination of Bob Hayes and Michael Macky, issue 18), undated
- 4.20** Transcript of part of eighth hearing (cross-examination of Michael Macky, issues 20 and 21), undated
- 4.21** Transcript of part of eighth hearing (cross-examination of Brent Parker, issue 24), undated
- 4.22** Transcript of part of fourth hearing (cross-examination of Rapiata Darcy Ria, Bruce Stirling, Fiona Small, David Alexander, Tony Walzl, and Judith Binney), undated
- (a) Written amendments to cross-examination of Judith Binney from fourth hearing, undated
- (b) Amended transcript of cross-examination of Judith Binney from fourth hearing, undated
- 4.23** Transcript of part of fifth hearing (cross-examination of Warren Pohatu, Peter McBurney, Keith Pickens, Dr Katherine Orr-Nimmo, Jody Wyllie, Brian Murton, Robert Cookson, and Bryan Gilling), undated
- 4.24** Transcript of part of third hearing (cross-examination of Garry Clapperton), undated
- 4.25** Transcript of ninth hearing (tapes 15–28), undated
- 4.26** Transcript of ninth hearing (tapes 1–7), undated
- 4.27** Transcript of ninth hearing (tapes 8–14), undated

RECORD OF DOCUMENTS

* Document confidential

† Document held in Waitangi Tribunal library, level 2,
Caltex Tower, 141 The Terrace, Wellington

A DOCUMENTS RECEIVED PRIOR TO FIRST HEARING

- A1** Vincent O'Malley, 'East Coast Confiscation Legislation and its Implementation', report commissioned for Wai 144 claim, February 1994

- A2** William Te Aho, 'Te Puni Kokiri Mortgage Portfolio claim', report commissioned by Waitangi Tribunal for Wai 351 claim, December 1995
- A3** Siân Daly, *Poverty Bay*, Waitangi Tribunal Rangahaua Whanui Series, 1997
- A4** Kathy Orr-Nimmo, 'East Coast Maori Trust', report commissioned by Crown Forestry Rental Trust for Wai 283 claim, February 1997
- (a) Supporting documents to document A4, secs A–H, I (pts I–II), J–B, various dates
- A5** Dion Tuuta, 'Wai 337 Awapuni Blocks (Watson Park)', report commissioned for Wai 337 claim, May 1999
- A6** Bernadette Arapere, 'Ngariki Kaiputahi Scoping Report', report commissioned by Waitangi Tribunal, 11 August 2000
- A7** Bryan Gilling, 'The Validation Court: Crown, Judiciary and Maori Land 1888–1909', report commissioned by Waitangi Tribunal, September 1999
- (a) Supporting documents to document A7, various dates
- A8** Bryan Gilling, 'The Validation Court, 1892–1909: An Overview and Summary as to the Issues', report commissioned by Waitangi Tribunal, August 2000
- (a) Supporting documents to document A8, various dates
- A9** Steven Oliver, 'Gisborne Harbour Board and the Development of Port Gisborne', research report, September 2000
- (a) Supporting documents to document A9, various dates
- (b) Steven Oliver, supplement to document A9, undated
- A10** Vincent O'Malley, 'An Entangled Web: Te Aitanga-a-Mahaki Land and Politics, 1840–1873, and their Aftermath', research report, September 2000
- (a) Supporting documents to document A10, 4 vols, various dates
- A11** David Alexander, 'Rongowhakaata Lands during the Twentieth Century', research report, October 2000
- (a) Supporting documents to document A11, various dates
- A12** David Alexander, 'Rongowhakaata Lands – Arai Matawai: A Block History from 1911 Onwards', research report, October 2000
- (a) Map of Arai Matawai, undated

A13 David Alexander, 'Rongowhakaata Lands – Public Works Act Takings of Rongowhakaata Land During the Twentieth Century', research report, October 2000

(a) Maps of lands taken for public works, undated

A14 David Alexander, 'Rongowhakaata Lands – Paokahu Block: A Twentieth Century Block History', research report, October 2000

A15 David Alexander, 'Rongowhakaata Lands – Awapuni Moana: The Loss, The Struggle and The Return', research report, October 2000

(a) Supporting documents to document A15, various dates

A16 Document renumbered document A25

A17 Kathryn Rose, 'The Aitanga-a-Mahaki Land and Autonomy, 1873–1890', research report, 1999

A18 Kathryn Rose, 'The Aitanga-a-Mahaki Land 1890–1970: Alienation and Efforts at Development', research report, 2000

(a) Supporting documents to document A18, 8 vols, various dates

A19 Dr Keith Pickens, 'Ngai Tamanuhiri Land Alienation Report', report commissioned by Waitangi Tribunal, September 2000

A20 Dr Brad Coombes, 'Ecological Impacts and Planning History', research report, November 2000

A21 Bernadette Arapere, 'Ngariki Kaiputahi Research Report', report commissioned by Waitangi Tribunal, undated

(a) 'Chronology of Important Petitions and Events Affecting Ngariki Kaiputahi Interests in the Mangatu Block, 1881–1975', table, undated

(b) Supporting documents to documents A21 and A22, 3 vols, various dates, vol1

(c) Supporting documents to documents A21 and A22, 3 vols, various dates, vol2

(d) Supporting documents to documents A21 and A22, 3 vols, various dates, vol3

A22 John Robson, 'Ngariki Kaiputahi Mana Whenua Report', research report, November 2000

A23 Bruce Stirling, 'Rongowhakaata and the Crown, 1840–1873' research report, January 2001

A24 Fiona Small and Philip Cleaver, 'Rongowhakaata and the Native Land Court 1873–1900', research report, October 2000

(a) Supporting documents to document A24, 6 vols, various dates

A25 Merata Kawharu, 'Te Mana Whenua o Te Aitanga a Mahaki', research report, 2000

(a) Amendment to document A25, undated

A26 Brian Murton, 'Te Aitanga a Mahaki, 1860–1960: The Economic and Social Experience of a People', research report, 2001

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A27 Jacqueline Haapu, 'Te Ripōata O Mangatu, The Mangatu Report', research report, September 2000

A28 Rongowhakaata Trust, 'Rongowhakaata: Te Tipuna, Te Whenua Me Te Iwi – A History of a People', research report, January 2001

A29 Peter Boston, 'Tahora Block Scoping Report', research report, January 2000

A30 Peter McBurney, 'Ngai Tamanuhiri: Mana Whenua Report', research report, January 2001

A31 Tony Walzl, 'Rongowhakaata: Socio-Economic Overview', research report, March 2001

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A32 Bryan Gilling, 'The People, the Courts and the Lands', report commissioned by Ngariki Kaiputahi, March 2001

A33 Moka Apiti, 'Turanganui a Kiwa: Historical Overview Maps', map booklet for Crown Forestry Rental Trust, 4 pts, March 2001, pt1

A34 Entry vacated

A35 Brian Murton, 'The Economic and Social Consequences of Land Loss for Nga Tamanuhiri 1860–1980', research report, 2001

(a) Supporting documents to document A35, 9 vols, various dates

A36 Tui Gilling, 'Te Whanau a Kai: The Manawhenua and Alienation of Te Whanau a Kai Lands, 1869–1910', research report, April 2001

- A37** Judith Binney, 'Te Kooti Arikirangi Te Turuki', statement, May 2001
- A38** Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press, 1995), excerpts
- A39†** Judith Binney, *Redemption Songs*, excerpts
- A40** Entry vacated
- A41** Moka Apiti, 'Turanganui a Kiwa: Historical Overview Maps', map booklet for Crown Forestry Rental Trust, 4 pts, March 2001, pt2
- A42** Moka Apiti, 'Turanganui a Kiwa: Historical Overview Maps', map booklet for Crown Forestry Rental Trust, 4 pts, March 2001, pt3
- A43** Vincent O'Malley, 'Questions Arising from the Waitangi Tribunal Statement of Issues (Sections 2–5)', October 2001
- A44** Brief of evidence of Bruce Stirling and response to questions in Waitangi Tribunal statement of issues (secs 7–10), undated
- A45** Brief of evidence of Judith Binney for Te Whanau a Te Kooti Rikirangi and Rongowhakaata, undated
- A46** Brief of evidence of Lewis Moeau for Rongowhakaata, undated
- A47** Dr Brad Coombes, 'Overview of Environmental Impacts in the Gisborne Inquiry District', summary of evidence, 5 November 2001
- A48** Vincent O'Malley, 'Questions Arising from the Waitangi Tribunal Statement of Issues (Section 8)', November 2001
- A49** Steven Oliver, 'The Gisborne Harbour Board and its Public Works and Land Takings', summary of evidence, undated
- A50** Brief of evidence of Owen Lloyd for Ngariki Kaiputahi, undated
- A51** Moka Apiti and Moira Jackson, 'Turanganui a Kiwa: Historical Overview Maps', map booklet for Crown Forestry Rental Trust, 4 pts, November 2001. pt4

A52 Written questions for witnesses addressing environmental matters in advance of first hearing, 16 November 2001

A53 Brief of evidence of Tutekawa Wyllie, 14 November 2001

A54 Merata Kawharu, 'Te Aitanga a Mahaki Te Mana Whenua o te Aitanga a Mahaki', summary, 2000

A55 Brief of evidence of John Ruru, undated

A56 Brief of evidence of David Hawea, undated

A57 Statement of evidence of Puka Moeau, undated

A58 Opening submissions of counsel for Ngai Tamanuhiri, undated

(a) Timeline of events, undated

A59 Opening submissions of counsel for Ngariki Kaiputahi, undated

A60 Opening submissions of counsel for Te Whanau a Kai, undated

A61 Opening submissions dealing with sections 2–5 of the statement of issues, undated

A62 Response to questions of clarification for Vincent O'Malley (questions from counsel for Ngai Tamanuhiri), undated

A63 Response to questions of clarification for Vincent O'Malley (questions from counsel for Ngariki Kaiputahi), undated

A64 Response to questions of clarification for Vincent O'Malley (questions from counsel for Te Whanau a Kai), undated

A65 Response to questions of clarification for Vincent O'Malley (questions from Crown counsel), undated

A66 Summary of joint submissions of counsel for environmental issues, undated

A67 Outline of opening submissions for claimants concerning sections 6–10 of the statement of issues, undated

- A68** Response of Bruce Stirling to questions of clarification for first hearing, undated
- A69** Response of Judith Binney to questions of clarification for first hearing, undated
- A70** ‘Written Questions of Crown Counsel for Witnesses Addressing Environmental Matters in Advance of Hearing One – Responses to Questions Addressed to Brad Coombes’, undated
- A71** Response of Steven Oliver to questions of clarification for first hearing, undated
- A72** *Overview Hearing Site Visit*, Te Whakarau vhs videotape
- A73** Brad Coombes, PowerPoint presentation, undated
- A74** Donald Loveridge, ‘The Origins of the Native Lands Acts and Native Land Court in New Zealand’, research report, October 2000
- A75** ‘Evidence of Robert Hayes on the Native Land Court Legislation Post 1865 and the Operation of the Native Land Court in Hauraki’, 17 January 2001
- (a) Amendments to document A75, undated
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- A76†** Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998)
- A77†** Richard Boast, *Maori Land Law* (Wellington: Butterworths, 1999)
- A78†** Bryan Gilling, ‘The Nineteenth-Century Native Land Court Judges: An Introductory Report’, research report, undated
- A79** Bryan Gilling, ‘“The Queen’s Sovereignty Must be Vindicated”: The Development and Use of the 1840 rule in the Native Land Court’, *New Zealand Universities Law Review*, vol16, no2 (December 1994)
- A80** Bryan Gilling, ‘“The Queen’s Sovereignty Must be Vindicated”: The Development and Use of the 1840 rule in the Native Land Court’, *New Zealand Universities Law Review*, vol16, no2 (December 1994), pp136–174
- A81** Bryan Gilling, ‘Engine of Destruction? The Native Land Court in the Chatham Islands’, *Victoria University of Wellington Law Review*, vol24, no4 (July 1994), pp115–139

A82 Bryan Gilling, 'By Whose Custom? The Native Land Court in the Chatham Islands', *Victoria University of Wellington Law Review*, vol 23, no 3 (October 1993), pp 45–58

A83 Donald Loveridge, *Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952*, Waitangi Tribunal Rangahaua Whanui Series, 1997

A84 Hazel Riseborough and John Hutton, *The Crown's Engagement with Customary Tenure in the Nineteenth Century*, Waitangi Tribunal Rangahaua Whanui Series, 1997

A85† Allan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Auckland: Auckland University Press, 1974)

A86 Allan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2

A87 David Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909* (Wellington: Huia Publishers, 1999)

A88 Responses of Vincent O'Malley to directions of the Tribunal concerning further questions to witnesses of 27 November 2001, May 2002

A89 Responses of Bruce Stirling to the directions of the Tribunal concerning further questions to witnesses of 27 November 2001, undated

B DOCUMENTS RECEIVED TO END OF FIRST HEARING

B1 Brian Murton, 'Summary and Questions Arising from the Waitangi Tribunal Statement of Issues', November 2001

B2 Questions of clarification for Vincent O'Malley for second hearing, 23 November 2001

B3 Questions arising from the Waitangi Tribunal statement of issues concerning the evidence of Kathryn Rose, November 2001

B4 Kathryn Rose, 'The Aitanga-a-Mahaki Land and Autonomy, 1873–1890', summary report, undated

B5 Kathryn Rose, 'The Aitanga-a-Mahaki Land 1890–1970: Alienation and Efforts at Development', summary of report, undated

- B6** Questions of clarification on behalf of Ngai Tamanuhiri for Te Aitanga a Mahaki historical witnesses, 27 November 2001
- B7** Questions of clarification for witnesses for second hearing from counsel for Ngariki Kaiputahi, 27 November 2001
- B8** Summary of brief of evidence of Maata Keiha, undated
- B9** Summary of brief of evidence of Charlie Pera, undated
- B10** Summary of brief of evidence of Rutene Irwin, undated
- B11** Dr Brad Coombes, 'Catchment Degradation and Ssubsequent Control in the Headwaters of the Waipaoa', summary of brief of evidence, undated
- B12** Summary of Mangatu report and response to Tribunal questions arising from statement of issues, undated
- B13** Questions arising from statement of issues concerning evidence of Kathryn Rose, November 2001
- B14** Brief of evidence of John Ruru, undated
- B15** Opening submissions of counsel for Te Aitanga a Mahaki, undated
- B16** Responses of Dr Merata Kawharu to questions of clarification from counsel for Te Whanau a Kai, undated
- B17** Written questions from Crown counsel for witnesses in advance of second hearing, 29 November 2001
- B18** Further questions of clarification for Jacqueline Haapu from counsel for Ngariki Kaiputahi, 6 December 2001
- B19** Responses of Vincent O'Malley to questions of clarification from counsel for Te Whanau a Wi Pere, undated
- B20** Kathryn Rose, 'The Aitanga-a-Mahaki Land and Autonomy, 1873–1890', summary report, undated

APPI

B21 Kathryn Rose, 'The Aitanga-a-Mahaki Land 1890–1970: Alienation and Efforts at Development', summary report, undated

B22 Responses of Kathryn Rose to questions of clarification from counsel for Te Whanau a Kai, undated

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B24 Responses of Kathryn Rose to questions of clarification from counsel for Ngai Tamanuhiri, undated

B25 Responses of Kathryn Rose to questions of clarification from Crown counsel, undated

B26 Moka Apiti, 'Te Aitanga a Mahaki (Wai 271, 283, 814)', map booklet for Crown Forestry Rental Trust, December 2001

B27 Responses by Professor Brian Murton to questions of clarification from counsel for Te Whanau a Kai, undated

B28 Responses by Professor Brian Murton to questions of clarification from counsel for Ngariki Kaiputahi, undated

B29 Responses by Professor Brian Murton to questions of clarification from Crown counsel, undated

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c1 Bryan Gilling, 'Great Sufferers through the Cession: Te Whanau a Kai and the Loss of Patutahi', research report, December 2001

c2 Brief of evidence of Joseph Anaru Hetekia Te Kani Pere, undated

(a) Copy of slides for visual presentation, undated

(b) Supporting documents to document c2, various dates

c2—*continued*

(c) ‘Wi Pere (1837–1915): A Traditional Leader and Parliamentarian’, undated

(d) Wi Pere trust centenary, 1899–1999

c3 Responses of Bernadette Arapere to questions arising from statement of issues, 7 January 2001

c4 John Robson, ‘Ngariki Kaiputahi Mana Whenua Report’, summary report, undated
Responses of John Robson to questions arising from statement of issues, undated

c5 Summary of brief of evidence of Joseph Hohepa Brown, undated

c6 Summary of brief of evidence of Irene Ruahine Renata, undated

c7 Summary of brief of evidence of Owen Lloyd, undated

c8 Summary of brief of evidence of Sid Hirini Tamanui, undated

c9 Summary of brief of evidence of David Brown, undated

c10 Summary of brief of evidence of Dr Bryan Gilling, undated
Responses of Dr Bryan Gilling to questions concerning Te Whanau a Kai arising from statement of issues, undated

c11 Brief of evidence of Garry Wayne Clapperton, undated

c12 Brief of evidence of Tom Smiler junior, undated

c13 Summary of brief of evidence of Tom Smiler junior, undated

c14 Brief of evidence of Ritihia Josephine Ihimaera, undated

c15 Brief of evidence of Witi Ihimaera, undated

c16 Summary of brief of evidence of David Thomas Hawea, undated

c17 Summary of report by Bryan Gilling and responses to questions concerning Ngariki Kaiputahi arising from statement of issues, undated

- c18** Questions of clarification from counsel for Te Aitanga a Mahaki for witnesses in advance of third hearing, 22 February 2002
- c19** Brief of evidence of Rees Allen Johnston, undated
- c20** Brief of evidence of Martin John Baker, undated
- c21** Brief of evidence of Pukepuke Alfred Thomas Peawini, undated
- c22** Summary of brief of evidence of Ngapo (Bub) Wehi, undated
- c23** Brief of evidence of Owen Lloyd, undated
- c24** Questions of clarification for Bryan Gilling by counsel for Rongowhakaata and Nga Uri o Te Kooti Rikirangi, undated
- c25** Opening submissions of counsel for Te Whanau a Wi Pere, undated
- c26** Submissions of claimant counsel concerning the Pouparae block, undated
- c27** Opening submissions of counsel for Te Whanau a Kai, undated
- c28** Responses of Bryan Gilling to questions of clarification from counsel for Rongowhakaata and Nga Uri o Te Kooti Arikirangi, undated
- c29** Responses of Tui Gilling to questions of clarification from counsel for Te Aitanga a Mahaki, undated
- c30** Brief of evidence of Tom Smiler junior, undated
- c31** Te Whanau a Kai GIS map booklet, January 2002
- c32*** Supporting documents for Te Whanau a Kai, various dates
- c33*** Te Whanau a Kai whakapapa, undated
- c34*** Na Hemi i tuhi te nei pukapuka, 1936
- c35** Brief of evidence of David Hawea, undated

- C36** Opening submissions of counsel for Ngariki Kaiputahi, undated
- C37** Brief of evidence of Joseph Hohepa Brown, undated
- C38** Brief of evidence of Irene Ruahine Kino Brown Renata, undated
- C39** Brief of evidence of Tanya Parerau Rodgers, undated
- C40** Ngariki Kaiputahi GIS map booklet, undated
- C41** Submission of Wai 874 claimant counsel concerning jurisdiction, 31 January 2002
- C42** Brief of evidence of David Brown, undated
- C43** Brief of evidence of Sid Hirini Tamanui, undated
- C44** Responses of John Robson to questions of clarification from counsel for Te Aitanga a Mahaki, undated
- C45** Responses of Bryan Gilling to questions of clarification from counsel for Te Aitanga a Mahaki, undated
- C46** Responses of Bernadette Arapere to questions of clarification from counsel for Te Aitanga a Mahaki, undated
- C47** vhs videotape presentation for Ngariki Kaiputahi, undated
- C48** Documents concerning Judges J Rogan, L O'Brien, T Heale, and J A Wilson, various dates

D DOCUMENTS RECEIVED TO END OF FOURTH HEARING

- D1** Brief of evidence of Professor Judith Binney concerning section 23 of the statement of issues, undated
- D2** Brief of evidence of Elizabeth Moeau, undated
- D3** Brief of evidence of Rikirangi Moeau, undated

- D4** Brief of evidence of Maeva Moeau, undated

- D5** Brief of evidence of Puka Moeau, undated

- D6** Brief of evidence of Harold Brookes Kirk, undated

- D7** Brief of evidence of Maewa Thornton, undated

- D8** Amendments to Fiona Small and Philip Cleaver, 'Rongowhakaata and the Native Land Court 1873–1900', research report, January 2002

- D9** Written questions and answers of Fiona Small and Philip Cleaver to statement of issues, undated

- D10** Tony Walzl, 'Rongowhakaata: Socio-Economic Overview, 1850–2000', summary report, undated

- D11** Summary of reports by David Alexander for Rongowhakaata, undated

- D12** Bruce Stirling, 'Rongowhakaata and the Crown, 1840–1873', summary report, undated

- D13** Summary of brief of evidence of Taranaki Paratene, undated

- D14** Brief of evidence of Taharakau Stewart, undated

- D15** Brief of evidence of Stanley Joseph Pardoe, undated

- D16** Brief of evidence of Scott Riki, undated

- D17** Brief of evidence of Ruby Westrupp Smith, undated

- D18** Brief of evidence of Rapiata Darcy Ria, undated

- D19** Summary of brief of evidence of Heni Sunderland, undated

- D20** Brief of evidence of Paora Whaanga, undated

- D21** Brief of evidence of Petera Tupara, undated
- (a)** William Greenwood, *The Upraised Hand , or, The Spiritual Significance of the Rise of the Ringatu Faith* (Wellington: Polynesian Society, 1942)
- D22** Fiona Small and Philip Cleaver, 'Rongowhakaata and the Native Land Court, 1873–1900', summary report, undated
- D23** Written questions of clarification from Crown counsel for witnesses in advance of fourth hearing, 12 February 2002
- D24** Transcript of interview by Judith Binney with Arnold Butterworth concerning Nga Tapa execution of 1869, undated
- D25** Brief of evidence of Peter Moeau, undated
- D26** Questions of clarification on behalf of Ngai Tamanuhiri for Rongowhakaata historical and technical witnesses, undated
- D27** Questions of clarification from counsel for Te Whanau a Kai for Rongowhakaata expert witness, undated
- D28** Brief of evidence of Lewis Moeau, undated
- D29** Written questions of clarification for Lewis Moeau from counsel for the Museum of New Zealand Te Papa Tongarewa in advance of fourth hearing, 21 February 2002
- D30** Brief of evidence of Heni Sunderland, undated
- D31** Brief of evidence of Taranaki Paratene, undated
- D32** Opening submission of counsel on behalf of Rongowhakata, undated
- D33** GIS map booklet for Rongowhakaata, undated
- D34** Responses of Bruce Stirling to questions of clarification from counsel for Te Whanau a Kai and Crown counsel, undated

APPI

- D35** Responses of Bruce Stirling to questions of clarification from counsel for Ngai Tamanuhiri, undated
- D36** Responses of Fiona Small to questions of clarification, undated
- D37** Responses of David Alexander to questions of clarification, undated
- D38** Responses of Tony Walzl to questions of clarification from Crown counsel, undated
- D39** Responses of Lewis Moeau to questions of clarification from counsel for the Museum of New Zealand Te Papa Tongarewa, undated
- D40** Opening submissions of counsel for Nga Uri o Te Kooti Arikirangi, undated
- D41** Wirangi Pera, background paper on Haahi Ringatu, undated
- D42** *He Karakia, He Waiata Kinaki: Nga Uri o Te Kooti Rikirangi*, undated
- D43** Brief of evidence of Hinemihiao Larkin, undated

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- E1** Brian Murton, 'The Economic and Social Consequences of Land Loss for Ngai Tamanuhiri, 1860–1980', summary report, 11 February 2002
- E2** Peter McBurney, 'Ngai Tamanuhiri: Mana Whenua Report', summary report, 11 February 2002
- E3** Katherine Orr-Nimmo, 'East Coast Maori Trust', summary report, 11 February 2002
- E4** Responses by Katherine Orr-Nimmo to section 18 of statement of issues, 11 February 2002
- E5** Responses by Katherine Orr-Nimmo to section 20 of statement of issues, 11 February 2002
- E6** Responses by Katherine Orr-Nimmo to section 21 of statement of issues, 11 February 2002
- E7** Dr Keith Pickens, 'Ngai Tamanuhiri Land Alienation Report', summary report, 13 February 2002

- E8** Responses by Dr Keith Pickens to statement of issues, 13 February 2002
- E9** Summary of brief of evidence of Latimer Pera Matenga Riki, undated
- E10** Summary of brief of evidence of Lee Martell, undated
- E11** Summary of brief of evidence of Rose Thompson, undated
- E12** Summary of brief of evidence of Tutekawa Wyllie, undated
- E13** Brief of evidence of Robert Kotuku Cookson, 15 February 2002
(a) Annexures to document E13, undated
- E14** Brief of evidence of Sue Te Huinga Nikora, undated
(a) Whakapapa
(b) Traditional boundary of Turanga designated by Roro
(c) Te Whakataunga no te Hui: A Resolution
- E15** Dr Michael Belgrave, Dr Mervyl McPherson, and Dr Peter Mataira, 'Turanganui a Kiwa: A Socio-Demographic Profile of the Gisborne Land Inquiry District', research report, February 2002
- E16** Written questions of clarification of Crown counsel for witnesses Professor Brian Murton and Katherine Orr-Nimmo in advance of fifth hearing, 12 March 2002
- E17** Questions of clarification on behalf of Rongowhakaata for Ngai Tamanuhiri witnesses, undated
- E18** Written questions of clarification of Crown counsel for Bryan Gilling in advance of fifth hearing, 19 March 2002
- E19** Brief of evidence of Warren Pohatu, 25 March 2002
- E20** Brief of evidence of Jody Balneavis Wyllie, 25 March 2002
- E21** Brief of evidence of Lee Martell, 25 March 2002
- E22** Brief of evidence of Rose Thompson, 25 March 2002

APPI

E23 Nga korero o Latimer Pera Matenga Riki e pa ana ki Ngai Tamanuhiri Mana Motuhake, 25 March 2002

E24 Brief of evidence of Dr Keith Pickens, 27 March 2002

E25 'Nga Tohu Whenua o Ngai Tamanuhiri', map from site visit, undated

E26 Opening submissions of counsel on behalf of Ngai Tamanuhiri, undated

E27 Responses of Peter McBurney to questions of clarification from counsel for Rongowhakaata, undated

E28 Ngai Tamanuhiri GIS map booklet, March 2002

E29 Responses of Dr Keith Pickens to questions of clarification from counsel for Rongowhakaata, 27 March 2002

E30 Responses of Katherine Orr-Nimmo to questions of clarification from Crown counsel, 4 April 2002

E31 Responses of Brian Murton to questions of clarification, undated

E32 Brief of evidence of Tutekawa Wyllie, 25 March 2002

E33 Nga korero whakamutunga o Tutekawa Wyllie e pa ana ki a Ngai Tamanuhiri Mana Motuhake, 5 April 2002

E34 Opening submissions of Wai 896 claimant counsel, undated

E35 Opening submissions of Wai 129 claimant counsel, undated

E36 Responses of Bryan Gilling to section 18 of statement of issues and questions of clarification of Crown counsel, undated

F DOCUMENTS RECEIVED TO END OF SIXTH HEARING

F1 Ashley Gould, 'Afforestation at Mangatu (Issue 26)', March 2002

(a) *Poverty Bay Problems*, vhs videotape, 1950

- F2** Kerry Pollock, 'Private Transactions to 1869 (Issue 10)', March 2002
- F3** Cecelia Edwards, 'Detention to the Chatham Islands, 1866–1868 (Issue 4)', March 2002
- F4** Paul Goldstone, 'The Native Land Court at Poverty Bay/Turanga (Issues 12 and 13)', March 2002
- F5** Cecelia Edwards, 'Crown Acquisition and Management of Te Hau Ki Turanga (Issue 27)', March 2002
- F6** John Waugh, 'Waipaoa Catchment Erosion (Issues 26 and 30)', March 2002
- F7** Paul Goldstone, 'Ngatapa and the Execution of Prisoners (Issue 6)', March 2002
- F8** Bob Hayes, 'Joint Tenancy (Issue 11)', March 2002
- F9** Brent Parker, 'Johnson's Title to Te Kuri (Issues 17, 3 and 15)', March 2002
- (a) Native Land Court order for Johnson concerning Te Kuri
 - (b) Native Land Court order for Ema Mararo concerning Te Kuri
 - (c) Native Land Court succession of Tanatiu Te Amoko
 - (d) Native Land Court sketch of lot 2, part Te Kuri, sold by Johnson to Hemi Mahuki
- F10** Cecelia Edwards, 'Turanganui a Kiwa 1840–1865 (Issue 2)', March 2002
- F11** Michael Mackey, 'Trust Company Management by Wi Pere and William Rees (Issues 20 and 21)', March 2002
- (a) Amendments to document F11, undated
 - (b) Amendments to document F11, undated
- F12** Brent Parker, 'Cession Retention Maps (Issue 8)', March 2002
- F13** Brent Parker, 'Public Works (Issue 24)', March 2002
- F14** Kerry Pollock, 'Turanga Land Interests of Te Kooti (Issue 23)', March 2002
- F15** Bob Hayes, 'Protection Mechanisms (Issue 17)', March 2002
- F16** John Battersby, 'Conflict in Poverty Bay 1865 (Issue 3)', March 2002

F17 Brief of evidence of Dame Cheryll Sotheran concerning Te Hau ki Turanga, 8 March 2002

F18 Cecilia Edwards, 'Implementing a Policy of Confiscation in Turanganui a Kiwa (Issues 5, 7 & 8)', March 2002

(a) Amendments to document F18, undated

F19 Cecilia Edwards, 'Implementing a Policy of Confiscation in Turanganui a Kiwa (Issues 5, 7, 8)', summary report, March 2002

F20 Document renumbered document F32

F21 Document renumbered document F28

F22 Bob Hayes, 'Crown Purchases (Issue 16)', March 2002

(a) Memorandum from Crown counsel concerning deeds relating to Crown purchase of Waikohu Matawai block (issue 16), 20 June 2002

(b) Waikohu Matawai deeds

F23 Summary of brief of evidence of Cecelia Edwards concerning Turanganui a Kiwa 1840–1865 (issue 2), March 2002

F24 Summary of brief of evidence of John Battersby concerning conflict on Poverty Bay (issue 3), March 2002

F25 Summary of brief of evidence of Cecelia Edwards concerning detention on Chatham Islands, 1866–68 (issue 4), March 2002

F26 Summary of brief of evidence of Paul Goldstone concerning Ngatapa and execution of prisoners (issue 6), March 2002

F27 Summary of brief of evidence of Kerry Pollock concerning private transactions to 1869 (issue 10), March 2002

F28 Summary of brief of evidence of Bob Hayes concerning joint tenancy (issue 11), March 2002

(a) Tables and charts concerning Poverty Bay Commission awards 1869

(b) *Raupatu Document Bank*, 139 vols (Wellington: Waitangi Tribunal, 1990), vol 129, extracts

F29 Summary of brief of evidence of Paul Goldstone on Native Land Court at Poverty Bay–Turanga, 1874–1884 (issues 12, 13), March 2002

(a) Documents referred to by counsel for Ngariki Kaiputahi

(b) *Poverty Bay Herald*, 22 September 1876, extract

F30 Summary of brief of evidence of Robert Hayes concerning Crown purchasing (issue 16), March 2002

F31 Summary of evidence of Robert Hayes concerning protection mechanisms (issue 17), March 2002

F32 Summary of evidence of Cecelia Edwards concerning Crown acquisition and management of Te Hau Ki Turanga (issue 27), March 2002

F33 Crown document bank, 11 vols, March 2002

F34 Bob Hayes, ‘Native Land Court: Leasing (Issue 14)’, March 2002

F35 Opening submissions of Crown counsel (first hearing), 15 April 2002

F36 Summary of brief of evidence of Robert Hayes concerning Native Land Court and leasing (issue 14), April 2002

(a) Supporting documents to document F36, various dates

G DOCUMENTS RECEIVED TO END OF EIGHTH HEARING

G1 Gary Hawke, ‘Capital, Finance and Development Reflections on Economic Concepts and the Gisborne Inquiry’, March 2002

G2 Paul Goldstone, ‘Hamiora Pere/Peri – Part of Issue 6’, April 2002

(a) Correspondence of Bowen to Granville from micro-2 1164, 1165, C0209

G3 Written questions of clarification of Wai 129 claimant counsel for Robert Hayes concerning protection mechanisms, 11 April 2002

G4 Written questions of clarification of Wai 129 claimant counsel for Robert Hayes and Michael Macky concerning the Validation Court, 15 April 2002

G4—*continued*

(a) Supporting documents to document G4 concerning the Maraetaha 2 block and the Validation Court, 2 vols, various dates

G5 Brent Parker, 'Turanga Land Block Database', March 2002

G6 Cecilia Edwards, 'Poverty Bay Commission Title Investigation (Issue 9)', March 2002

(a) Amendments to document G6, May 2002

G7 Summary of brief of evidence of Ashley Gould concerning afforestation at Mangatu (issue 26), April 2002

G8 Summary of brief of evidence of John Waugh concerning the Waipaoa Catchment Board (issue 26 and 30), April 2002

G9 Summary of brief of evidence of Cecilia Edwards concerning Poverty Bay Commission title investigation (issue 9), March 2002

G10 Summary of brief of evidence of Brent Parker concerning cession retention maps (issue 8), March 2002

G11 Summary of brief of evidence of Michael Macky concerning trust company management by Wi Pere and William Rees (issues 20 and 21), May 2002

G12 Responses of Michael Macky to questions of clarification concerning issue 20, May 2002

G13 Responses of Michael Macky to questions of clarification concerning issue 21, May 2002

(a) Amendments to document G13, undated

G14 Michael Macky and Bob Hayes, 'Precis of Validation Court Minutes (Issue 18)', May 2002

G15 Opening submissions of Crown counsel (second hearing), 21 May 2002

G16 Responses of Bob Hayes to written questions of clarification by Wai 129 claimant counsel concerning Crown purchasing (issue 16), undated

G17 Supplementary evidence of Brent Parker concerning public works (issue 24), undated

G18 Summary of supplementary evidence of Brent Parker concerning public works (issue 24), undated

G19 Opening submissions of Crown counsel (third hearing), 27 May 2002

G20 Responses of Bob Hayes to questions of clarification by Wai 129 claimant counsel concerning protection mechanisms (issue 17), undated

G21 Responses of Michael Macky to questions of clarification by Wai 129 claimant counsel concerning the Validation Court (issue 18), undated

G22 Responses of Bob Hayes to questions of clarification by Wai 129 claimant counsel concerning the Validation Court (issue 18), undated

H DOCUMENTS RECEIVED TO END OF NINTH HEARING

H1 Closing submissions for Te Aitanga a Mahaki, undated

H2 Closing submissions for Ngai Tamanuhiri, undated

(a) Appendix to issue 7: deed of cession, undated

H3 Nga Tapaetanga Whakapi mo Rongowhakaata, undated

H4 Nga Tapaetanga Whakapi mo te Kereme a Nga Uri o Te Kooti Rikirangi, undated

H5 Closing submissions of counsel for Te Whanau a Kai, undated

H6 Closing submissions for Te Muhunga block claim, undated

H7 Closing submissions for Pouparae block claim, undated

H8 Closing submissions of counsel for Ngariki Kaiputahi, undated

H9 Nga Whakatakotoranga whakapi o nga kai kereme mo Wai 896 te whenua rahui o Te Karaka 16, 26 Hune 2002

H10 Closing submissions of Wai 129 claimant counsel, 26 June 2002

H11 Tauparapara for closing submissions of Wai 129 claimant counsel, 26 June 2002

H12 Summary of closing submissions of Wai 878 claimant counsel, 26 June 2002

H13 Submissions on behalf of the Museum of New Zealand Te Papa Tongarewa concerning Te Hau ki Turanga, 27 June 2002

H14 Closing submissions of Crown counsel, undated

H15 Responses of counsel for Te Aitanga a Mahaki to closing submissions of Crown counsel (issues 1–4), 29 June 2002

H16 Responses of Wai 129 claimant counsel to closing submissions of Crown counsel concerning the Validation Court (issue 18), 29 June 2002

H17 Nga Whakatakotoranga whakatautohe ki nga tapaetanga o te karauna mo Wai 896, 29 June 2002

H18 Supplementary closing submissions and submissions in reply for Te Whanau a Kai concerning Hamiora Pere, undated

APPENDIX II

THE NATIVE LAND ACT 1873

ANALYSIS.

Title.

Preamble.

1. Short Title.

2. Commencement of Act.

3. Interpretation.

4. Repeal of Acts.

CONSTITUTION OF COURT.

5. Districts established.

6. Portions of the Colony may be excluded from operation of Act.

7. Native Land Court.

8. Constitution of Court.

9. Salaries of Judges and Assessors.

10. Travelling allowances.

11. Interpreters.

12. Other officers.

13. Seal of Court.

14. One Judge empowered to act.

15. Assessors may assist in proceedings.

16. Administrative business and notices.

17. Rules, &c.

18. The Court Rolls.

19. Custody of Court Rolls.

20. Governor may stay proceedings and stop surveys.

NATIVE LAND AND RESERVES.

21. District officers. Map of Maori New Zealand. Tribal lands. Present owners.

22. Reference book of Native land.

23. Appendix of existing Native reserves.

24. Power to set apart land as reserves.

25. Surveys.

26. Title ascertained.

27. In open Court.

28. Names of owners to be enrolled. Form No 1.

29. Extract of Court Rolls sent to Native Minister.

30. Reserves to be gazetted.

31. Land exempt from operation of Act.

32. Saving of rights for making reserves.

JURISDICTION AND DUTIES OF THE COURT.

(1.) *Investigation of Titles.*

33. Surveys imperative in every case.

34. Notice of application.

35. Service of notices.

36. Notices to be published.

37. Reports on claims.

38. Preliminary inquiries.

39. Security for costs of survey.

40. Notice of sitting.

41. Sitting of Court thereon.

42. Witnesses. Their examination.

43. Adjournment of sittings.

44. Conduct of case.

45. Proportionate shares to be ascertained in certain cases.

46. Voluntary arrangement to be recognized.

(2.) *Memorials of Ownership.*

47. Memorial of ownership. Schedule, Form No 1.

48. Condition annexed.

49. Sales, &c, notwithstanding condition.

50. Decisions to be gazetted.

51. Copy of Court Rolls to be evidence. Schedule, Form No 1. Authentication.

52. Native Minister to record copy of Court Rolls.

53. Memorials, &c, exempt from Stamp duty.

(3.) *Owners under disability.*

54. Interests of infants and persons under disability.

55. To be notified to the Governor.

(4.) *Succession.*

56. Claimant dying.

57. Owner dying.

REHEARING

58. Rehearing.

SALES AND LEASES. PARTITION.

- 59. Sales under Memorials of ownership. Memorandum of transfer. Form No 2.
- 60. Court to explain effect of sale.
- 61. Crown grant to purchaser.
- 62. Leases under Memorials of ownership. Memorandum of lease. Form No 3
- 63. Receivers of rents.
- 64. Receivers accountable to the Court.
- 65. Interests of dissentients may be separated.
- 66. Further subdivision thereof.
- 67. Tenure of aggregate allotments.
- 68. Fresh Memorials of ownership to be issued.

SURVEYS.

- 69. Government may undertake surveys.
- 70. Survey regulations.
- 71. Inspector of Surveys to certify maps. Approved map evidence of survey.
- 72. Agreement for surveys.
- 73. Land in payment for surveys.
- 74. Former licenses of surveyors nullified.

THE LEGAL ESTATE. REGISTRATION, ETC

(1.) *Crown Grants.*

- 75. Power to declare freeholds. Issue of Crown grants.
- 76. Effect of grant.
- 77. Lands of the Crown.
- 78. Vesting of legal estate.
- 79. Former grantees to be tenants in common.

(2.) *Commutation of Native Title.*

- 80. Crown grants may be issued to Natives in certain cases.

(3.) *Instruments of Disposition.*

- 81. Registration.
- 82. Situation of land.
- 83. Instruments to be in duplicate.
- 84. Mortgages.
- 85. Signing of deeds and instruments.
- 86. Married women not to be examined.
- 87. Transactions void.
- 88. Judgments not to affect Native land.

(4.) *Past Transactions.*

- 89. Former grantees may apply for subdivision or partition.
- 90. Mode of surrender of Crown grant for cancellation.
- 91. Effect of cancelling.
- 92. Where lands in part alienated, undivided shares of former grantees may be ascertained.
- 93. Allotment of shares, and certificate thereof.
- 94. Court to be guided by equity and good conscience.
- 95. Not to apply to transactions prior to 1869.
- 96. Leases validated in certain cases.
- 97. Owners under former certificates of title may apply for partition.
- 98. Lands under former certificate how to be dealt with
- 99. Former declarations validated.

GENERAL POWERS OF THE COURT

- 100. Evidence in previous case may be adopted.
- 101. References from Supreme Court under 'Native Rights Act, 1865.'
- 102. Effect of decision of Court.
- 103. Case may be sent to Supreme Court.
- 104. Errors may be amended.

MISCELLANEOUS PROVISIONS.

- 105. Notifications of Native title extinguished authoritative.
- 106. Land may be taken for roads.
- 107. Inchoate agreements by Land Purchase Commissioners.
- 108. Ancient agreements invalid but equitable may be recognized.
- 109. Old land claims may be investigated.
- 110. According to provisions of this Act.
- 111. Report to Land Claims Commissioner.

FEEES.

- 112. Governor to fix fees.

SCHEDULE.

- Form No 1—Memorial of ownership.
- Form No 2—Memorandum of transfer.
- Form No 3—Memorandum of lease.

AN ACT to amend and consolidate the Laws relating to the Native Land Court and to Native Land. [2nd October, 1873.] Title.

WHEREAS it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated: Preamble.

And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land:

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act shall be 'The Native Land Act, 1873.' Short Title.
2. This Act shall come into operation on the first day of January, one thousand eight hundred and seventy-four. Commencement of Act.
3. In construing this Act, the words and phrases following shall have the meanings hereby attached to them respectively, unless there be something in the context or the subjectmatter repugnant to or inconsistent with such meanings: Interpretation.
 - 'Instrument' shall mean and include any grant certificate of title memorial of ownership memorandum of transfer or lease conveyance assurance deed map plan will probate or exemplification of will, or any other document in writing relating to the transfer or other dealing with land or evidencing title thereto.
 - 'Court' shall mean the Native Land Court of New Zealand,
 - 'District' shall mean a District constituted for the purposes of this Act
 - 'Chief Judge' and 'Judge' shall mean respectively the Chief Judge and a Judge of the Court.
 - 'Tribe' shall mean a tribe or a section of a tribe or hapu as the case may be.
 - 'Native' shall mean an Aboriginal Native of the Colony of New Zealand, and shall include all half-castes and their descendants by Natives.
 - 'Native land' shall mean lands in the Colony which are owned by Natives under their customs or usages.
 - 'Inspector of Surveys' shall mean the Inspector of Surveys heretofore appointed or hereafter to be appointed by the Governor, and shall include his deputies appointed by him.

Repeal of Acts.

4. 'The Native Lands Act, 1865,' 'The Native Lands Act, 1867,' 'The Native Lands Act Amendment Act, 1868,' 'The Native Lands Act, 1869,' and 'The Native Lands Acts Amendment Act, 1870,' except such parts of any of the aforesaid Acts as relate to the imposition and payment of duties upon the alienation of lands granted under the provisions of such Acts, and the seventy-third section of the Constitution Act, are hereby repealed; but this Act shall not render valid or invalid or in any way affect any rights acquired or proceedings completed under any of the said repealed Acts before the repeal of the same, nor shall this Act destroy the liability of any person who has acted under any of the said repealed Acts to answer in any Court for any act or thing by him done or omitted to be done under any of such repealed Acts for which he would have been liable to answer if this Act had not been passed; and for the purpose of preserving such liability and the rights of parties who may now have any remedies or rights thereunder or under any of them, the said repealed Acts remain in force. And provided also that proceedings heretofore commenced and in progress under any of the said repealed Acts before the repeal of the same may be continued and perfected under this Act, so far as this Act extends and the circumstances of each case are compatible with the objects and provisions of this Act.

CONSTITUTION OF COURT

Districts established.

5. It shall be lawful for the Governor in Council from time to time to divide the Colony into districts for the purposes of this Act, and the limits of such districts from time to time to alter as occasion may require.

Portions of the Colony may be excluded from the operation of Act.

6. It shall also be lawful for the Governor in Council by Proclamation in the *New Zealand Gazette* and in the *Kahiti*, to define the boundaries of any particular portion of the Colony, and to declare that such portion thereof shall be totally excluded from the operation of this Act; and accordingly until such Proclamation shall be revoked, this Act shall have no force or effect within such portion of the Colony as shall be defined in any such Proclamation.

Native Land Court.

7. The Native Land Court of New Zealand (hereinafter called 'the Court') shall be a Court of record for the investigation of the titles of persons to Native land according to Native custom and usage, and for the other purposes hereinafter set forth.

Constitution of Court.

8. The Court shall consist of one Chief Judge and of such other Judges as the Governor in Council may from time to time appoint, together with such Assessors, being Aboriginal Natives of New Zealand, as the Governor in Council may from time to time appoint; and the Governor may from time to time remove any such Chief Judge, Judges, or Assessors or any of them, and appoint another or others in his or their place and stead.

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| <p>9. Salaries shall be paid to the Chief Judge, Judges, and Assessors, at such rate as may in each case be from time to time appropriated by the General Assembly.</p> | <p>Salaries of Judges, and Assessors.</p> |
| <p>10. Allowances shall be paid out of any moneys appropriated for the purpose by the General Assembly to the Chief Judge, Judges, and Assessors, when travelling in performance of their duties under this Act, at such rates as the Governor shall from time to time determine.</p> | <p>Travelling allowances.</p> |
| <p>11. To every district there shall be attached a competent Interpreter, who shall act as Clerk or Secretary to the Judge who from time to time may preside over the Court of such district, and who shall interpret all documents and instruments issued by such Judge.</p> | <p>Interpreters.</p> |
| <p>12. It shall be lawful for the Governor from time to time to appoint such interpreters clerks and other officers as may be required for the conduct of the business of the Court throughout the Colony, at such salaries as may in each case be from time to time appropriated by the General Assembly.</p> | <p>Other officers.</p> |
| <p>13. The Court shall have in the custody of each Judge a seal of the Court for the sealing of all documents issued by the Court and required to be sealed.</p> | <p>Seal of Court.</p> |
| <p>14. Every Judge of the Court shall have the same jurisdiction and may exercise the same powers as the Court in all matters whatever under this Act.</p> | <p>One Judge empowered to act.</p> |
| <p>15. One Assessor or more Assessors shall sit at a Court when required by the presiding Judge, and assist in the proceedings, but not otherwise; and his or their concurrence shall be necessary to the validity of any judgment or order.</p> | <p>Assessors may assist in proceedings.</p> |
| <p>16. All administrative business of the Court shall be carried on by the Chief Judge, subject to the provisions of this Act. And whenever in this Act notice is required or permitted to be given or application to be made to the Court, such notice or application may be given or made to any Judge.</p> | <p>Administrative business and notices.</p> |
| <p>17. The Judges of the Court with the Assessors shall, as soon as conveniently may be after the passing of this Act, make such general rules touching the sittings of the Court and the practice and procedure thereof in all matters as they may deem advisable: Provided always that all rules to be made under the authority of this Act shall be submitted to the Governor in Council for his approval; and upon being so approved shall be forthwith published in the <i>New Zealand Gazette</i>, and shall, from and after a date to be fixed by the Governor in Council in that behalf, have the force of law until altered or repealed by other rules to be similarly made and approved.</p> | <p>Rules, &c.</p> |

The Court Rolls.

18. There shall be kept in the Native Land Court a separate book for each district established under this Act, as hereinafter mentioned, in which shall be recorded consecutively the result of every investigation of title of Native land in the district, with full particulars of the land and the owners thereof, as is hereinafter more particularly set forth. Each folium of such books shall be distinguished by a consecutive number. Each progressive volume of such books shall likewise be distinguished by a consecutive number; but the first folium of each volume after the first shall be marked with the consecutive number immediately following the number marked on the last folium of the immediately preceding volume. Such a volume, or a series of such volumes, shall constitute the ‘Court Rolls of the District of [*name District*].’

Custody of Court Rolls.

19. The Court Rolls of each district, one of the original approved survey maps hereinafter referred to, and all documents of the Court relating to Native land within such district, shall be kept in the office of the Court of the district under the custody of the officer appointed for such district, as hereinafter mentioned. Such Court Rolls and other records shall be open to the public for inspection and search at such times and upon the payment of such fees as shall be prescribed by rules. A transcript of the Court Rolls of each district, and of all subsequent enrolments thereon, with tracings of all maps, shall be transmitted to the Chief Judge of the Court.

Governor may stay proceedings, and stop surveys.

20. It shall be lawful for the Governor from time to time, before the commencement of or at any stage of any case or proceeding, by notice to the Chief Judge or the presiding Judge signed by himself or by a Minister, or transmitted by Telegraph, to declare that such case or proceeding shall not be tried or proceeded with, and thereupon the jurisdiction of the Court in such matter shall cease and determine, but shall revive with the revocation of such notice. Similarly, and by any like notice, the Governor or a Minister may stop any survey from being proceeded with, at any time and from time to time.

NATIVE LAND AND RESERVES.

District Officers.

21. For every district established under this Act the Governor in Council shall appoint some competent officer, (hereinafter called the ‘District Officer,’) whose duties shall be:—

Map of Maori New Zealand.

(1.) To prepare for record a general skeleton map of the district assigned to him, distinguishing the different tracts of country in possession of the various tribes or hapus of the Natives at the date of the signing of the Treaty of Waitangi, and the nature of the tenure thereof.

Tribal lands.

(2.) To compile with the assistance of the Assessors, and of the most reliable chiefs of the district, or with the assistance of such other person or persons as he may consider to be trustworthy, accurate and authentic information relative to the district aforesaid, defining the intertribal boundaries by their Native names, giving the estimated acreage of such tribal land, with a description of the course and direction of the principal rivers running

through such land, and the names and positions of the various mountains or lakes or other salient points in the general features of the country. They shall also supplement the information by tracing the genealogy and names of the various families or hapus to which the different portions of the original tribal land shall have descended.

Present Owners.

22. The result of such inquiry shall be entered in a book to be kept in the office of the Court of the district, and called the 'Local Reference Book.' Every subsequent information obtained from time to time, whether in addition to or in emendation of the first entry, shall be added to the book, and the date of such addition shall be marked thereon. It shall be the duty of the officer having the custody of such book to produce the same before any Court which may require the same in the course of any proceeding before such Court, and such book shall be receivable as evidence of the facts, recorded therein.

Reference book of Native land.

23. The Native Reserves Commissioner of any district appointed under 'The Native Reserves Act, 1873,' shall, at the request in writing in that behalf of the District Officer, furnish to such officer a list of all lands within his own district that have heretofore by any authority whatsoever been set apart or reserved for the benefit of the Natives and that now subsist for that purpose, or are generally known as Native reserves, together with the names descriptions and boundaries thereof and tracings of the same. Such list and tracings, when received by the District Officer, shall be appended by him to the 'Local Reference Book.'

Appendix of existing Native reserves.

24. It shall also be the duty of every District Officer to select, with the concurrence of the Natives interested, and to set apart, a sufficient quantity of land in as many blocks as he shall deem necessary for the benefit of the Natives of the district: Provided always that no land reserved for the support and maintenance of the Natives, as also for endowments for their benefit, shall be considered a sufficiency for such purposes, unless the reserves so made for these objects added together shall be equal to an aggregate amount of not less than fifty acres per head for every Native man woman and child resident in the district. In each case of land so set apart as aforesaid, the District Officer shall transmit a report of the particulars of each such reserve for the approval of the Governor in Council.

Power to set apart land as reserves.

25. After any such reserve shall have been so approved, and with such concurrence as aforesaid, the District Officer shall then direct the blocks of land so selected to be surveyed by a surveyor, to be authorized in writing for the purpose by the Inspector of Surveys, and the boundaries thereof to be distinctly marked out.

Surveys.

26. On the completion of the survey of any such reserve, the District Officer shall give notice thereof in manner provided by section thirty-six of this Act in writing to the Chief Judge of the Court, and make application to have the title to the said blocks of land investigated by the Court.

Title ascertained.

TURANGA TANGATA TURANGA WHENUA

APPII

The Chief Judge thereupon shall give public notice of the day and place when and where a sitting of the Court will be held for the investigation of the title to the said blocks of land.

In open Court.

27. At such sitting of the Court, the investigation of the title to the reserve shall be proceeded with according to the rules herein contained as to ordinary cases of investigation of titles to land.

Names of Owners to be enrolled.

28. After the inquiry shall have been completed, the presiding Judge shall cause a Memorial of ownership of the reserve as hereinafter described to be inscribed on the Court Rolls. The names of all the owners of such reserve shall be enrolled thereon; and such enrolment shall be individually, by the respective names of all the persons found to be entitled.

Form No 1.

Extract of Court Rolls sent to Native Minister.

29. An extract of the Court Rolls containing the copy of such a Memorial of ownership, signed by the Judge and sealed with the seal of the Court, stating the names of the owners and giving full particulars of the reserve, and having a plan of the land drawn thereon or annexed thereto, shall thereupon be forwarded by the Judge to the Native Minister

Reserves to be gazetted.

30. After the period of six months, hereinafter fixed as the limit of time within which there may be a rehearing of any case, shall have expired, the Governor shall cause the said extract of Court Rolls to be published in the *New Zealand Gazette*, and also in the *Kahiti*, with a notice to the effect that the lands described in such extract will be inalienable by sale lease or mortgage, except with the consent of the Governor in Council first obtained in each case.

Land exempt from operation of Act.

31. After the publication of such notice as aforesaid, the land defined in any such extract of Court Rolls shall be held by the Native owners thereof in accordance with Native custom and usage; but with the consent of the Governor in Council such land or any part thereof may be subject to the operation of this Act, as if the Memorial of ownership had been made under the forty-seventh section of this Act.

Saving of rights for making reserves.

32. Nothing in this Part of the Act contained shall be deemed or construed to abridge limit or to interfere in any way with the powers already subsisting; or which may hereafter be granted to any person or persons or body corporate, to set apart land for the benefit of the Natives.

JURISDICTION AND DUTIES OF THE COURT.

(1.) *Investigation of titles.*

Surveys imperative in every case.

33. Before any claim to land shall be investigated by the Court, and before any award in partition of any land shall be made by the Court, it shall be necessary that a survey of such land shall have been made, and approved maps thereof in duplicate, as hereinafter described, shall

have been lodged in the Court. Such surveys and maps shall be made in conformity with the provisions of this Act, and of any rules in force relating to surveys.

34. Any Natives may, subject to and in manner and form directed by rules of the Court, give notice to the Chief Judge that they claim to be interested in a piece of Native land, and that they desire that their claim should be investigated by the Court in order that a Memorial of ownership may be issued for such piece of land. Such application shall specify the boundaries of the said land by Native names or otherwise sufficiently describe it, and shall also state the names of every tribe and hapu interested therein, or the names of all the persons admitted to be interested therein, and shall, when the land is claimed by more than two claimants, be signed by at least three of the claimants.

Notice of application.

35. A copy of such application shall be sent at the same time by the applicants to each of the tribes hapus or persons named in the application, or believed by the applicants to be interested in any portion of the land comprised in the application. And the applicants shall satisfy the Court at the sitting thereof for the hearing of the claim, that such notices have been duly served upon such persons or parties; and in the minutes of the proceedings of the Court shall be entered a note of the manner in which the Court was so satisfied.

Service of notices.

36. Copies of all notices of claims, as soon as may be after the receipt of the application, and notices of all sittings of the Court for the investigation of titles, with a Schedule of the cases to be investigated, shall be forwarded to each of the District Officers, Commissioners of Crown Lands, Inspectors of Surveys, and Native Reserves Commissioners, in whose district the land or any portion thereof respectively is situate, also to the claimant and counter-claimant or objector (if any), and to such other persons for distribution as the Chief Judge shall think fit, and shall be inserted in the *Kahiti* in the Maori language, and in the *Gazette* of the Province in which the land affected is situate in the Maori and English languages.

Notices to be published.

37. It shall be the duty of such District Officers, Commissioners of Crown Lands, Inspectors of Surveys, and Native Reserves Commissioners respectively, on the receipt of any such notice of claim, to examine the same to ascertain if any of the land comprised in the application has at any time theretofore within their knowledge been alienated to the Crown or otherwise, and to report thereon to the Chief Judge or to the Judge for the time being presiding over the Court in the district; and if they shall find that any of such land has been at any time so alienated, they shall forthwith notify the same to such Judge, and thereupon all proceedings of the Court in respect of such portion of the land as may have been alienated shall be stayed. Such officers as aforesaid may also in their report notify to such Judge any objection they may be cognizant of to the hearing of any such claim, or any difficulty or counter claim they may be aware of as existing against any

Reports on claims.

portion of the land comprised in the application; and in any such case, the Judge shall suspend all further proceedings in the Court relative to the hearing of the claim until such objections are disposed of or removed.

- Preliminary inquiries. **38.** The Judge shall institute such preliminary inquiries as he may deem necessary in the manner he may think best, with a view of ascertaining whether the application to bring the land under the Act is in accordance with the wishes of the ostensible owners thereof; and if he shall upon that inquiry be satisfied that the application is *bona fide*, and no objections thereto have been offered by the persons hereinbefore required to report upon such application, and that the hearing of such claim is not likely to lead to any disturbance of the peace of the country, he shall require a survey of the land to be made under the direction of the Inspector of Surveys, and the boundaries thereof to be effectually marked out on the ground. The Judge shall in each case minute a note of the manner in which he shall have satisfied himself in respect of the aforesaid matters.
- Security for costs of survey. **39.** Provided always that the applicants shall in each case satisfy the Inspector of Surveys that the costs and charges of the surveys and requisite maps of the claim will be paid by them either in money or in land to be transferred to Her Majesty.
- Notice of sitting. **40.** On completion of the survey, the Chief Judge shall give public notice of the day and place when and where a sitting of the Court will be held for the investigation of the title to the said land. Such notice shall be circulated in the same manner as notices of claims, as provided in section thirty-six of this Act.
- Sitting of Court thereon. **41.** At such sitting of the Court, the Court shall, after having satisfied itself that all the notices hereinbefore required to be given have been duly served, ascertain from such evidence as it shall think fit, not only the title of the applicants, but also the title of all other claimants to the land respecting which notice shall have been given, and the names of all such claimants.
- Witnesses. Their examination. **42.** It shall be the duty of the presiding Judge to require the attendance of any witnesses whose evidence may appear to him to be necessary, or the production of any documents which shall appear to him to be necessary; and for that purpose he may adjourn the inquiry.
- Adjournment of sittings. **43.** The Court shall have power to adjourn its sittings on any case or proceeding pending in such Court, from time to time and place to place, to such time and place as it may consider desirable or necessary.
- Conduct of case. **44.** The examination of witnesses and the investigation of title shall be carried on by the presiding Judge without the intervention of any counsel or other agent: Provided that it shall be

competent for the claimants to select one of themselves to act as their spokesman to conduct the case in their behalf.

45. At the same sitting of the Court, and if the majority in number of the claimants shall so desire it, the inquiry shall be extended, in order to ascertain in such instance the amount of the proportionate undivided share that each such owner of such land is entitled to according to Native usage and custom; and in any such case no registration of the names of such owners shall be made until the proceedings are completed by the recovery of such amount, which, in every such case, shall be clearly set forth in the Memorial of ownership.

Proportionate shares to be ascertained in certain cases.

46. In carrying into effect the preceding sections, or any of the sections hereinafter contained regarding partitions, the Court may adopt and enter of record in its proceedings any arrangements voluntarily come to amongst themselves by the claimants and counter-claimants, and may make such arrangement an element in its determination of any case concurrently or subsequently pending between the same parties. In every such record there shall be entered the names of the persons with whose consent, and the names of the persons by whom any claim shall have been settled by any such arrangement.

Voluntary arrangement to be recognized.

(2.) *Memorials of Ownership.*

47. After the inquiry shall have been completed, the Court shall cause to be inscribed on a separate folium on the Court Rolls a Memorial of Ownership in the Form No1 of the Schedule hereto, giving the name and description of the land adjudicated upon, and declaring the names of all the persons who have been found to be the owners thereof, or who are thenceforward to be regarded as the owners thereof under any voluntary arrangement as above mentioned, and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner. Every such Memorial shall have drawn thereon or annexed thereto a plan of the land comprised therein, founded on the map approved as hereinafter mentioned, and shall be signed by the Judge and sealed with the seal of the Court.

Memorial of ownership. Schedule, Form No1.

48. To every such Memorial there shall be annexed the following condition, namely, that the owners of the piece of land referred to in such Memorial have not power to sell or make any other disposition of the said land, except that they may lease the same for any term not exceeding twenty-one years in possession and not in reversion, without fine premium or foregift, and without agreement or covenant for renewal, or for purpose at a future time.

Condition annexed.

49. Nothing, however, in the foregoing condition annexed to any Memorial of ownership shall be deemed to preclude any sale of the land comprised in such Memorial where all the owners of

Sales &c notwithstanding condition.

such land agree to the sale thereof, or to prevent any partition of such land in manner hereafter provided, if required.

Decisions to be gazetted.	50. The decision of the Court in every case of the hearing of a claim shall forthwith be published in the <i>Gazettes</i> in the same manner as hereinbefore provided with respect to notices of claims, and the persons in whose favour such decision shall be made shall be deemed to be the owners of the land referred to in such decision, unless the decision of the Court shall be amended or reversed upon a rehearing as hereinafter provided.
Copy of Court Rolls to be evidence.	51. A copy of the enrolment of the Memorial, certified under the hand of any Judge of the Court after the expiration of one month after the time hereinafter allowed for a rehearing (if no rehearing shall have been ordered), with the date of the making of such copy, and sealed with the seal of the Court, shall be receivable as evidence of the deed or facts referred to in such Memorial, and shall be conclusive of the ownership of the land described therein, according to Native custom.
Schedule Form No 1. Authentication.	
Native Minister to record copy of Court Rolls.	52. In every instance after the expiration of one month after the time allowed for a rehearing, and if no rehearing shall have been ordered, a copy of the enrolment, certified as above mentioned in every claim heard and decided by the Court, shall, together with one of the approved duplicate maps as hereinafter described, of the land referred to in the Memorial, be transmitted to the Native Minister for record in his office.
Memorials, &c, exempt from stamp duty.	53. All Memorials of ownership issued under this Act to any Native owners shall be exempted from the payment of any duty under 'The Stamp Duties Act, 1866,' or any Acts amending the same.
	(3.) <i>Owners under Disability.</i>
Interests of infants and persons under disability.	54. If any Natives who or any of whom shall be infants or lunatics shall be found to be entitled to any interest in the land under adjudication, the names of such persons under disability shall nevertheless be enrolled in the Memorial of ownership owners thereof, together with the proportionate shares (if ascertained) accruing to each one of them, and the age of such minor or the nature of the disability, so far as known, shall be added in such Memorial.
To be notified to the Governor.	55. An intimation of each such case, with all the particulars thereof, shall forthwith be transmitted to the Governor, and thereafter the interests of such persons under disability shall be dealt with in accordance with the provisions of 'The Maori Real Estate Management Act, 1867:' For this purpose the word 'hereditaments' in the said Act shall be deemed to include Native land held under Memorial of ownership, and any trustee so appointed may give the consent to sales leases

and partitions hereinafter provided for, and receive the shares of the proceeds of any such sale or lease, and dispose of the same for the benefit of the person for whom he is such trustee, as nearly as possible in the manner provided by ‘The Maori Real Estate Management Act, 1867,’ and when no sufficient provision is made in the said Act, then in such manner as the Governor in Council may from time to time direct.

(4.) *Succession.*

56. If any Native interested in the land under adjudication shall die before the same shall be adjudicated upon, the inquiry shall be proceeded with nevertheless; and if such Native so dying shall be found to be an owner, the Court shall ascertain the name of the person or persons who according to Native custom would be entitled to the interest of such deceased Native, and shall inscribe the names of such persons on the Court Rolls in lieu of the name of such deceased owner. Claimant dying.

57. In case of any Native holding land under Memorial of ownership or Crown grant under this Act, or under any certificate of title or Crown grant issued under any of the Acts hereby repealed dying intestate, the Court may, upon the application of any person claiming to be interested in such land, inquire into the matter, and ascertain by such evidence as it shall think fit, who, according to Native custom, ought to succeed to the interest of such deceased intestate, and thereupon by order of Court, under seal of the Court, shall declare the names of the persons who in the judgment of the Court ought to succeed to the interest of such deceased. Every such order shall have the same legal effect as a will duly made and executed. Owner dying.

REHEARING.

58. Upon the application of any persons interested in any in Native land, who may feel themselves aggrieved by the decision of the Court in respect thereof, the Governor in Council may order a rehearing of any matter heard and decided under the provisions of this Act within such a period of time from the publication of the decision and Memorial of ownership in manner hereinbefore required as may be limited in such order; and upon such order being made, all proceedings theretofore taken by the Court in such matter shall be annulled, and the case shall commence *de novo*, and shall proceed in manner provided by this Act: Provided that no application for a rehearing shall be entertained if it be made after six months shall have elapsed from the time of such publication. Rehearing.

SALES AND LEASES—PARTITION.

59. In case any sole owner, or any number of collective owners, shall be desirous of selling the land they hold under Memorial of ownership, and either before or after any partition shall have been made of any such land, the Court shall make inquiry into the particulars of the transaction, Sales under Memorials of ownership.

Memorandum of transfer, Form No 2.

and on being satisfied of the justice and fairness thereof, of the assent of all the owners to such sale, and of the payment of the whole amount of the costs and charges payable in respect of such land for original surveys maps and investigation of title, or the subsequent costs and charges attending the partition (if any), and also of the payment of the whole amount of the purchase money stipulated upon, without any deduction whatever except for advances of money made to the Native owners by way of earnest money to bind the agreement for such sale, the Court shall make an indorsement upon the Memorial of ownership, which shall be presented to the Court for the purpose, to the effect that the transaction appears to be *bona fide*, and that no difficulty exists in respect of the alienation of the land comprised in such Memorial. Sales of land held under Memorials of ownership may be effected by memorandum transfer in the Form No 2 in the Schedule hereto, or to the like effect. Such transfers shall be signed by all the owners in the manner hereinafter provided in respect of the signing of deeds and instruments.

Court to explain effect of sale.

60. Before the completion of the sale of any land held under a Memorial of ownership, the Court shall explain to the owners that effect of such sale will be absolutely to transfer their own rights in the land to the proposed purchaser without any further claim on their part, either on the land or on its proceeds, and the Court shall satisfy itself in every case that the owners understand such effect.

Crown grant to purchaser.

61. After the memorandum of transfer hereinbefore mentioned shall have been signed by all the Native owners of the land comprised therein, and the Judge shall have been satisfied that the duties payable to Her Majesty in respect of the transaction have been paid, the Judge shall inscribe on the Court Rolls, and indorse upon the Memorial of ownership, a certificate of the completeness of the sale, and a declaration as hereafter mentioned to the effect that the purchaser shall thenceforth hold the land comprised in such Memorial as freehold. Such Memorial of ownership, so indorsed, shall be forthwith transmitted by the Judge to the Governor, with a recommendation that a Crown grant for the land comprised in such Memorial may be issued in favour of the purchaser.

Leases under Memorials of ownership.

62. No lease of any land held under Memorial of ownership shall be valid unless all the owners of the land comprised in such shall assent thereto; and the Court shall satisfy itself in every case of lease of the fairness and justice of the transaction, of the rents to be paid, and of the assent of all the owners to such lease. Upon being satisfied in respect of the matters aforesaid, and also that the duties payable to Her Majesty in respect of the transaction have been paid, the Court shall enter a memorandum of the particulars of the lease on the Court Rolls, and a transcript of such memorandum on the Memorial of ownership of the land comprised in such lease. Leases of land held under Memorials of ownership may be effected by memorandum of lease, in the Form No 3 in the Schedule hereto, or to the like effect. Such leases shall be signed by all the owners in the manner hereinafter provided in respect of the signing of deeds and instruments.

Memorandum of lease, Form No 3.

63. In case of any lease being made under a Memorial of ownership, the Judge may after ascertaining the consent of all the owners, and on their application, appoint any persons selected by them, not being fewer than four persons, either out of their number or not, and either European or Native persons, to be receivers on behalf of all the lessors of the rents accruing to or accrue under such leases. If all the owners shall not agree in their selection of such receivers, and shall request the Court to make such selection on their behalf, the Court may accordingly make selection of such persons, not being fewer than four persons, either European or Native, as it shall think most fitting to be appointed receivers as aforesaid. A receipt signed by all the receivers appointed as aforesaid, for any moneys paid to them as receivers by the lessee, for rent accrued under the lease, shall be a good and sufficient discharge to the lessee for so much of the rent money as shall be expressed in such receipt; and the lessee shall not be bound to see to the proper application of any of the money so paid by him; nor shall he be, in any way, accountable for any loss or application thereof.

Receivers of rents.

64. In case of any lease under Memorial of ownership, wherein receivers have been appointed as above mentioned to receive the rents under the lease as they accrue, it shall be lawful for the Court, on the application of any of the lessors who may feel himself aggrieved by the apportionment of such rents by the receivers, at any time if it shall think fit, to summon the said receivers before it and require them to give an account of the rents received by them, and thereupon may make any order it shall think just and fitting in such matter, and may remove such receivers and appoint others in their place, or, by order of Court directed to the lessee, may require him for the future to pay all such rents into the Court; and such order shall discharge the lessee from any further payment to the receivers in regard of rent, if he shall pay the same in accordance with such order; and the Court shall pay the rents so received by the Court to each of the several owners according to such proportion as it shall think just.

Receivers accountable to the Court.

65. In any case of a proposed sale or lease of land, held under Memorial of ownership, if the Court shall find that all the owners are not desirous to sell or lease the said land, but that there are dissentients thereto, the Court shall ascertain the number of such last-mentioned persons, and if the Court shall find that the majority of the owners in either case are desirous that a subdivision of the land shall be made between them, then, in every such case, the Court may cause a partition of the whole land to be made into two aggregate allotments, proportioned to the interests of those who wish to sell or lease, and of those who dissent, and shall award the same as the Court shall think just, one of these allotments to the dissentients, the other to the intending sellers or lessors, and thereafter the Court shall proceed in the further matter of the particular sale or lease as hereinbefore provided.

Interests of dissentients may be separated.

Further subdivisions thereof.

66. The Court may also make any further subdivision of the aggregate allotment awarded to such dissentients as they may desire, but in every such case the costs and expenses attending such further subdivision shall be apportioned among the dissentient owners alone.

Tenure of aggregate allotments.

67. All such land as shall be taken on partition in an aggregate allotments allotment shall be held by the persons to whom it shall given on partition under the same tenure and customs as the land in respect of which such land shall have been given on partition would have been held in case no partition had been made: Provided, however, that in any case where not more than ten individual Natives shall be found to be the owners of any such aggregate allotment as aforesaid, it shall be lawful for such Natives to make application to the Court in manner hereinafter provided in respect of the issue of Crown grants to Natives in certain cases for a commutation of their title to any such allotment for an English title of freehold; but in every such case the proportionate undivided share of any such aggregate allotment to which each of the individual Native owners thereof may be entitled shall first be ascertained by the Court, and inscribed on the Court Rolls, as well as on the new Memorial of ownership issued in respect of such allotment.

Fresh Memorials of ownership to be issued.

68. In every case of partition under this Act, the Court shall cause the boundaries of the different allotments to be distinctly marked out upon the ground, and plans in duplicate of such allotments shall be deposited in the Court. Upon receipt of such plans the presiding Judge shall cause a tracing of the subdivision of the land to be marked on the original approved map deposited in the Court, and shall cancel the original Memorial of ownership by writing thereon the word 'Cancelled,' and likewise in the Court Rolls, subscribing his name and affixing the seal of the Court to such cancellation; and shall in lieu of such original Memorial cause new Memorials of ownership to be issued for so many allotments as the land comprised in the original Memorial shall have been subdivided into to the persons respectively entitled to such allotments. Any partition so made by the Court shall have the same effect, so far as concerns the special rights of the persons affected thereby, as a deed of partition made and assented to by the several parties named in the original Memorial of ownership.

SURVEYS.

Government may undertake surveys.

69. The Governor may, at the request of the Native claimants or owners, cause maps and surveys to be made of any Native lands, and may defray the costs thereof out of and charge the same against any fund specially appropriated to Native purposes, such costs to be repaid in manner hereinafter provided. Such surveys shall be made under the immediate control of the Inspector of Surveys by surveyors to be from time to time authorized in writing by him for the purpose.

Survey regulations.

70. All surveys of Native lands that shall be hereafter undertaken shall be conducted in strict conformity with general regulations that shall be prepared by the Inspector of Surveys in that

behalf as soon as may be after the passing of this Act. All such regulations shall be submitted to the Governor in Council for his approval, and when so approved shall be forthwith published in the *New Zealand Gazette*. Any surveyor who, in the execution of the survey of any Native lands undertaken by him, shall wilfully transgress in any manner any of the regulations so to be published as aforesaid, shall be liable to forfeit, at the discretion of the Inspector of Surveys, the whole or any part of the amount that at any time may be payable to him in respect of such survey.

71. The Inspector of Surveys or his deputy in the district – and for the purposes of this Act the Inspector of Surveys may appoint fit and proper persons to be his deputies in each district established under this Act – shall examine all surveys and plans, and shall take such proceedings as he shall think fit for testing their correctness, and for collating them in general maps and registers, and no Memorial of ownership shall issue until a plan in duplicate of the land comprised therein shall be deposited in the Court, and unless it shall be certified in writing thereon by such Inspector that the same is correct and in conformity with the rules for the time being in force under this Act, and the Court shall take notice of the signature of such Inspector without proof thereof, and the maps so certificated as correct shall be impressed with the seal of the Court as approved maps, and shall be received in evidence of the survey without further proof. One of such maps shall be recorded in the Court of the District; the other shall be transmitted after the case shall have been decided to the Native Minister for record in his office.

Inspector of Surveys to certify maps.

Approved map evidence of survey.

72. Where any Native claimants or owners of land shall agree with the Inspector of Surveys for the survey of any piece of land, such agreement shall be in writing, and therein shall be stated the fixed rate to be paid for the costs of such survey with plans thereof in duplicate, and the mode of payment, whether in money or land, and also the time for such payment, if there is to be a money payment. Such document shall be interpreted in Maori and English, and shall be signed by the Native claimants or owners in the manner hereinafter provided in respect of the signing of deeds and instruments.

Agreement for surveys.

73. If the court shall see fit, it may, on the application of the Inspector of Surveys, order that a defined portion, to be ascertained and agreed upon between the Inspector and the Native owners of any land so surveyed as aforesaid, shall be transferred by the Native owners to Her Majesty in satisfaction of any such advances as aforesaid made for such owners either in respect of the same or any other land, and may include in the amount of money so to be satisfied all fees payable under this Act in respect of the same land or any other land owned by the same persons or tribe.

Land in payment for surveys.

74. No surveyor who may hold a license under any of the Acts hereby repealed shall henceforward undertake or execute the survey of any Native lands without the written sanction and authority in that behalf of the Inspector of Surveys in each case. And no person shall be entitled to recover in any Court of law the Colony any charge for the execution of the survey of any Native

Former licenses of surveyors nullified.

lands undertaken by him after the passing of this Act, unless he shall prove to the Court that such survey was so authorized by such Inspector as aforesaid.

THE LEGAL ESTATE, REGISTRATION, ETC.

(1.) *Crown Grants.*

Power to declare freeholds.

75. And whereas it is expedient to enable parties making *bona fide* purchases of land from the owners thereof according to Native custom, to hold the same as freehold: Be it enacted that upon the completion of the *bona fide* sale by the owners thereof under Memorial of ownership, of any land under the provisions hereinbefore contained, it shall and may be lawful for the Court, by order under the hand of a Judge thereof and the seal of the Court inscribed on the Court Rolls, and indorsed on the memorial of ownership, to declare that the land comprised in any memorial of ownership shall be held for the future in freehold tenure, and the same land shall be held as freehold accordingly, anything hereinbefore provided notwithstanding; and from the date of such order the Native title over the land comprised in such order shall be extinguished. And it shall be lawful for the Governor at any time thereafter to issue a Crown grant for any such land.

Issue of Crown grants.

Effect of grant.

76. Such Crown grants shall be as valid and effectual to all intents and purposes as grants by the Governor of waste or demesne lands of the Crown, and as if the land comprised therein had been ceded by the Native owners to Her Majesty.

Lands of the Crown.

77. Any order of the Court made in favour of Her Majesty shall effectually vest the land therein described in Her Majesty Her Heirs and Successors, as demesne lands of the Crown, freed absolutely discharged of and from all Native titles customs or usages.

Vesting of legal estate.

78. The legal estate in land included many Memorial of ownership shall in all cases vest one month after the expiration of the time hereinbefore allowed for an application for a rehearing, and not before.

Former grantees to be tenants in common.

79. In any grant heretofore made under any of the Acts hereby repealed, when there is more than one grantee, such grantees shall be and shall be deemed to have been tenants in common and not joint tenants; but the estate or interest of each of several such grantees shall not be deemed to equal or of an equal value, unless it has been so stated in their grant: Provided that nothing in this section contained shall be deemed to apply to any former grantees who may have already alienated the land comprised in any such grant.

(2.) *Commutation of Native Title.*

Crown grants may be issued to Natives in certain cases.

80. Anything in this Act contained notwithstanding, in any case of an original investigation of title of Natives to any Native land under this Act, or in any case of a partition under this Act,

whenever it shall be found that not more than ten individual Natives are the owners of any piece of land, or of any aggregate allotment under the partition and where such Natives are desirous of effecting a commutation of their ownership of such land under Native custom for an English title in fee-simple, it shall be lawful for such Natives, at any time after one month after the expiration of the time hereinbefore limited for an application for a rehearing, to make application to the Court for the extinguishment of the Native title over the land comprised in the memorial of ownership issued to them, and for a declaration that they may in future hold the same in freehold tenure; and thereupon the Court may at its discretion, and if it shall deem it fit, and if it be satisfied that all the owners of the land are desirous of effecting such commutation of title, and that they fully understand the effect thereof, and after the proportionate undivided share of each of the owners of the land has been ascertained and inscribed on the Court Rolls as well as on the Memorial of ownership, by order as hereinbefore mentioned, in the case of *bona fide* sales, declare that the same land shall be held by the Native owners thereof in freehold tenure, and the same land shall be held as freehold accordingly. The Memorial of ownership with the indorsements shall be forthwith transmitted by the Judge to the Governor, with a recommendation that a Crown grant for the land comprised in such Memorial may be issued; and it shall be lawful for the Governor at any time thereafter to issue a Crown grant for such land in favour of the Native owners named in the Memorial of ownership: Provided that in no case shall any Crown grant be issued in favour of more than ten collective individual Native owners; and provided also that any Crown grant so to be issued in favour of any Native owners as aforesaid shall be issued in favour of such Natives as tenants in common, and not as joint tenants, in undivided shares of defined proportions.

(3.) *Instruments of Disposition.*

81. Registration of instruments affecting any Native land, so long as such land shall be held under Memorial of ownership, shall be effected by enrolment in the Native Land Court of the district where the land the subject of the particular transaction is situate. No instrument affecting any such land shall be registered anywhere else. Registration.

82. For the purpose of registration and for other purposes of this Act, where any parcel of land shall be situate within more districts established under this Act than one, such land shall be deemed to be comprised within that district in which the greatest portion of the land is situate. Situation of land.

83. Every memorandum of transfer or of lease, or other instrument of disposition, affecting any land held under Memorial of ownership, shall be in duplicate, and shall, for description of the land intended to be dealt with, refer to the Memorial of ownership of the land, or shall give such other description as may be necessary to identify such land. Every such instrument shall have drawn thereon or annexed thereto a plan of the land comprised therein, founded on the approved map recorded in the Court. One original of such instrument shall be recorded in the Native Land Instruments to be in duplicate.

Court of the district by annexation to the Court Rolls referring to the land comprised in such instrument, and the other shall be delivered to the person entitled thereto. A note of the particulars of each of such instruments shall be inscribed on the folium of Court Rolls referring to the land, and a transcript of such note shall be indorsed on the Memorial of ownership.

Mortgages.

84. In every instrument of disposition by way of mortgage wherein any Native or Natives is or are parties to the transaction referred to in such instrument, a condition shall be expressly set forth to the effect that ‘the mortgagee shall not in any case be entitled to foreclose the equity of redemption, anything contained in “The Land Transfer Act, 1870,” or “The Land Transfer Act 1870 Amendment Act, 1871,” notwithstanding.’ And every instrument of disposition by way of mortgage, whether heretofore executed or that maybe executed hereafter, shall be read and construed as if the above condition had been inserted in such instrument. Every declaration expressed in any such instrument or indorsed thereon, negating or in any such modifying such condition as aforesaid, shall be null and void absolutely.

Signing of deeds and instruments.

85. No transfer lease or other instrument of disposition by any Natives to any person not of the Native race shall be valid unless properly explained to such Natives before the execution thereof by an Interpreter appointed under this Act, and unless a clear statement of the content thereof, written in Maori and certified by the signature of such Interpreter, shall be indorsed on the transfer lease or other instrument. It shall be the duty of such Interpreter to record in the Court of the district a certified copy of every such written statement. Every such instrument shall be signed by such Natives in the presence of and be attested by a Judge of the Court or Resident Magistrate, and at least one other male adult credible witness; or if any of such Natives cannot write, his mark shall be made thereto in the same presence. The Judge or Resident Magistrate in whose presence any such instrument shall be signed, shall satisfy himself that the Natives so signing such instrument fully understand its purport, and shall, when attesting the same, add thereto a memorandum to that effect.

Married women not to be examined.

86. It shall not be nor be deemed to have been necessary for any married woman of the Native race, on executing any deed required by law to be acknowledged before Commissioners, to make such acknowledgment; and such deed shall be and be deemed to have been as valid and effectual as if signed by a *feme sole*: Provided nevertheless that in every case the husband shall be a party to such deed; and that the signatures of both husband and wife shall be attested in the manner and form hereinabove mentioned.

Transactions void.

87. Except as herein mentioned every conveyance transfer gift contract or promise affecting Native land before it shall become vested in freehold tenure by order of the Court shall be absolutely void: Provided, always, that contracts by *parole* may be made affecting flax timber or actual productions growing on such land, extending over a period of not more than two years.

88. No judgment of any Court obtained against any owner of an undivided share of any land shall after the passing of this Act affect such share; and no judgment against any Native grantee under any of the repealed Acts shall be registered in the Deeds or Land Registry Office.

Judgments not to affect Native land.

(4.) *Past Transactions.*

89. If any grantee under any of the repealed Acts shall be desirous that subdivision shall be made of the land included in the grant or any part thereof for the purpose of having his share in severalty allotted to him, or for the purpose of effecting a partition among the owners thereof; and if no sale lease or disposition of the said land or any part thereof shall have been made before the passing of this Act, such person may apply to the Court to make such separation or subdivision, and the Court may proceed thereupon in the manner hereinbefore provided with respect to partition, and may order a Crown grant for a defined portion of the land to be issued to the applicant; and on the surrender of the original grant to the Crown, the Court may, in its discretion, order such subdivision as it shall deem just, and may order Crown grants to be issued according to the award in partition.

Former grantees may apply for subdivision or partition.

90. The surrender before mentioned may be legally and effectually made by the delivery up of the original grant, and by any writing which shall, in the judgment of the Court, sufficiently show the intention of the surrenderers, if signed by the persons named in the original grant, or their devisees, or other persons who at the time being shall be the representatives under the provisions hereinbefore contained of any of them who may have died intestate; and on the receipt by the Secretary of Crown Lands, or other proper officer, of such original grant and surrender as before mentioned, he shall cancel the grant and the record thereof, authenticating such cancelling with his signature, and stating the reason thereof.

Mode of surrender of Crown grant for cancellation.

91. The effect of such cancelling shall be the same as if the grant had been absolutely repealed by *scire facias*.

Effect of cancelling.

92. In any case where any one or more of several grantees under any of the repealed Acts has alienated or shall hereafter alienate his or their individual share or shares in the land granted, by sale or other disposition, and where the purchaser of such share or shares shall be desirous of ascertaining the share or shares so purchased by him, or where in any such case as last aforesaid any of the owners of the unalienated residue of the block of land, shall be desirous of ascertaining the share or shares of the owners of such residue, it shall be lawful for any such purchaser as aforesaid, or for any owner of any share of such residue, to apply to the court to have his or their respective shares ascertained and determined. Thereupon the Court shall proceed in any manner it shall deem best to ascertain and determine the share or shares acquired by any such purchaser or of the owners of any such residue. This provision shall not apply where the shares of the grantees are

Where lands in part alienated, undivided shares of former grantees may be ascertained.

fixed in the Crown grant. If in any such case as aforesaid the applicant applies that the land may be subdivided, and that the portion to which the applicant is entitled in respect of his share may be allotted, the Court may proceed in such manner as it may think fit to make such subdivision.

Allotment of shares, and certificate thereof.

93. After the determination of the shares and the land to be allotted in respect thereof, a certificate shall be given by the Court defining the share of the land to which the applicant is entitled, and the extent and boundaries of the piece of land to which he is entitled in respect of such share. Such certificate shall be transmitted by the Court to the Registry of Deeds, if the land is not under the Land Transfer Act, and such certificate shall be registered, and the Crown grant and all deeds relating to the land comprised therein shall, when registered, have the same effect as if the Crown grant had defined such share and such portions of land.

In all proceedings under this section of this Act the Court may order that such persons as it shall think necessary shall receive notice of the application. If the Court shall think that injustice may be done by the making of such certificate, the Court may refuse altogether or delay to make the same.

Court to be guided by equity and good conscience.

94. In all proceedings for ascertaining and determining any share or allotting any land under the two last foregoing sections, the Court shall be guided by equity and good conscience, and the decision of the Court shall be binding and conclusive on all parties: Provided, nevertheless, that if any grantee or any purchaser from any grantee shall feel himself aggrieved by the decision of the Court in the matter, it shall be lawful for him at any time within six months after such decision shall have been given, but not afterwards, to make application to the Court that such decision may be forwarded to the Supreme Court for its revision. And thereupon the Judge shall forthwith transmit the particulars of the case, with his decision therein, to the Supreme Court for revision accordingly, and the Supreme Court may thereupon, and having in view the equity of the case, confirm any such decision, or may alter amend or reverse the same.

Not to apply to transactions prior to 1869.

95. Nothing in the last three foregoing sections shall be deemed to apply to any transactions that shall have been completed previously to the passing of 'The Native Lands Act, 1869.'

Leases validated in certain cases.

96. All leases heretofore made by persons to whom certificates of title have been issued under the seventeenth section of 'The Native Land Acts, 1867,' shall be and be deemed to have been as valid and effectual to all intents and purposes as if the seventy-third section of the Constitution Act had been repealed by 'The Native Lands Act, 1865.'

Owners under former certificates of title may apply for partition.

97. After the passing of this Act, no land comprised in any title heretofore issued under the seventeenth section of 'The Native Lands Act, 1867,' shall until it shall have been subdivided and awarded, be alienated by sale gift mortgage lease or otherwise, except in accordance with the provisions of this Act: Provided that it shall be lawful for the persons found by the Court to be

interested, or for any of them, to apply to the Court to subdivide the land comprised in such certificate; and thereupon the Court shall have such and the same power as it has in cases of partition in the case of dissentients to any sale or lease, as hereinbefore provided; and a subdivision may be ordered notwithstanding that a lease or leases of such land or of some part thereof may have been heretofore made; but no award of partition in such case shall take effect during the subsistence of any lease of the land comprised in such award.

98. All lands comprised in any such certificate issued as last aforesaid, respecting which no conveyance lease mortgage or contract has been made, may be dealt with in the like manner as land held under Memorial of ownership under this Act: Provided that land comprised in any such certificate respecting which any dealings may have heretofore been had, may be dealt with in the like manner as land held under Memorial of ownership under this Act; but only in the case that in every dealing with such land the parties to such transactions shall satisfy the Court that they have the assent of all the persons whose names are indorsed on the certificate, as well as the assent of those named on the face of the certificate, to any such transaction.

Lands under former certificate, how to be dealt with.

99. In all cases where a declaration shall heretofore have been made before a Judge of the Native Land Court, or a Justice of the Peace, to the effect specified in the seventy-fourth section of 'The Native Lands Act, 1865,' or the thirty-second section of 'The Native Lands Act, 1867,' such declaration shall be and be deemed to have been a full and complete compliance with the provisions of the said seventy-fourth and thirty-second sections respectively, notwithstanding that such declaration shall not have been either in the form prescribed by the Imperial Statute 5 and 6 William the Fourth, c. 62, or by the Act of the General Assembly of New Zealand, intituled 'The Justices of the Peace Act, 1866,' and shall have and be deemed to have had the same legal effect and operation as declarations made pursuant to and in the form prescribed by the said Imperial Statute 5 and 6 William the Fourth, c 62, or by 'The Justices .of the Peace Act, 1866.'

Former declarations validated.

GENERAL POWERS OF THE COURT.

100. The Court may order that any evidence which may have been given in a case which shall have been previously before the Court and in which the parties are the same, or in the opinion of the Court are substantially the same, shall be received and used as evidence in the Case before the Court at the time being.

Evidence in previous case may be adopted.

101. If any action or any issue of fact or of Maori custom or usage relating to Native land shall be referred to the Court by an order of the Supreme Court, the Court shall forthwith hear and determine the same, and shall forward its decision thereon to the Registrar of the Supreme Court for the district from whence the reference shall have come.

References from Supreme Court under 'Native Rights Act, 1865.'

Effect of decision of Court.

102. Such decision shall be received by the Supreme Court as the authoritative determination of the question of fact or of Maori custom or usage so referred, and shall be dealt with in the same manner as and shall have the effect of a verdict of a jury in the Supreme Court.

Case may be sent to Supreme Court.

103. On the application of either of the parties, or on its own motion, the Court may order that any question of law arising in any matter judicially before it shall be sent to the Supreme Court for decision, and thereupon all proceedings in such matter shall be *ad interim* stopped in the Native Land Court, and a case stating the facts and the question of law arising shall be drawn up by the parties and settled and approved by the Native Land Court, and the Supreme Court shall determine the same; and the judgment or decision given by the Supreme Court shall be returned into the Native Land Court, and be accepted by it as authoritative and final on the question submitted.

Errors may be amended.

104. The Chief Judge and every Judge may at all times amend all defects and errors in any proceeding in the Court, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made; and for the purpose of this provision, everything done in or by the Court or the Judge shall be deemed to be a proceeding in the Court up to the issue of the Memorial of ownership.

MISCELLANEOUS PROVISIONS.

Notifications of Native title extinguished authoritative.

105. Any notification published in the *New Zealand Gazette* and purporting to be made by or by the authority of the Governor, and stating that the Native title over any land therein described was extinguished previously to a date therein specified, shall for all purposes be received as conclusive proof that the Native title over the land described in such notice was extinguished at some time previously to the date therein specified, and that such land on such date ceased to be Native land within the meaning of this Act; and in order to prove such notification and the due making and publication thereof, it shall be sufficient to produce a copy of the *New Zealand Gazette* purporting to be printed by the Government Printer, with such notification therein.

Land may be taken for roads.

106. From and out of any land which may have heretofore been or may be granted under the provisions of any of the Acts hereby repealed or of this Act, it shall be lawful for the Governor at any time thereafter to take and lay off for public purposes one or more line or lines of road or railway through the said lands, provided that the total quantity of land which may be taken for such line or lines of road shall not be more than after the rate of five acres in every one hundred acres: Provided that it shall be lawful for the Governor at any time, by indorsement on the Crown grant or on a subsequent instrument of disposition, or by separate deed, to release any such right, and to discharge the land comprised therein from the said liability: Provided also that nothing herein contained shall authorize the taking of any lands which shall be occupied by any pahs, Native villages or cultivations, or by any buildings gardens orchards plantations burial or

ornamental grounds, except subject to the provisions of 'The Land Clauses Consolidation Act, 1863:' Provided always that this power shall cease and determine at the expiration of ten years from the date of the Crown grant.

107. And whereas arrangements have at various times heretofore been made by officers duly authorized to obtain the cession of Native land to Her Majesty with Natives owning or pretending to own Native land, and in some cases money has been paid on account of such arrangements, but no perfected agreements have been made nor possession required by Her Majesty of such lands: Be it enacted that it shall be lawful for the Court, either in the claim of any Native claiming to be interested in any such land or in the claim of the Governor, to investigate the title to and the interests in such land in the manner prescribed in this Act, and the Court shall make such orders, either for the completion of the agreement upon such terms and conditions as the Court shall think fit, or for the apportionment of the land between the parties interested therein in such manner as the Court shall think equitable, or for the repayment by the Natives who shall be found to have received such money as aforesaid of the same or any part thereof to Her Majesty, or it may by such order declare that such land or any part thereof has been duly ceded to Her Majesty, and all such orders shall be good and effectual; and any order declaring that the land or any part thereof has been duly ceded to Her Majesty shall vest the same in Her Majesty and Her Successors absolutely as demesne lands of the Crown, freed and discharged from all Native titles customs or usages.

Inchoate agreements by Land Purchase Commissioners.

108. And whereas agreements for the purchase and sale of timber flax and other natural productions growing upon Native land have at various times before the passing of 'The Native Lands Act, 1865,' been entered into by Europeans and Natives, and at the time such agreements were made the parties thereto acted in good faith, and such agreements have since that time been carried out in good faith by both parties, but the law at the time of making such agreements was such that the said agreements could not be legally made, or in other cases have been invalidated by 'The Native Lands Act, 1865:' And whereas it is desirable to maintain and give effect to such agreements as aforesaid as have been made and acted upon in good faith, and are themselves fair and reasonable in their character: Be it therefore enacted as follows:—It shall be lawful for any of the parties to such contracts and agreements as aforesaid, or their legal representative, when the title to land the subject of any such agreement shall come before the Court for investigation, to make application to the Court stating the nature extent and circumstances of the agreement alleged to exist in respect of the said land; and it shall be lawful for the Court, upon such application, to hear and investigate the truth of the alleged facts, and if the Court shall see fit, and if the circumstances and justice of the case shall appear to demand the same, to make an order that the Memorial of ownership to be issued shall be subject to such agreements or such part thereof as the Court may think just, or to impose such restrictions on the alienability of the land comprised in such Memorial as shall give protection to the rights of the applicant: Provided nevertheless that

Ancient agreements invalid but equitable may be recognized.

no right reserved or conferred under this clause shall extend to a longer period than twenty-five years from the date of the order of Court.

Old land claims may be investigated.

109. And whereas there still remain outstanding in different parts of the Colony, but more especially in the northern parts thereof in and about the districts of Hokianga and the Bay of Islands, sundry claims to land that have arisen in respect of dealings between Europeans and the Natives which have not as yet been satisfactorily determined and finally settled:

And whereas the protracted delay in the adjustment of these claims to land has in a principal measure been caused by the difficulty of obtaining proper surveys of the land comprised in such claims, owing to the claimants themselves not having the means to defray the cost of such surveys: And whereas it is highly expedient that these land claims should be settled without any further delay, in order that the Native land comprised therein should be entirely released from any conflicting titles thereto:

And whereas the Native Land Court, as constituted under this Act, affords the most convenient practical machinery for effectuating this purpose:

Be it therefore further enacted, that upon a request being made in that behalf by the Land Claims Commissioner for the time being under the Land Claims Settlement Acts, 1856 and 1858, to any Judge of the Court in any district established under this Act, wherein any outstanding land claims as aforesaid may still be subsisting, such Judge shall proceed as soon as conveniently may be in and towards the investigation and settlement of such claim, notwithstanding such claimant may be any person other than a Native.

According to provisions of this Act.

110. In such inquiry, the Judge shall be guided throughout by the provisions herein contained *mutatis mutandis* in respect of the investigation of titles, and all the provisions hereof respecting the making of surveys by the Government, and the taking of land in payment for such surveys shall *mutatis mutandis* apply to the surveys of the land in such claims, and the Judge is hereby authorized to direct such surveys to be made: Provided that to the cost of the surveys for which land out of such claim may be taken in payment, there shall be added the costs of the investigation into such claim by the Court.

Report to Land Claims Commissioner.

111. After the inquiry shall have been completed, no Memorial of ownership of the land found to belong to such claimant shall be inscribed on the Court Rolls, but the Judge shall forthwith transmit to the Land Claims Commissioner a report of the case with the judgment of the Court thereon, and proceedings thereafter shall be continued with respect to such claim in accordance with the provisions of the Land Claims Settlement Acts: Provided always that no Crown grant under such last-mentioned Acts shall be issued to any claimant unless and until all the costs of survey maps and investigation of such claim shall have been first paid or satisfied.

FEES.

112. The Governor may, by regulations to be published in the *New Zealand Gazette* from time to time, fix and determine and alter the fees to be paid and payable in respect of any application or other proceeding under this Act, and the mode of payment of the same. And it shall be in the discretion of the Court to refuse to consider any matter, or to stay the progress of any proceeding, if and so long as any fee due and payable in respect thereof shall be unpaid. All fees payable under this Act shall be paid into the Colonial Treasury. Governor to fix fees.

SCHEDULE

FORM I.

MEMORIAL OF OWNERSHIP.

The Native Land Court of the District of [Wellington], New Zealand } In the matter of a parcel of land at , in the District of , in the Province of , called .
 } At a sitting of the Native Land Court begun and holden at , on the day of , 18 , and concluded on the day of , 18 , it was ascertained to the satisfaction of the Court, [or, it was arranged voluntarily between the parties that the persons hereinafter named should henceforth be regarded as the owners of the several pieces of land set over against their names,] and the Court doth hereby adjudge that the Natives whose names are arranged according to their hapus and tribes in the table hereinafter contained are the owners according to Native custom of all that piece of land at , in the district of , in the Province of , known by the name of , containing by admeasurement , be the same more or less, bounded on the as the same is delineated on the plan drawn hereon or hereunto annexed, together with all the rights and appurtenances thereunto belonging. *And it is hereby also adjudged that the proportionate shares of the said owners in the said piece of, land are as set forth in the said table. Secs 28, 47.

And it is hereby ordered that the above-named owners under this Memorial may not sell or make any other disposition of the said land except that they may lease the said land for any term not exceeding twenty-one years, in possession and not in reversion, without fine premium or foregift, and without agreement or covenant for renewal, or for purchase at a future time. Secs 48, 40.

NAME OF			
Native Owners.	Hapus.	Tribes.	*Proportionate Shares.

Given under the hand of , Judge of the said Court, and sealed with the seal thereof,
 this day of , 18 .
 (LS) AB, Judge.

*Omit, where the inquiry is not extended to ascertain the proportionate shares.

APPENDIX

CERTIFICATE OF AUTHENTICATION.

Sec 51.

Witness my hand and the seal of the Court this _____ day of _____
(LS) AB, or CD, or EF, Judge.

MEMORANDUM OF TRANSFER.

Sections 59, 85.

AB,	EF,
CD,	GH

FORM III.

MEMORANDUM OF LEASE.

Sections 62, 85.

832

THE NATIVE LAND ACT 1873

APPII

I XY, of [*Here insert description*], do hereby accept this lease of the above described lands, to be held by me as tenant, and subject to the conditions, restrictions, and covenants above set forth.

Dated this day of , one thousand eight hundred and .

AB,	EF,	} Lessors.
CD,	GH,	
	XY,	Lessee.

Signed by the above-named AB, CD, EF, and GH, as lessors, after the contents had been explained to them by an Interpreter of the Court, and they appearing clearly to understand the meaning of the same; and by the above-named XY, as lessee, this day of , one thousand eight hundred and , in the presence of
JP [Judge of Court *or* Resident Magistrate.]
QR [*Any adult male credible witness.*]

APPENDIX III

A LEGACY OF PROTEST

Following the survey of Patutahi, Turanga Maori began to protest at the size of the land they had only now learnt, the claimants say, that the Crown was to retain. The evidence provided in the Native Land Court, to select committee hearings on petitions, and to commissions of inquiry, provides us with further insight into the deed of cession and the 1869 agreement.

THE PAPATU CASE

In 1877, Hoani Ruru brought a case in the Native Land Court claiming that the survey of Patutahi infringed on the Papatu block. Papatu had been surveyed by Bousfield in 1871 and consisted of 6500 acres, approximately 3000 of which had been included in the Government survey of Patutahi.¹

Evidence was presented to the Native Land Court, much of it discussed above (see ch8), which referred to the understanding of Turanga Maori that the 1869 agreement had been for three blocks of 5000 acres each.

Hoani Ruru told the court how he had leased Papatu to Eruera Harete prior to giving the boundaries to the ceded block to Atkinson and Graham, and that he was unlikely to have compromised his leasing agreement by making it part of the retained lands of the Crown.² According to claimant historian Bruce Stirling, Turanga Maori made serious efforts not to impinge on their leases when selecting the lands that would be retained by the Crown.³ Hoani Ruru also told the court that they only discovered that the Crown survey of Patutahi overlapped with Papatu, in the area of the Ara Mahutahuia and Kokakonui creeks, in 1874.

Judge Rogan ultimately concluded that the claimants had not proved their case.⁴ In his decision, Rogan noted that, for the first time in the sittings of the court in Poverty Bay, a difference of opinion had arisen between the judge and the assessor. Ordinarily, such a matter would be referred to the chief judge to decide the matter or direct a rehearing. But the minute book recorded that although Rogan was unable to give judgment under such circumstances:

1. Document A23, p 293

2. Ibid, p 295

3. Ibid

4. Document A23, p 299; doc A10, pp 471–472

he would state that in his own opinion, based on the evidence given by the several witnesses, more particularly by Mr Bousfield, who was acting as Government Surveyor at the time of the cession, and had made a sketch map of the district at that time for the information of the Court of Commission, the Natives had failed to prove their case.⁵

Rogan informed Locke by telegram that the decision was in favour of the Government. Locke advised the Native Department accordingly. However, Under-Secretary Clarke identified the discrepancy between Rogan's telegram to Locke and the actual decision. Rogan denied there was a discrepancy: the claimants having not proved their case, no decision could be reached, and therefore the Government had won.⁶

In 1878, Hape Kiniha, Hoani Ruru, Wi Pere, and other Turanga Maori gave evidence before the native affairs select committee in support of further petitions regarding Patutahi and Papatu.⁷ Locke, called as a witness, relied greatly upon the 1869 sketch map. This sketch map, Stirling noted, was 'prepared merely to assist the Poverty Bay Commission and by no means a final survey of named boundaries agreed at that time'.⁸

TE ARAI MATAWAI

As a result of the confiscation, some Rongowhakaata had, by 1873, become almost landless. An area beside the Arai river, called Te Arai Matawai, was returned to Rongowhakaata. While ostensibly to ensure that the iwi did not remain landless, it is clear that Rongowhakaata sought the return of the land on the basis of it having been wrongfully confiscated.⁹

KAUANGAROA

In 1878, Eru Takihi and others filed a petition claiming that the Kauangaroa block had been wrongly included in the Patutahi confiscation. The petitioners stated that they had remained loyal, that they had not signed the deed of cession, and that they had never agreed to part with the Kauangaroa block.¹⁰ Keita Wyllie told the committee that the petitioners were correct that this land was not part of the land to be retained by the Crown, but 'Captain Porter went out in a secret manner with his surveyors and had the land surveyed'.¹¹

5. Document A23, p299

6. Document A10, pp 471–472; doc A23, pp 299–300

7. Document A23, pp 304–306

8. Ibid, p304

9. Ibid, p284

10. Ibid, p310

11. Ibid

The committee rejected this petition, and a similar one filed in 1880, on the basis that the land had been given up to the Crown in 1869 and the parties had understood this at the time.¹²

From 1878 to 1879, the native affairs select committee heard the Kauangaroa petitions. Seemingly in contrast to all the other evidence presented by Maori in this and other select committees and Native Land Court hearings, Keita Wyllie's evidence referred not to an agreement for three blocks of 5000 acres to be retained by the Crown, but that the agreement was for 50,000 acres.¹³ The committee does not appear to have pursued this point, which, considering its contrast to the otherwise consistent testimony on this agreement, is notable.¹⁴ We further note Stirling's contention that the 50,000 acres of Patutahi that Keita Wyllie appears to have been referring to could not have come from the Government's original interpretation of the boundaries, since this land had only come to 30,000 acres.¹⁵

In 1879, the native affairs select committee made an inquiry into a petition that claimed that excess acreage had been taken at Te Muhunga. Wi Pere again gave evidence before the committee, and repeated his understanding that the agreement had been for three separate blocks of 5000 acres to be retained by the Crown, but that the Government had joined the Arai and Patutahi blocks and retained more than 50,000 acres.¹⁶ The committee rejected this petition. Locke himself placed great store in the 1869 sketch map, telling the committee that the land taken was 'as near as possible' to the boundaries given on it.¹⁷

The petitions continued. In 1893, for example, Ngapera Kokino submitted a petition claiming that 'all the lands of her forefathers had been taken from them' in the Patutahi confiscation, despite the fact that they had remained 'loyal'.¹⁸

THE CLARKE COMMISSION, 1882

In August 1882, Henry Tacy Clarke was appointed to head a royal commission to investigate a number of land claims and petitions from Turanga. One of the petitions considered was related to a claim to the Tapatoho (or Tapatohotoho) portion of Patutahi.¹⁹ In the late 1860s, Tapatoho had been given to the Government to build barracks, but no barracks were ever built. The petitioners sought the return of the land.²⁰ Furthermore as we have noted, one of the leading petitioners, Eruera Harete, had not signed the deed of cession and believed he should not be bound by it.

12. Ibid

13. Ibid. Stirling has queried Keita Wyllie's statement, noting that it was inconsistent with her claim that Porter had acquired extra land in Patutahi only by stealth in his carrying out of the survey.

14. Ibid, p311

15. Ibid, p310

16. Ibid, p311

17. Ibid

18. AJHR, 1893, 1-3, p2 (doc A23, p320)

19. Document A23, p314; doc C1, p33 (Henry Harris, Rutene Te Eke, Mihi Pahura, Hana Te Hemohaere, and Ihaia Tamaikahakina)

20. Document A23, p314; doc C1, p33; doc A10, pp489-490

Locke, who had proved to be a central figure throughout, gave evidence relating to the 1869 agreement. We note that Locke's denial (that there had ever been an intention to form a military settlement in this area) 'seems to fly in the face of the oft-stated government goal in the period of 1866–1869'.²¹ Questioned by Eruera Harete, Locke conceded that the acreage for Patutahi in the minutes of the Poverty Bay Commission was not written at the same time as the rest of the minutes:

The acreage in the minutes of the Commission held in 1869 do not appear to have been written at the same time as that other part of the minutes; 57,000 acres appear to have been filled in by some one else; but I would remark that the acreage was shown on the sketch-plan at the time it was produced before the Commission. The sketch-plan referred to now shows fifty thousand and some odd acres, and there is also the mark of an erasure having been made. I am not prepared to say when the erasure was made further than it now corresponds with Mr Bousfield's later survey.²²

Clarke declined to recommend this petition for favourable consideration. Clarke considered that the tribes as a whole had ceded the land and made the subsequent agreement, and that the individual members were bound by this collective decision. Clarke asserted that it was consistent with Maori custom for individuals to be bound by such a tribal decision.²³ Clarke also declined to make a recommendation on an 1877 petition from Ema Katipa, who likewise argued that she had not signed the deed of cession, nor participated in the proceedings of the Poverty Bay Commission. Clarke maintained his position that the cession was made at the tribal level, with the collective decision and action overriding individual rights.²⁴

Clarke did, however, criticise the tampering with such an important document, saying:

one of the maps handed in in evidence in this case – the map produced before the Commission of 1869, and bearing the signature of one of the Commissioners – has been altered by erasing partially the figures indicating the acreage, and other figures substituted so as to accord with the actual survey afterwards made. I think this is a very wrong proceeding, by whomsoever authorized. No document or instrument of such importance – the record of judicial proceedings – should be tampered with in any way. In this case, fortunately, the original figures are discernible, and it does not affect the subject of this report.²⁵

The commission also inquired into seven separate petitions, including one from Wi Pere. Pere's petition covered three grounds: the first related to the claim that excess acreage had been taken in Te Muhunga; the second was in regard to a portion of Te Muhunga named Waitawaki, which Pere wished to have returned to him personally; and the third sought land for Te Whanau a Kai, who

21. Document A23, p314; doc C1, p33; doc A10, pp489–490

22. Document A23, p315; doc A10, pp490–491

23. Document A23, p316; doc C1, p34

24. Document A23, p316; doc C1, p40

25. Document A23, p315; doc C1, p35; doc A10, p491

had been rendered virtually landless by the combination of confiscation and the joint tenancy tenure of the land returned by the Poverty Bay Commission.²⁶ Pere told the commissioner of the effect of the cession of Patutahi on Te Whanau a Kai: 'No portion of Patutahi', he said, 'was returned to the loyal Natives'.²⁷ Pere did not repudiate the cession itself. Rather he appealed to the Government's sense of compassion: owing to the confiscation of Patutahi, the hapu no longer owned any flat land in Turanga. Pere agreed to give up claims to Patutahi if land could be made available to Te Whanau a Kai.²⁸

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)'.²⁹ Pere submitted a list of 113 named individuals to be placed on the title of the block.³⁰

In his evidence before the Clarke commission, Pere repeated his understanding that the agreement between Turanga Maori and the Crown had been limited to three blocks of 5000 acres each, and any excess was to be returned.³¹ Pere told the commission that:

The government at first asked us to hand over the land under the deed of cession, to be protected by them. Afterwards, they stated that the land had been ceded by us absolutely to the Queen . . . I admit that the natives consented to cede 15,000 acres to the government, which were at Patutahi, Te Muhunga, and Te Arai . . . 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.³²

26. Document A23, p317; doc C1, p37; doc A10, p493. We have discussed Pere's issues in our discussion of the claim before this Tribunal by Te Whanau a Wi Pere – see chapter 6.

27. AJHR, 1884, sess 2, G-4, pp13–14 (doc C2(b)). Pere also referred to the detrimental effect of the joint-tenancy awards, particularly the way in which individuals had sold their interests, apparently without approval from chiefs like himself. In this, Pere appears to have been referring to the alienation of land in neighbouring blocks, such as Makauri and Repongaere.

28. Document A10, p499

29. AJHR, 1884, sess 2, G-4, p12 (doc C2(b))

30. Ibid, p16. We note that there are two lists, one which follows Wi Pere's evidence and another which is signed by HT Clarke (p13). Aside from some differences in spelling and the order of names, the two lists are identical. We note that neither list is 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 Brian Gilling: see transcript 4.4, 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 Pere as holding rights in the ceded Te Muhunga block: see AJHR, 1884, sess 2, G-4, p13 (doc C2(b)). Both spellings – 'Ngatikohuru' and 'Ngatikahuru' – are used.

It appears, therefore, that the individuals listed constituted some kind of community selected by Pere from various Te Aitanga a Mahaki hapu that held rights in close proximity to one another. The community was possibly those who were living on Pere's land in the Makauri block, although this too is uncertain. Some may have been people who 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.

31. Document A23, p317; doc C1, p36

32. Document A23, p317; doc A10, p496

Pere acknowledged to the commission that he had made no protest at the Poverty Bay Commission in 1869, believing that only 15,000 acres would be taken.

Pere based his personal claim to Waitawaki on the basis of a gift from the owners, dated 3 August 1841. Pere's father, Thomas Halbert, had asked for two pieces of land for the benefit of his son. Pouparae and Waitawaki were the pieces given. Halbert sold Waitawaki to Bishop Williams. Williams had initially agreed to return the land to Pere, but changed his mind following the events at Waerenga a Hika.³³ On the basis of Atkinson's undertaking personally to later return Waitawaki to Pere, that block was included in the Te Muhunga block to be retained by the Crown. Locke confirmed that McLean had promised Pere 'the Orchard' (an 11-acre portion of Waitawaki), and had also instructed him to ascertain whether there was sufficient land available in the bush reserve of Te Muhunga to provide Pere with a further 25 acres.³⁴ Clark recommended that Pere be granted 91 acres, consisting of 'the Orchard', with the remainder to be made up of bush reserve.³⁵

On the basis of charity or compassion, rather than as of right, Clarke recommended that 500 acres of reserves of 'fair average quality' be provided for Te Whanau a Kai, saying that had Wi Pere:

demanded consideration as a matter of right, or with a disposition to repudiate the arrangement made in 1869, and confirmed before the commissioners on the 30th June in the same year, 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 his favour.³⁶

Pere also made the following statement, which Crown witness Brent Edwards believed related to the additions to the Te Arai block, but which Whanau a Kai witness Bryan Gilling believed related to the Kaimoe–Patutahi block:

When the land was handed over in 1869, Rongowhakaata and Taitangamahaki were the tribes who made the arrangement. It was a tribal matter; every individual consented to it. The only person who objected was Tamihana Ruatapu; it was about Patutahi. He did not object in Court; no one did. In my own case, when I found that all the chiefs consented, I was obliged to consent also.³⁷

PETITIONS FOLLOWING THE RECOMMENDATIONS OF THE CLARKE COMMISSION

In 1903, Turanga Maori lodged three petitions concerning the excess land taken in the Patutahi block. Again, the Crown took no action on these petitions. As Stirling noted:

33. Document A10, pp 494–495. See also our discussion of settler land claims in chapter 7.

34. Document A10, p 495

35. Ibid, p 498; doc F18 app B, p 210

36. Document A23, p 318; doc C1, p 37

37. Document F18, p 119; doc C1, p 40

The Native Department had been disestablished and such was the state of the institutional memory of the 1860s that officials confused the Atkinson referred to by the petitioners with his more famous brother, the former premier, Sir Harry Atkinson. The inquiry thus did nothing to address the petitioner's grievances.³⁸

In 1914, Winiata Moeau and 47 other Rongowhakaata petitioned the Government to compensate them for the loss of their land in Patutahi. The petition stated that only three blocks of 5000 acres each were to have been taken 'for the part your petitioners and their tribe, the Rongowhakaata, took in the Hauhau troubles'.³⁹ The confiscation of lands in Patutahi (presumably Kaimoe) was attributed to 'the crime of a different tribe namely the Whanau-a-Kai'.⁴⁰ For their part, the petitioners believed that 'there was no understanding that the Rongowhakaata should also lose their interests in the Patutahi block'.⁴¹

Following the Clarke commission, Whanau a Kai, like Rongowhakaata, again petitioned the Government to have their lands restored to them. The Government received a number of petitions in 1914. Among them was one filed by Wi Pere and 39 others regarding the land taken in excess of the 15,000 acres that had been agreed to be given up.⁴² In it, the Patutahi block was described as being given up 'in payment for those members of Te Whanauakai, who had joined the Hauhaus'.⁴³ However, the petitions failed to achieve any redress.

THE JONES COMMISSION, 1920

In 1920, a number of Turanga petitions (including the 1914 petitions) were referred to a native land claims commission, along with numerous other petitions from around New Zealand. Robert Jones, the chief judge of the Native Land Court and under-secretary of the Native Department, headed the 1920 commission. The Jones commission sat for three days in Turanga and for one day in Wellington to hear evidence on the Turanga petitions.

Both Stirling and Gilling refer to the terms of reference given to the commission, which prevented it from examining the wider issues of the confiscation process. Instead, the commission was limited to inquiring into the claimed discrepancies between the acreage ceded and the

38. Document A23, p320

39. Petition 450/14, Le1/1914/9 (RDB, p1149); see also AJHR, 1916, I-3, p6 (doc A23, p321)

40. Petition 450/14, Le1/1914/9 (RDB, p1149)

41. Ibid. There appears to have been some confusion between Patutahi as the larger, 57,000-acre block, and the more specific area described as Patutahi (Kaimoe), purportedly given up by Te Whanau a Kai. Presumably, the Rongowhakaata petitioners were objecting to the loss of the balance of the land (which was neither the Kaimoe nor the Te Arai portions of the block), which they felt was a loss principally suffered by Rongowhakaata. Alternatively, these individuals may have been Rongowhakaata who were 'loyal' but who also had interests in the Kaimoe area. They did not receive compensation for their loss. There is insufficient evidence to determine the issue either way.

42. Petition 616/14 (RDB, p25,193)

43. Ibid

area actually retained by the Crown.⁴⁴ Captain Wiremu Tutepuaki Pitt represented Te Aitanga a Mahaki, Rongowhakaata, and Ngai Tamanuhiri, while Te Whanau a Kai were represented by a local solicitor, Mr Dunlop.⁴⁵

Pitt repeated what had almost become a mantra to petitioning Turanga Maori; the agreement had been for the Crown to retain three blocks of 5000 acres each.⁴⁶ This arrangement had unravelled when the survey of Patutahi and Te Arai merged those blocks into one large block. Pitt referred to the altered Poverty Bay Commission minutes, and described those minutes as ‘rather vague, and appear to have been altered and subsequent notes inserted’.⁴⁷ He also referred to the 1869 sketch map plan, pointing out its absence of detail with regard to the Te Muhunga, Patutahi, and Te Arai blocks, and noting that it too had been altered with the acreage surveyed in 1873 having been inserted, rather than the acreage given in 1869 when the map was made.⁴⁸ Pitt acknowledged that Turanga Maori could have been more vigilant in protecting their rights, but had ‘relied on the integrity of the parties they were dealing with’. Since then they had been persistent in their protest and requests for ‘rectification for what was done either wrongfully or under misapprehension’.⁴⁹

Pitt explained that it was understood that the 15,000 acres taken by the Crown was to have been divided equally amongst the Crown, Ngati Porou, and Ngati Kahungunu. However, a much larger area had been taken ‘and given to the highest bidder’.⁵⁰ Pitt calculated that, after discounting the 5137 acres returned to Turanga Maori and the 15,000 acres that the Government was entitled to, the Government had retained an excess of 38,809 acres out of the 56,945 acres that it had taken.⁵¹

The commission identified two examples of the ‘quite evident’ confusion on the part of the Poverty Bay Commission regarding the exact size of the area to be retained by the Crown. The first example was the description of Patutahi as land ‘of very good quality’. While the commission accepted this as a description of Patutahi proper, it ‘could in no way apply to the greater proportion of the 57,000 acres’.⁵²

The second example of confusion on the part of the Poverty Bay Commission was their misunderstanding that Te Arai adjoined Patutahi on the western side. The commission had mistakenly considered that Te Arai and Tapatoho were same block.⁵³ It noted that, if the ‘restricted area, 735 acres refers to Tapatohotoho, as assumed, then it nowhere adjoins Patutahi proper, and only adjoins the remaining 50,000 acres on the east’.⁵⁴

44. Document A23, p323; doc C1, p46

45. Document A10, p510; doc A23, p324

46. Document C1, p48; doc A10, p510

47. Document A23, p324; doc A10, p511

48. Document A23, p328; doc A10, p518

49. Document A23, p325; doc C1, p49; doc A10, p511

50. Document A23, p324; doc A10, p511

51. Document A23, pp324–325

52. Document A10, p518; doc A23, pp328–329

53. Document A23, p329

54. Document A10, p519; doc A23, p329

The commission also referred to Richmond's comments in Parliament in August 1869 that he had envisaged 'something like 20,000 acres', and no more than was necessary to fulfil the Government's promises to the defence force.⁵⁵ In trying to explain why the Crown had retained almost three times this amount, the commission concluded:

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. According to the Poverty Bay Titles Act, 1874, there was returned to Rongowhakaata 4,000 acres, and to Te Aitanga a Mahaki 185,000 acres, out of the lands ceded to the Governor on the 18th December 1868. Such a proceeding would be in direct conflict to Mr Richmond's assurance to His Excellency the Governor and his explicit instructions to Mr Atkinson.⁵⁶

The commission concluded that the Crown had retained more land than it should have.⁵⁷ The commission noted the absence of a written record and lamented that the Government had not formally confirmed the agreement, since this 'would at least have given an opportunity to have the matter properly investigated at the time, and, if an error had been made, to have corrected it'.⁵⁸

The commission noted that Turanga Maori had been consistent in their view that the agreement had been for 15,000 acres, but found that a larger area was to be retained by the Crown:

There is some evidence that Patutahi proper was only to be 5,000 acres. Patutahi (or Kaimoe) had originally contained 3,546 acres, and part of Rakaukaka was added, making it up to over 4,500 acres. It was said the balance was made up at Tapatohotoho. The person who owned Rakaukaka afterwards claimed and was awarded compensation for the part so taken. There must have been some special reason for increasing the flat land in that way. We can find no definite evidence that Te Arai, or the inland block was to be so confined. To make it only 5,000 acres and join it to Patutahi, as the minutes, would make a very awkward-shaped piece of land, and would by no means cover the boundaries which we understand to be pointed out by Wi Pere. We are therefore inclined to think that something larger than 15,000 acres in all was to be awarded, though the Natives may well have supposed that the boundaries as pointed out would not cover more than that.⁵⁹

55. Document A10, p519; doc A23, p329

56. Document A10, p520; doc A23, p330. Te Aitanga a Mahaki received 400,000 acres, not 185,000, and Rongowhakaata received 5000 acres, not 4000, 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 instead processed through the Native Land Court and awarded to various individuals: doc A23, p330; doc A10, p520.

57. Document A10, p521; doc A23, p331

58. Document A10, p521

59. Ibid, p522

On the basis of Richmond's reference to 20,000 acres for the Government and Ngati Porou, plus an equal share for Ngati Kahungunu, the commission concluded that the agreement had actually been for some 30,000 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, who it had agreed should share equally with the Crown, not more than 10,000 acres each.⁶⁰

The commission stated that 'We also think that, while there is much to be said in favour of the Natives' claim that only 15,000 acres was intended to be reserved, there is no evidence sufficiently conclusive for us to find it to be so'.⁶¹

The commission's findings ultimately resulted in compensation being provided for the land taken in excess of 31,000 acres. The negotiations and distribution of this subsequent compensation agreement led to conflict between Rongowhakaata and Te Whanau a Kai, which this Tribunal heard about in some length (see ch 6).

60. Document c1, p57

61. Ibid

GLOSSARY

<i>hapu</i>	kin groups claiming common descent
<i>kaimoana</i>	food from the sea
<i>kainga</i>	villages
<i>kaitiaki</i>	trustee or guardian
<i>kaitiakitanga</i>	trustee or guardian of the people
<i>karakia</i>	prayer
<i>kaumatua</i>	elder
<i>kawanatanga</i>	government, government forces
<i>kingitanga</i>	kingship movement
<i>kohuru</i>	murder
<i>kokiri</i>	war party
<i>kokopu</i>	native trout
<i>komiti</i>	committee
<i>kotahitanga</i>	accord or unity
<i>kowhaiwhai</i>	scroll painting on rafters
<i>kuia</i>	elderly lady
<i>koura</i>	freshwater crayfish
<i>mahinga kai</i>	vegetable garden, cultivation
<i>manu</i>	bird
<i>matakite</i>	visionary
<i>momokino</i>	base born
<i>niu</i>	ceremonial pole
<i>ope</i>	war party
<i>rahui</i>	embargo
<i>rangatira</i>	chiefs
<i>raupatu</i>	confiscation
<i>rohe</i>	territory
<i>runanga</i>	assembly
<i>tangihanga</i>	mourning
<i>tapenakara</i>	tabernacle
<i>tapu</i>	sacred
<i>taonga katoa</i>	all things treasured
<i>taurekareka</i>	slavery
<i>tikanga</i>	custom
<i>tukutuku</i>	ornamental panels
<i>tuna</i>	eel
<i>waiata</i>	song or psalm
<i>whakapapa</i>	network of possible relationships
<i>whakarau</i>	the followers of Te Kooti
<i>whakatauki</i>	proverb
<i>whanau</i>	multigenerational extended family units
<i>whanaunga</i>	company of travellers
<i>whenua</i>	the land
<i>wharehuni</i>	meeting house

