

TE TAU IHU
O TE WAKA A MAUI

TE TAU IHU
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PRELIMINARY REPORT ON
TE TAU IHU CUSTOMARY RIGHTS IN THE
STATUTORY NGAI TAHU TAKIWA

WAI 785

WAITANGI TRIBUNAL REPORT 2007



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

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The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON



The Waitangi Tribunal
141 The Terrace
WELLINGTON

23 August 2007

E te Minita Māori

Tēnā rā koe e te rangatira e noho mai na i runga i tēnā taumata whakahirahira e whakatutuki nei i ngā kaupapa me ngā moemoeā a te Iwi Māori.

Tēnei anō hoki te mihi me te tangi atu ki ngā mate huhua puta noa i ngā whāruarua o te motu. Ara te hunga kua huri tuarā ai ki o rātou maunga ki o rātou awa kua hipa atu ki tua o te ārai. No reira ngā mate haere atu ra koutou, haere ki te au te rēna, te urunga te taka, te moenga te whakaarahia.

Ka hoki mai ki a tātou o te ao tangata e takatū nei i roto i te ao hurihuri. Tēnā tātou katoa.

Ko ngā tuhituhinga e whai ake nei te tuarua o ngā ripoata ki a koe mō ngā tikanga tūturu a tēnā iwi a tēnā iwi i roto i te rohe whānui o te Tau Ihu o te Waka a Maui. Ko te tino kaupapa o tēnei ripoata he āta titiro ki ngā tikanga tūturu a tēnā iwi a tēnā iwi i roto i te rohe o Ngāi Tahu i whakamanahia i raro i te ture kawana. Ko ngā iwi e kōrerotia nei e mātou ko Ngāti Apa, ko Rāngitane, ko Ngāti Toa Rangatira, ko Ngāti Rārua, ko Ngāti Tama me Te Ātiawa.

E tautoko ana a mātou whakataunga i ngā tono a ēnei iwi me te tūmanako hoki a te wā ka whakataungia ngā take i waenganui i ngā iwi o te Tau Ihu o te Waka a Maui me te Karauna i runga anō i te wairua me ngā whanonga pono o te Tiriti o Waitangi.

This is our second preliminary report on the customary rights of Te Tau Ihu iwi. We have prepared these preliminary reports with the aim of assisting claimants and the Crown with their negotiations by providing early findings on customary rights and their treatment by the Crown. Whereas our first report discussed rights within the Te Tau Ihu district, this report concerns the customary rights of Te Tau Ihu iwi within the statutorily defined Ngāi Tahu takiwā. Our findings on Treaty breach and the recommendations which follow are final as far as they relate to Te Tau Ihu iwi rights within the Ngāi Tahu statutory takiwā.

We are satisfied that the six Te Tau Ihu iwi that advanced claims with respect to the takiwā – Ngāti Apa, Rāngitane, Ngāti Toa Rangatira, Ngāti Rārua, Ngāti Tama, and Te Ātiawa – had valid customary rights in the takiwā. All these Te Tau Ihu iwi had customary rights in parts of the takiwā that overlapped the acknowledged rights of Ngāi Tahu.

On the east coast, we found that Rāngitane, Ngāti Toa, and Ngāi Tahu had legitimate overlapping customary rights in the area between Parinui o Whiti and Waiau-toa. On the West Coast, we found that Ngāti Rārua, Ngāti Tama, Te Ātiawa, Ngāti Toa, Ngāti Apa, and Ngāi Tahu had legitimate overlapping customary rights between Kawatiri and Kahurangi. None of these rights had been extinguished prior to Crown purchasing from 1847.

The rights of all these iwi were protected and guaranteed by the Treaty. Notwithstanding this, the Crown extinguished the vast majority of these interests in a series of purchases between 1847 and 1860 without determining the correct right-holders or obtaining their full and free consent.

In 1847, the Government extorted the Wairau block from three chiefs in Wellington, thus disenfranchising all other Ngāti Toa, Ngāti Rārua, and Rāngitane people. Then, in 1853, the Government arranged a cession of all Ngāti Toa's interests in the South Island by an unfair manipulation. From 1854 to 1856, it used this cession (the Waipounamu purchase) to obtain the interests of all the other Te Tau Ihu tribes without their free and full consent. These actions were in plain breach of the Treaty and its principles.

Ngāi Tahu's interests in the northern part of the takiwā were also extinguished through a series of blanket purchases from 1848, concluding with the Kaikoura purchase (1859) on the east coast and the Arahura purchase (1860) on the west. In the Kaikoura transaction, the Crown neither inquired into nor considered Ngāti Toa's or Rāngitane's rights. Ngāti Toa's interests in the northern part of the takiwā had been inadequately acknowledged in the Wairau purchase and were not reconsidered in the Kaikoura transaction. The Crown had altogether failed to either inquire or consider Rāngitane's interests on this part of the coast, and these interests were unfairly extinguished through the Kaikoura purchase, in breach of the Treaty and its principles.

On the West Coast, the rights of Ngāti Toa, Ngāti Rārua, Ngāti Tama, and Te Ātiawa had been inadequately acknowledged in the Waipounamu purchase and were not reconsidered during negotiations for Arahura. The Crown had never inquired into Ngāti Apa's customary rights and once more failed to do so in the Arahura transaction. Ngāti Apa were only belatedly considered, and the Government made no inquiry into the extent of their interests. This limited and belated acknowledgement precluded Ngāti Apa's informed consent and was in breach of the Treaty and its principles.

These historical breaches against Te Tau Ihu iwi continued into the twentieth century, when the Crown chose to deal exclusively with Ngāi Tahu in the Ngāi Tahu takiwā, at the expense of Te Tau Ihu iwi that also had legitimate rights in the area. In its dealings with iwi in the South Island since the 1990s, the Crown has relied on the Maori Appellate Court's 1990 decision on customary rights. On the basis of the court's finding that Ngāi Tahu had sole rights of ownership in the Kaikoura and Arahura blocks at the time of the sale to the

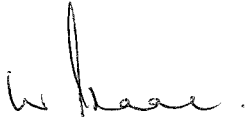
Crown, the Government has dealt exclusively with Ngāi Tahu in the matter of historical Treaty breaches in the Ngāi Tahu takiwā.

The boundaries of the takiwā were statutorily defined in the Te Runanga o Ngāi Tahu Act 1996 and the Ngāi Tahu Claims Settlement Act 1998, but there is nothing in this legislation that prevents the Government from considering Te Tau Ihu iwi interests within the takiwā. The legislation is not in itself in breach of the Treaty, rather the breach lies in the way in which the Government has interpreted it. Te Tau Ihu iwi interests were ignored during the negotiation and settlement of the Ngāi Tahu claim. The Crown failed to adequately consult with Te Tau Ihu iwi during this process, and assets that could potentially have been included in any future settlement with Te Tau Ihu iwi were vested in the sole ownership of Ngāi Tahu. This exclusive treatment has continued post-settlement, to the detriment of Te Tau Ihu iwi.

We recommend that the Crown negotiate with Te Tau Ihu iwi with regard to these breaches of the Treaty concerning lands and interests in the takiwā and to agree on equitable compensation for any loss of interests incurred through the prior settlement with Ngāi Tahu.

We hope that you can negotiate an appropriate settlement with Te Tau Ihu Māori, in order to mitigate the prejudice and to restore a proper Treaty relationship.

Heoi anō, nāku nā

A handwritten signature in black ink, appearing to read 'WW Isaac'.

WW Isaac

Deputy Chief Judge

ABBREVIATIONS

AC	<i>Appeal Cases</i> (England)
AJHR	<i>Appendix to the Journals of the House of Representatives</i>
app	appendix
CA	Court of Appeal
ch	chapter
comp	compiler
doc	document
ed	edition, editor
fol	folio
intro	introduction
ltd	limited
MA	Department of Maori Affairs file
MLCJ	Maori Land Court judge (when used after a surname)
no	number
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
para	paragraph
PC	Privy Council
pt	part
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
sess	session
TOW	Treaty of Waitangi
trans	translator
UKPC	<i>United Kingdom Privy Council</i>
v	and
vol	volume

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

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 785 (Te Tau Ihu) record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION

In March 2007, the Wai 785 (Te Tau Ihu) Tribunal completed a preliminary report on customary rights in Te Tau Ihu o te Waka a Maui (the northern South Island). This second preliminary report considers customary rights south of Te Tau Ihu, in the statutorily defined Ngai Tahu takiwa. As with the first preliminary report, it is published in the expectation that it will assist negotiations between the Te Tau Ihu claimants and the Crown.

1.1 BACKGROUND

Our first preliminary report addressed issues around the customary rights of Te Tau Ihu iwi and the Crown's treatment of such rights within the district known as Te Tau Ihu o te Waka a Maui. It did not consider all aspects of the claims heard by the Te Tau Ihu Tribunal from August 2000 to March 2004. Among issues specifically excluded from consideration in the report were claims in Ngai Tahu's statutorily defined takiwa.

We had intended to reserve our discussion on this issue for our final report. However, shortly before releasing the preliminary report we were informed that negotiations were progressing quickly and that the early publication of our findings on claims in the takiwa would materially assist this process.¹ We therefore agreed to publish a second preliminary report on this issue before completing the full report on Te Tau Ihu claims.

The boundaries of the Ngai Tahu takiwa (district) are defined by the Te Runanga o Ngai Tahu Act 1996.² Map 1 shows the northern boundary line, which divides the Te Tau Ihu district and the statutorily defined Ngai Tahu takiwa.

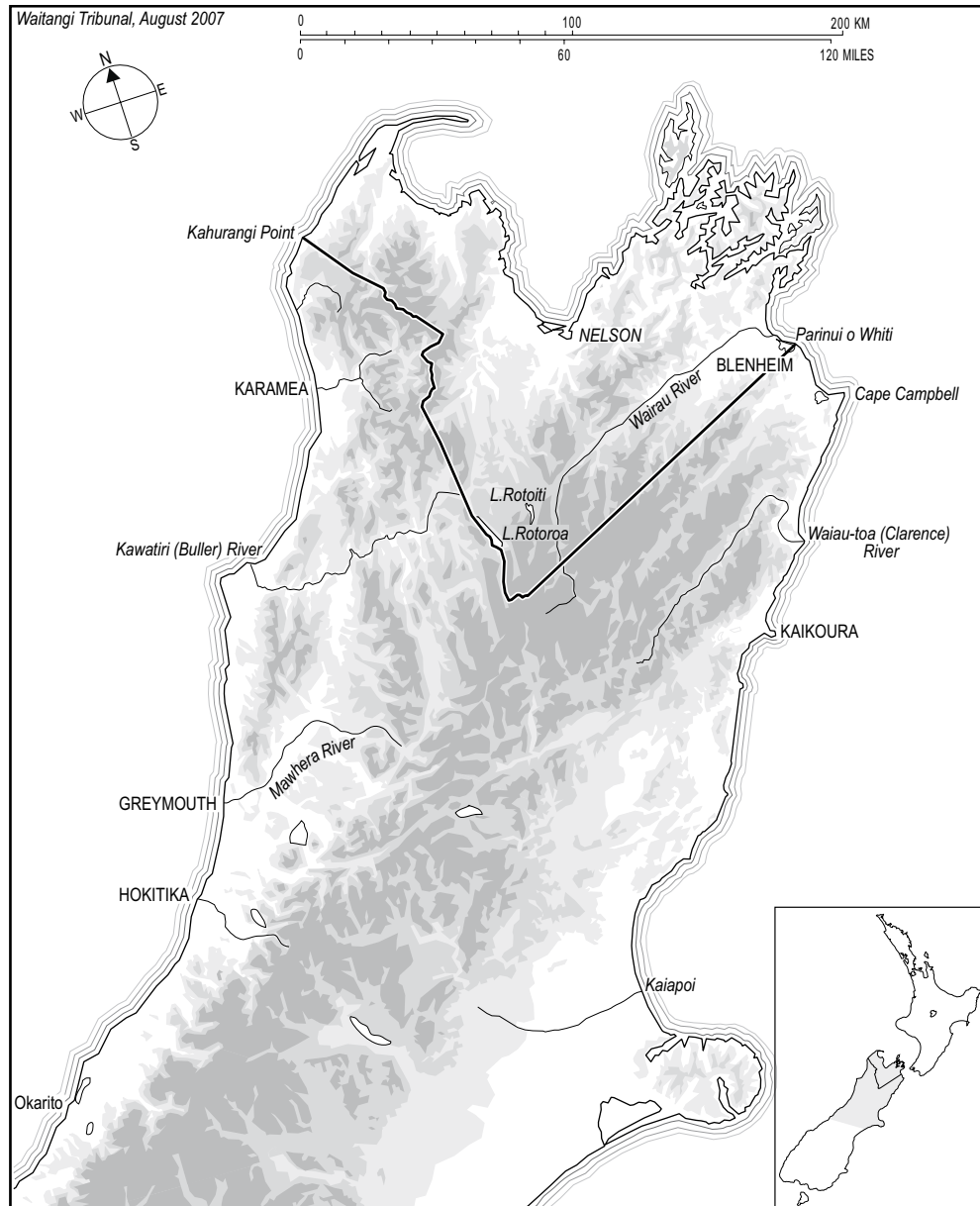
Six of the eight Te Tau Ihu iwi advanced claims with respect to customary interests in the Ngai Tahu takiwa. Claims were submitted by Ngati Apa and Rangitane of the Kurahaupo waka and Ngati Toa Rangatira, Ngati Rarua, Ngati Tama, and Te Atiawa of the Kawhia–Taranaki tribes. Claims in the takiwa were also an aspect of the overarching claim, Wai 102, which was registered to ensure that all Te Tau Ihu iwi were included in the claims process.

1. Kurahaupo ki te Waipounamu Trust to registrar, Waitangi Tribunal, 19 March 2007; counsel for Te Runanga o Ngati Toa to Barry Rigby, Waitangi Tribunal, 19 March 2007

2. Te Runanga o Ngai Tahu Act 1996, s 5

TE TAU IHU O TE WAKA A MAUI: PRELIMINARY REPORT 2

1.1



Map 1: The boundary between Te Tau Ihu and the Ngai Tahu statutory takiwa

Source: The Te Runanga o Ngai Tahu Act 1996

The claimants alleged that the Crown breached the Treaty of Waitangi and its principles in the course of purchasing and allocating reserves by:

- ▶ failing to inquire properly into the customary interests of Te Tau Ihu iwi before purchasing land or confirming purchases, and prior to defining interests in reserves;
- ▶ failing to obtain the consent of the correct customary right-holders before purchasing land or confirming purchases;

INTRODUCTION

1.2

- ▶ failing to carry out correct or legitimate purchases of land;
- ▶ imposing artificial European boundary lines over customary interests; and as a result
- ▶ wrongly and unfairly depriving Te Tau Ihu Maori of their customary resource-use and land entitlements, to their great and lasting social, cultural, and economic prejudice.

The Te Tau Ihu claimants also alleged that the Crown breached the Treaty during its negotiations with Ngai Tahu by:

- ▶ failing to ensure a proper inquiry was held into Te Tau Ihu rights and interests in the Ngai Tahu takiwa;
- ▶ failing to actively protect these rights and interests;
- ▶ failing to consult with Te Tau Ihu iwi prior to reaching a settlement with Ngai Tahu; and
- ▶ upholding Ngai Tahu's claim to exclusive rights in the takiwa, thereby prejudicially impacting on the mana of Te Tau Ihu iwi and their ability to seek redress for historical claims.

1.2 THE SECOND PRELIMINARY REPORT

This second preliminary report has the same status as the first. Where issues are comprehensively dealt with in this report, our discussion and findings are final. It is not, however, a complete report on all the issues raised by the Te Tau Ihu claimants, so we make no final overall findings as to prejudice, nor do we make recommendations for redress.

In section 1.4, we provide a brief overview of the Te Tau Ihu iwi claims involving land in the Ngai Tahu statutory takiwa. Ngai Tahu objected to these claims and asserted that we did not have the jurisdiction to consider them. Section 1.5 discusses the grounds of our rejection of that argument and the view of the High Court and Court of Appeal on the matter.

In chapter 2, we provide our interpretation of the Te Tau Ihu claimants' customary history and rights within the takiwa. Chapter 3 then considers the Crown's treatment of those customary rights in the course of its purchasing and with respect to the reserves created through that process on the West Coast.

Chapter 4 considers the Crown's treatment of these rights arising out of the Treaty settlement process with Ngai Tahu. We examine the Crown's role in the Maori Appellate Court's definition of the boundary between Te Tau Ihu iwi and Ngai Tahu in 1990. We also consider the Crown's subsequent reliance on this decision in its negotiations and settlement with Ngai Tahu, and in the associated legislation, the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Settlement Act 1998.

Our conclusions and findings are summarised in chapter 5.

1.3 TREATY PRINCIPLES

The Treaty principles outlined in our first preliminary report are applicable to the issue of the Crown's treatment of customary rights in the Ngai Tahu statutorily defined takiwa. Of particular relevance to this report are the principles of partnership, reciprocity, active protection, and equal treatment. For convenience, we repeat the first preliminary report's brief explanation of these principles.

1.3.1 Partnership

In the words of the president of the Court of Appeal, 'the Treaty signified a partnership between the races', and each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'.³ The obligations of partnership include the duty to consult Maori and to obtain the full, free, and informed consent of the correct right-holders in any transaction for their land.

1.3.2 Reciprocity

Above all, the partnership between Maori and the Crown is a reciprocal one, involving fundamental exchanges for mutual advantage and benefits. Maori ceded to the Crown the kawanatanga (governance) of the country in return for the guarantee and protection of their tino rangatiratanga (full authority) over their land, people, and taonga. Maori also ceded the right of pre-emption over their lands, on the basis that this would be exercised in a protective manner and in their own interests, so that the settlement of the country would then proceed in a fair and mutually advantageous manner.⁴

1.3.3 Active protection

The Crown's duty to protect the just rights and interests of Maori arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure its acceptance, and the principles of partnership and reciprocity. This duty is, in the view of the Court of Appeal, 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. The Crown's responsibilities are 'analogous to fiduciary duties'.⁵ Active protection requires honourable conduct and fair processes from the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.

3. *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 665 (CA)

4. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, pp 238–245

5. *New Zealand Maori Council v Attorney General*, p 665

1.3.4 Equal treatment

The principles of partnership, reciprocity, autonomy, and active protection require the Crown to act fairly as between Maori groups – it cannot unfairly advantage one group over another where their circumstances, rights, and interests are broadly the same.⁶

1.4 TE TAU IHU CLAIMS IN THE NGAI TAHU STATUTORY TAKIWA

Six Te Tau Ihu iwi submitted claims with respect to land within the area statutorily defined as the Ngai Tahu takiwa. These iwi asserted traditional customary interests within the takiwa and stated that the Crown's treatment of their interests had breached the principles of the Treaty of Waitangi. The claims concerned the way in which the Crown purchases of the 1840s to 1860 were conducted and the subsequent treatment of reserves on the West Coast, as well as actions and omissions in the late twentieth century in the course of reaching a settlement with Ngai Tahu.

1.4.1 Claims of customary interests in the Ngai Tahu takiwa

With the exception of Ngati Koata, all of the Te Tau Ihu iwi stated that their customary interests extended beyond the statutorily defined boundary with the Ngai Tahu takiwa.⁷

The overarching claim submitted by Te Runanganui o Te Tau Ihu o te Waka a Maui stated that the interests of Te Tau Ihu Maori lay:

to the north of a line commencing on the eastern coast at the mouth of the Waimakariri River and following the bed of the river to its headwaters then following the main divide south to Browning's Pass then following the northern tributary of the Hokitika River from its headwaters to the western coast line.

The Runanganui claim was submitted as a collective claim, 'subject to later determination of individual iwi interests'.⁸

Rangitane stated that their customary interests extended across the South Island. They described their rohe as extending north from the mouth of Waiau-Toa (the Clarence River) and across the interior over to Kawatiri.⁹ Rangitane did not press their claims to the West Coast, their closing submissions instead emphasising their claim to interests on the east

6. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), pp 24–25

7. Counsel for Ngati Koata, memorandum concerning Ngai Tahu takiwa issues, 1 August 2003 (paper 2.658)

8. Te Runanganui o te Tau Ihu o te Waka Maui Incorporated, statement of claim, 27 April 1989 (claim 1.3), p 8

9. Rangitane, fifth amended statement of claim, 31 January 2003 (claim 1.1(f)), p 8

TE TAU IHU O TE WAKA A MAUI: PRELIMINARY REPORT 2

1.4.1

coast as far south as Waiau-Toa. Rangitane argued that Ngati Toa did not conquer them and that they maintained interests in these areas in and after 1840.¹⁰

Ngati Apa claimed customary interests in 'the whole block of country from the southern bank lands of the Kawatiri (including Tauranga Bay) north to Kahurangi Point and inland of that coastline in an easterly direction to the Nelson Lakes area.' They also submitted that their customary interests on the West Coast and inland had not been extinguished by the taua of circa 1827–32.¹¹

Ngati Rarua, Ngati Tama, and Te Atiawa all claimed customary interests on the West Coast on the basis of conquest followed by occupation. Te Atiawa referred to their interests in Buller and the West Coast, pointing to combined Te Atiawa, Ngati Rarua, and Ngati Tama settlements at Kararoa, Potikohua, and Kawatiri.¹² Ngati Rarua claimed interests on the West Coast as far south as Mawhera, Hokitika, and Okarito, but they emphasised that they did not claim to have exclusive interests.¹³ Similarly, Ngati Tama stated that their interest and authority in Te Tai Poutini (the West Coast) 'overlapped and was shared with Ngati Rarua, Te Atiawa, Ngati Apa and Ngai Tahu'.¹⁴

Ngati Toa submitted a claim for their customary interests extending across the island. Through conquest of Rangitane and defeat of Ngai Tahu they claimed to have secured rights down the east coast to at least Kaikoura and 'to a certain extent as far as Kaiapoi'.¹⁵ On the West Coast, they asserted rights to Arahura. Ngati Toa acknowledged the rights of their 'allies and relations' on the West Coast but pointed out that, 'historically, the ultimate right to control alienation of the land remained with Ngati Toa'.¹⁶ They argued that all other Te Tau Ihu iwi were 'subject to the overriding mana and authority of Ngati Toa as first conquerors' and that occupation was not necessary to maintain rights.¹⁷

Ngati Kuia abandoned their claim at a late stage of the hearing process. Giving formal notification of that decision in their closing submissions, they stated that they were not 'abandoning their history' by doing so and stressed their whakapapa links to areas that they had previously identified.¹⁸ These included Kawatiri, Maruia, and the inland areas of the West Coast and the east coast down to Kaikoura and Kaiapoi.¹⁹

10. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 12–17, 22–24

11. Ngati Apa, amended statement of claim, 14 February 2003 (claim 1.10(a)), p 5

12. Counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 11–12

13. Ngati Rarua, second amended statement of claim, 7 March 2003 (claim 1.13(b)), pp 13, 29

14. Ngati Tama, amended statement of claim, 26 February 2003 (claim 1.16(a)), p 5

15. Ngati Toa Rangatira, fourth amended statement of claim, 21 May 2003 (claim 1.7(d)), p 14

16. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp 44–45

17. Ngati Toa Rangatira, fourth amended statement of claim, p 15; counsel for Ngati Toa Rangatira, closing submissions, p 46

18. Counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), pp 7–8

19. Ngati Kuia, second amended statement of claim, 4 March 2003 (claim 1.11(b)), pp 7, 36–37

1.4.2 Crown purchasing and Te Tau Ihu iwi customary interests

A major plank of the Te Tau Ihu claims with respect to the Ngai Tahu takiwa related to Crown purchases of the mid-nineteenth century. Customary interests in the area were extinguished in a series of overlapping Crown transactions: for the 'Wairau' in 1847; by the 'Waipounamu' deeds in 1853–56; the 'Kaikoura' purchase in 1859; and 'Arahura' in 1860. All the claimants emphasised the inadequacy of reserves, which left them with an insufficient land base in the district.

Claims (with the exception of those of Ngati Toa) centred on the Crown's failure to properly investigate their customary interests before entering upon and in some instances completing purchases. As Ngati Apa stated, the Crown failed 'to conduct a full and exhaustive inquiry into the nature and extent of the rights' and to ensure that those alienating were entitled to do so.²⁰

The Crown's failure to properly consider customary interests was demonstrated by its initial purchase of the Wairau extending down to Kaiapoi on the basis of the signatures of only three Ngati Toa rangatira.

Within the Waipounamu purchase, which was in fact a series of purchases, the Crown again dealt first with Ngati Toa.²¹ The 1853 deed which extinguished 'all [Ngati Toa] lands in this island' set the framework for subsequent negotiations with other iwi. Claimants involved in subsequent deeds (Rangitane, Ngati Rarua, Te Atiawa, and Ngati Tama) stated that the Waipounamu purchase wrongly proceeded on the basis that those who signed the initial deed had the power to deal with their interests.²² This, they argued, pressured them into accepting the sale and, on their part, prevented them from exercising informed choice.

Ngati Apa were not involved in Waipounamu at all, and they viewed the belated recognition of their interests in the subsequent Arahura purchase (which primarily involved Ngai Tahu) as 'inadequate and token'.²³ Ngati Apa maintained that 'All other claims flow from that fundamental factor of either failing to ascertain all the customary rights holders in Te Tau Ihu, or purposefully ignoring them'.²⁴

Ngati Apa claimed that the Crown failed to define the interests that it acquired from them in Arahura and that both payment and reserves were inadequate.²⁵ They also stated that the Crown's failure to identify their customary interests in Arahura resulted in 'hopelessly inadequate reserve provision'.²⁶

20. Ngati Apa, amended statement of claim, pp 2–3

21. Rangitane, fifth amended statement of claim, pp 51–52

22. Ngati Tama, amended statement of claim, pp 6–7, 13; Te Atiawa, third amended statement of claim, 14 February 2003 (claim 1.14(c)), pp 7–8, 11; Rangitane, fifth amended statement of claim, pp 16–18; counsel for Rangitane, closing submissions, p 25

23. Ngati Apa, amended statement of claim, p 4

24. Counsel for Ngati Apa, closing submissions, [February] 2004 (doc T3), p 3

25. Ngati Apa, amended statement of claim, p 4

26. Ngati Apa, amended statement of claim, p 9

1.4.3

Both Ngati Tama and Te Atiawa stated that the Crown wrongfully proceeded on the basis that those who had signed the Arahura deed had the power to deal with their interests.²⁷ Ngati Rarua saw the Arahura purchase as a 'final stage' in a flawed process of buying out claims on the West Coast.

All the claimants contended that the reserves allocated to them in the area now defined as the Ngai Tahu takiwa were inadequate. The Waipounamu transaction did not involve the allocation of any reserves south of the boundary and there were few reserves allocated to Te Tau Ihu iwi in the Arahura purchase. As a result, the claimants alleged that they were left with insufficient land in the takiwa for their present and future needs.²⁸

A further outcome of the Crown purchasing process, argued Ngati Apa and Rangitane, was the imposition of boundary lines over land. Ngati Apa stated that artificial European boundaries that did not relate to customary interests were created through Crown purchasing.²⁹ In their view, this process had assisted Ngai Tahu in claiming a boundary which was wrongly upheld by the Maori Appellate Court in 1990.³⁰

Ngati Toa's claim was unique in that it centred on the Crown's coercive tactics and misuse of customary concepts to effect the purchase of Wairau. They argued that the Crown was right to deal with them before the others but that their agreement was obtained under pressure and was given with great reluctance both there and in the case of the Waipounamu purchase. Ngati Toa claimed that the Crown deliberately undermined traditional leadership and rangatiratanga, disrupted the balance of power, and dislocated social relations between the iwi.³¹ They stated that both the payment and the reserves were inadequate.³²

1.4.3 The West Coast reserves

Two classes of reserves were created following the Arahura purchase – endowment reserves, which were eventually vested in the Maori Trustee, and occupation reserves. All the claimants concerned pointed to their interests in those reserves as demonstrating the existence of their rights within the takiwa lands. They argued that these rights had subsequently been reduced by Crown actions and omissions with respect to the reserves.

Ngati Tama, Te Atiawa, and Ngati Rarua outlined the process through which occupation reserves were allocated. Ownership lists were arranged in the mid-1860s and the Young

27. Te Atiawa, third amended statement of claim, 14 February 2003 (claim 1.14(c)), p 11; Ngati Tama, amended statement of claim, p 13

28. Ngati Tama, amended statement of claim, p 13; Te Atiawa, third amended statement of claim, pp 3–4; Ngati Rarua, second amended statement of claim, p 10; Ngati Apa, amended statement of claim, p 4; Rangitane, fifth amended statement of claim, p 22

29. Ngati Apa, amended statement of claim, p 4

30. Counsel for Ngati Apa, closing submissions, pp 37, 48; counsel for Rangitane, closing submissions, pp 18–21

31. Counsel for Ngati Toa Rangatira, closing submissions, pp 96–98

32. Ngati Toa Rangatira, fourth amended statement of claim, pp 28–32

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commission then revisited the question of ownership in 1879. The commission's investigation resulted in a significant reduction of Te Tau Ihu Maori interests in the reserves, and Ngati Tama, Te Atiawa, and Ngati Rarua claimed that this reduction came about from the commission's failure to properly inquire into their interests.³³ Ngati Rarua also pointed to the Crown's failure to respond to their ensuing protests, which were sustained from the early 1880s through to the 1920s.³⁴

Ngati Apa claimed that the promised provision of reserves on the West Coast was not properly implemented.³⁵ They highlighted the Native Land Court's consideration of the West Coast reserves in the 1920s and a Maori Appellate Court decision in their favour in 1948.³⁶ They see those earlier decisions as showing that they had recognised interests in these lands that ought to have been given greater consideration by the Crown in subsequent dealings.

The Ngati Apa claim also concerned endowment reserves, which were revested in Maori ownership following a 1973 Government inquiry. The West Coast reserves were vested in the Mawhera Incorporation, an entity that Ngati Apa viewed as an exclusively Ngai Tahu organisation. As a result of the Crown's alleged failure to protect their interests, Ngati Apa claimed to 'have lost their ownership rights as Ngati Apa in all of those reserves north of Westport'.³⁷

The Crown allegedly repeated this error in its settlement of the perpetual leasing issue in 1997. Compensation was paid to Maori throughout New Zealand whose land had been administered by the Maori Trustee and leased in perpetuity. Ngati Apa stated that, when the Crown settled with Ngai Tahu with respect to the affected West Coast reserves, it made no provision for Ngati Apa beneficiaries.³⁸

1.4.4 The Crown's treatment of Te Tau Ihu iwi rights with regard to the Maori Appellate Court decision of 1990

We received claims on this issue from Ngati Toa, Ngati Rarua, Ngati Apa, Rangitane, and Te Atiawa. The claims concerned the Crown's role in the Maori Appellate Court's consideration of the dispute between Te Tau Ihu iwi and Ngai Tahu in 1989–90, which had arisen in the course of the Tribunal's inquiry into Ngai Tahu's claims. They also concerned the Crown's subsequent reliance on the court's decision in the enactment of the Te Runanga o Ngai Tahu Act 1996. This defined the Ngai Tahu takiwa with a northern boundary set by the Kaikoura

33. Ngati Tama, amended statement of claim, pp 9–11; Te Atiawa, third amended statement of claim, pp 8–11; Ngati Rarua, second amended statement of claim, pp 30–31

34. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), p 174

35. Counsel for Ngati Apa, closing submissions, p 22

36. Ibid, pp 32–33

37. Ngati Apa, amended statement of claim, p 10; counsel for Ngati Apa, closing submissions, p 45

38. Ngati Apa, amended statement of claim, p 9

and Arahura deeds, as set out in the Maori Appellate Court's 1990 decision.³⁹ These boundaries were then adopted in the Ngai Tahu Claims Settlement Act 1998.⁴⁰

The claimants were critical of section 6A of the Treaty of Waitangi Act 1975, which had been enacted in 1988 to enable the Waitangi Tribunal to refer the dispute between Te Tau Ihu iwi and Ngai Tahu to the Maori Appellate Court (as we discuss further below).

Ngati Toa contended that section 6A was flawed because only those who were parties to the Tribunal's Ngai Tahu inquiry could participate in the formulation of the case stated. Furthermore, section 6A made no provision for appealing the Maori Appellate Court's decision.⁴¹ Ngati Apa stated that the 1988 amendment meant that the court was required to fix 'artificial European style boundaries'.⁴²

Rangitane further stated that the court also 'made the issue one of a boundary dispute when that was not what was actually pleaded', and they asserted that the court should not have relied on the boundaries of Crown purchases to establish tribal boundaries.⁴³

All the claimants emphasised flaws in the Maori Appellate Court's procedure and the Crown's failure to protect Te Tau Ihu through this hearing process. They pointed to the disparity in their position and that of Ngai Tahu, who had access to significantly greater resources, publicly funded as a result of their involvement in the Tribunal process at the time. They also stated that the Crown could, and should, have taken a more active part in the proceedings and that its failure to do so was in breach of the Treaty principle of active protection.⁴⁴

The claimants alleged that the Crown breached its Treaty obligations to Te Tau Ihu iwi by relying on the Maori Appellate Court's decision to determine tribal boundaries and by legislating for an exclusive tribal district for Ngai Tahu.

In Ngati Toa's view, the Crown took the Maori Appellate Court's decision further than the court had intended; the court specifically stated that its decision was limited to the question of rights in a specific area at a specific time. Further, they argued that the 1990 decision should not have been relied on as the authoritative guide for tribal boundaries.⁴⁵ Ngati Apa also argued that exclusive tribal boundaries were not correct in custom and should not have been applied by the Crown.⁴⁶ The Crown had disregarded evidence that contradicted Ngai Tahu's claim to exclusive interests in the takiwa. Ngati Apa stated that the Crown had 'stuck

39. Te Runanga o Ngai Tahu Act 1996, s 5

40. Ngai Tahu Claims Settlement Act 1998, s 6(7)

41. Counsel for Ngati Toa Rangatira, closing submissions, pp 123–124

42. Ngati Apa, amended statement of claim, p 6

43. Rangitane, fifth amended statement of claim, p 50

44. Ngati Apa, amended statement of claim, pp 6–8; counsel for Ngati Rarua, closing submissions, p 126; Ngati Toa Rangatira, fourth amended statement of claim, p 46; Rangitane, fifth amended statement of claim, pp 48–50

45. Ngati Toa Rangatira, fourth amended statement of claim, p 47; counsel for Ngati Toa Rangatira, closing submissions, pp 124–125

46. Ngati Apa, amended statement of claim, p 6

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with exclusivity' since 1990 and would continue to do so, 'unless this Tribunal comes out with extremely strong findings'.⁴⁷

Ngati Toa and Ngati Apa highlighted the Crown's failure to consult with them during negotiations with Ngai Tahu, both with respect to the extent and nature of Te Tau Ihu iwi interests and on the effect that the settlement would have on their rights.⁴⁸

Most of the claimants stated that the Ngai Tahu Claims Settlement Act 1998 had had a prejudicial impact on them. Both Rangitane and Te Atiawa pointed to the impact on their access to reserves that had been allocated to them as 'landless natives' in the late nineteenth and early twentieth centuries.⁴⁹ More broadly, Ngati Apa argued that the settlement with Ngai Tahu had 'effectively removed assets and resources [from] any future settlement with Ngati Apa' south of Kahurangi Point.⁵⁰ Similarly, Ngati Toa stated that some of the areas vested in Ngai Tahu, or subject to special statutory entitlements in favour of Ngai Tahu, were within Ngati Toa's rohe. The Crown had transferred these rights to Ngai Tahu without consulting Ngati Toa.⁵¹ The 1998 Act had used the Maori Appellate Court decision of 1990 to exclude them from the region.⁵²

1.5 THE NGAI TAHU CHALLENGE TO THE TRIBUNAL'S JURISDICTION TO HEAR TE TAU IHU CLAIMS

At the commencement of our hearings in August 2000, Ngai Tahu challenged the Tribunal's jurisdiction to hear claims of Te Tau Ihu iwi within the Ngai Tahu takiwa.

1.5.1 Background

The challenge has its origins in the Ngai Tahu (Wai 27) inquiry. In 1986, Ngai Tahu filed claims with the Tribunal in respect of alleged breaches by the Crown in the South Island. These claims partly concerned grievances arising from the 1859 Kaikoura purchase and the 1860 Arahura purchase. In 1987, as the hearings were about to commence, Joe Takapua, on behalf of the Kurahaupo Waka Society Incorporated, filed a claim with the Tribunal about part of the lands described within the Ngai Tahu claims area. This area, north and east of the Waiau-toa (Clarence River), including the Awatere River valley, the inland Kaikoura

47. Ibid, p 9; counsel for Ngati Apa, closing submissions, p 43

48. Ngati Toa Rangitira, fourth amended statement of claim, p 47; Ngati Apa, amended statement of claim, p 9; counsel for Ngati Apa, closing submissions, p 45

49. Rangitane, fifth amended statement of claim, pp 47, 51; counsel for Te Atiawa, closing submissions, p 214

50. Ngati Apa, amended statement of claim, p 9; counsel for Ngati Apa, closing submissions, p 45

51. Ngati Toa Rangitira, fourth amended statement of claim, p 48

52. Counsel for Ngati Toa Rangitira, closing submissions, p 124

Range, and the coastline from White Bluffs to Cape Campbell and south to the Waiau-toa river mouth, had been part of the Kaikoura purchase.⁵³

Ngai Tahu viewed the claim as a boundary dispute and ‘strongly objected to the presence and any participation’ of the Kurahaupo incorporation in the Wai 27 inquiry. In an interim direction of 26 November 1987, the Ngai Tahu Tribunal concluded that the dispute needed to be resolved before it could proceed and that the Maori Land Court was the appropriate forum for such matters.⁵⁴ Section 6A of the Treaty of Waitangi Act 1975 was enacted in 1988 to enable the Tribunal to refer such disputes to the Maori Appellate Court, and the Ngai Tahu Tribunal accordingly referred the question to the court on 27 February 1989.⁵⁵

In its decision of 15 November 1990, the Maori Appellate Court ruled that:

The Ngai Tahu tribe according to customary law principles of ‘take’ and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.⁵⁶

In terms of section 6A of the Treaty of Waitangi Act, this decision was binding on the Ngai Tahu Tribunal, and the hearings proceeded on this basis. Ultimately, the Tribunal found that many of the Ngai Tahu allegations of Crown breach with regard to lands contained within the Kaikoura and Arahura purchases were well founded.⁵⁷

The Ngai Tahu Tribunal also recommended legislation to create a Ngai Tahu tribal structure with the power to undertake a settlement with the Crown. This resulted in the Te Runanga o Ngai Tahu Act 1996, which was followed by the Ngai Tahu Claims Settlement Act 1998.

1.5.2 The Ngai Tahu challenge and the response of the Tribunal and the courts

With this background in mind, it is not surprising that Ngai Tahu objected to and challenged the Tribunal’s jurisdiction to hear Te Tau Ihu claims within the Ngai Tahu takiwa. Counsel for Ngai Tahu submitted that, ‘At all material times, Ngai Tahu have enjoyed full and exclusive rights and interests within the Ngai Tahu claim area.’ Ngai Tahu maintained that the claims by Te Tau Ihu were an ‘attack on Ngai Tahu’s northern boundary’ and, as such, it was a Maori–Maori dispute and not a Maori–Crown issue. Counsel pointed to the

53. Rangitane, first amended statement of claim, 10 August 1987, (claim 1.1(a)); Rangitane, second amended statement of claim, 10 August 1987 (claim 1.1(b))

54. Waitangi Tribunal, memorandum concerning Kurahaupo–Rangitane cross claim, 26 November 1987 (paper 2.7)

55. Waitangi Tribunal, memorandum concerning procedure and case to be stated to Maori Appellate Court, 27 February 1989 (paper 2.9)

56. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court minute book 4, fol 672

57. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 1, pp 115–127

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Maori Appellate Court's 1990 decision, the provisions of the Te Runanga o Ngai Tahu Act and the Ngai Tahu Claims Settlement Act, 'which confirm Ngai Tahu's northern boundary and its exclusive entitlement within it'. Ngai Tahu therefore considered that this Tribunal did not have jurisdiction to inquire into any claim of Te Tau Ihu iwi within the Ngai Tahu takiwa. They also asserted that, in terms of section 6A(6) of the Treaty of Waitangi Act 1975, the 1990 Maori Appellate Court decision was binding on all Tribunal panels.⁵⁸

We considered the Ngai Tahu challenge at a judicial conference in October 2000. After hearing the submissions of Ngai Tahu, Te Tau Ihu iwi, and the Crown, we found that:

- ▶ the jurisdiction conferred by the Tribunal's empowering Act, the Treaty of Waitangi Act 1975, was sufficiently broad to enable us to embark on this inquiry;
- ▶ neither the Ngai Tahu Claims Settlement Act 1998 nor section 6A of the Treaty of Waitangi Act 1975 acted as a bar to the inquiry; and
- ▶ the Maori Appellate Court decision of 1990 was binding on the Tribunal in the Ngai Tahu inquiry but not on the Tribunal in the Te Tau Ihu inquiry.⁵⁹

Ngai Tahu sought a High Court review of these findings. In his decision of 4 April 2001, Justice McGechan stated that the question of the Tribunal's jurisdiction was one of statutory interpretation. The issue was whether the legislation that followed the 1990 Maori Appellate Court decision removed the Tribunal's prima facie jurisdiction under section 6 of the Treaty of Waitangi Act.⁶⁰

Justice McGechan found that the Ngai Tahu legislation was enacted to give final settlement between Ngai Tahu and the Crown and was not applicable to other parties. He stated that:

I consider on balance . . . that the Runanga Act, Settlement Act, ss 461 and 462, and with that s 6(9) now Act, should not be interpreted as removing the jurisdiction of the tribunal to hear Te Tau Ihu claims simply because they assert Te Tau Ihu iwi historic interests within the statutorily defined takiwa of Ngai Tahu.⁶¹

He also found that section 6A of the Treaty of Waitangi Act did not bind this Tribunal. Justice McGechan stated that this would 'lead to absurdity. It would mean the Waitangi Tribunal, however constituted, is bound by a prior Maori Appellate Court determination in all future cases.'⁶²

Ngai Tahu appealed to the Court of Appeal, which delivered its decision on 1 November 2001. Justice Tipping agreed with the Tribunal and the High Court, concluding that 'There

58. Counsel for Ngai Tahu, synopsis of submissions concerning jurisdiction, 29 September 2000 (paper 2.135), pp 5–6, 17–18

59. Waitangi Tribunal, memorandum concerning jurisdiction of Tribunal, 3 November 2000 (paper 2.156), pp 13, 18, 20

60. *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87, 99

61. *Ibid*, p 103

62. *Ibid*, p 104

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is nothing in the legislation . . . which prevents the tribunal from inquiring into the claims which Ngati Apa and the other claimants have made.’⁶³

Ngai Tahu made further submissions on jurisdictional issues in their closing submission to this Tribunal. We do not intend to revisit or answer the submissions made in respect to this issue again. The matter has been settled. The decisions of the High Court and Court of Appeal make it clear that this Tribunal has the jurisdiction to inquire into the Te Tau Ihu claims within the Ngai Tahu takiwa.

On this basis, from 5 to 8 August 2003, we heard evidence from Te Tau Ihu claimants with respect to their claims within the takiwa. Ngai Tahu then gave their evidence in response from 13 to 17 October 2003, a month before the Crown’s hearing week of 17 to 20 November 2003. We turn now to our consideration of this evidence, beginning with an examination of the customary history and rights of Te Tau Ihu iwi in the takiwa.

63. *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2002] 2 NZLR 179, 182 (CA)

CHAPTER 2

TE TAU IHU IWI CUSTOMARY RIGHTS IN THE NGAI TAHU STATUTORY TAKIWA

2.1 INTRODUCTION

This chapter addresses the claim that around 1840 Te Tau Ihu iwi had customary rights in the Ngai Tahu takiwa, as defined in the Te Runanga o Ngai Tahu Act 1996. Chapter 3 addresses the issue of whether such rights were properly considered by the Crown in its Wairau, Waipounamu, Kaikoura, and Arahura purchases in 1847, 1853–56, 1859, and 1860. It was the last two purchases that established boundaries on both coasts that were accepted by the Maori Appellate Court in 1990 as the northern boundaries of the Ngai Tahu takiwa.

Our discussion of customary rights in this chapter follows the approach that we used in our first preliminary report. Material from that report is repeated only where it is necessary to background the situation we are dealing with here. The Te Tau Ihu iwi claimants do not deny that Ngai Tahu had rights in the takiwa, but assert that they also had customary rights in the takiwa. It is those Te Tau Ihu claims that we are concerned with in this report.

As we explained in our first preliminary report, customary rights in land were seldom derived from one source, such as take raupatu, but usually from several, including taka-waenga marriages between invading chiefs and local women (which we discuss further below). Although a claim might ultimately trace back to raupatu, it was sustained occupation that gave recognised rights of ownership. Therefore, ‘conquerors’ had to actually live upon the land or exercise other acts of ‘ownership’ to develop rights in it. This was why they also married into the local people: it was the fastest, although not the only, way for migrants to secure the same degree of legitimacy and make safe their possession of a new homeland. In terms of what was right, one’s children could never be turned off.

Thus, the rights of an incoming group frequently overlaid those of others who remained on the ground or had temporarily withdrawn to areas of greater safety. Such groups still held associations with the land. They might challenge the rights of the newcomers, or they reached an accommodation with them (through intermarriage or *tuku*). Accordingly, in the discussion that follows, we sometimes refer to bundles of rights and overlapping rights.

Rights accrued over time and, consequently, the importance of different elements within the bundle also changed. Part of the problem faced by this Tribunal has been deciding at what date we judge who held rights in the takiwa and therefore the people to whom the

Crown held responsibility. In our view, a flexible approach, which looks at competing claims and how their balance changed over time, is required. This allows for a closer approximation of what custom was about – an evolving community understanding of what rights were held – than is provided for by concentrating on any one date (the usual approach of the Crown and the Native Land Court) or on 1860 (as in the crucial decision of the Maori Appellate Court discussed in chapter 4).

The competing claims before us have been supported by a number of research reports. These include, on the side of the Te Tau Ihu claimants, reports from historians David Armstrong (for Ngati Apa and Rangitane), Tony Walzl (for Ngati Rarua), Dr Bryan Gilling (for Ngati Toa), and Hilary and John Mitchell (relating generally to Te Tau Ihu). On the Ngai Tahu side, we received reports from Professor Atholl Anderson, Dr James McAloon, Dr Te Maire Tau, and Harry Evison. In addition, we received a Rangahaua Whanui overview report and a statement of response (to the Ngai Tahu submissions) by Dr Grant Phillipson (commissioned by the Tribunal), and a report on customary Maori land tenure in Te Tau Ihu by Dr Angela Ballara (commissioned by the Crown Forestry Rental Trust). Though most of our discussion is based on these papers, we have, wherever necessary, gone back to the original documents on which they were based. We have also taken into account numerous submissions from claimant kaumatua and kuia on customary rights in the takiwa.

In the discussion that follows, we look in more detail at the situation on the eastern and western sides of the takiwa. There is very little evidence on the extensive inland area, though it is sometimes mentioned in relation to expeditions across the island or from Te Tau Ihu to one or other of the coasts. Though the takiwa excludes Rotoiti and Rotorua (the Nelson lakes), it does contain much of the inland area claimed by Rangitane and Ngati Apa. Some mention of traditional occupation of the interior is made in the statements of claim of Rangitane and Ngati Apa. Also, the closing submissions of both Rangitane and Ngati Apa refer to the continued occupation of the interior by fugitives belonging to those tribes after the northern invasion, which did not extend to the hinterland at all.¹ Nevertheless, the most important areas of the rohe of both tribes were coastal, and most of the evidence refers to those areas. We therefore centre our attention on the customary rights being claimed on the coasts.

On the east coast, the Kurahaupo iwi, Rangitane, claimed long-standing rights that were said to have survived recent invasions by Ngati Toa and Ngai Tahu. Ngati Toa claimed rights by conquest against Ngai Tahu, and vice versa. On the West Coast, we consider the rights of the Kurahaupo iwi, Ngati Apa, and those of Ngati Toa and their northern allies, Ngati Rarua, Ngati Tama, and Te Atiawa, as against the rights of Poutini Ngai Tahu.

Before proceeding with our examination, we need to make some caveats. The great bulk of the oral evidence that has been recorded over the years consists of narratives of warfare,

1. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 7–8, 10; counsel for Ngati Apa, closing submissions, [February] 2004 (doc T3), pp 11–12, 47

as if to say that life consisted of nothing but attack and counter-attack, perpetually renewed by a never-ending quest for mana and utu. In fact, even in the era of heightened warfare encouraged by the musket, there were lengthy periods of peace and social and economic interaction between various groups. Though the musket heightened casualties, even the most stunning victories were usually accompanied by peacemaking and were cemented by marriages of the victorious rangatira with local women. There is little written record of this activity, although a number of instances were remembered and brought to our attention within Te Tau Ihu traditions. We also received a valuable submission on this practice from the Ngati Toa kaumatua, Ngarongo Iwikatea Nicholson. As he explained it:

Marriages between male and female captives with their captors [were] for the purpose of providing takawaenga between tribes who may have been at war, or intending to engage in such activity . . . The aforementioned marriage practices created what our customs describe as ‘Takawaenga.’ They and their offspring became just that (the mediators or buffer states or go-betweens) in times of stress between their tribes. They had an important role of responsibility towards maintaining inter-tribal stability through this, and had a special status of varying degrees, dependent on the circumstances that created them, and of course their own personal status . . . Bloodline relationships often provided stability between tribes, although the actual link could be several generations removed. The need to maintain these bloodlines [was] often the reason for other marriages to reunite those blood lines and secure the relationship link for future generations.²

It was a responsibility handed down from generation to generation. The offspring of matched marriages were the ‘people who walk[ed] between’ people from different descent lines and different regions, who would create a bond between the ‘conquered’ and the ‘conqueror’.³

Mr Nicholson described how Ngati Toa constructed a network of takawaenga links with both enemies and allies. One example given was created during the taua against Ngai Tahu at Kaiapohia, which had resulted in the death of Ngati Toa ariki Te Pehi Kupe in 1829 or 1830. When a woman prisoner, Te Ipinga, was found to be the daughter of Tukaimaka, a high-ranking Ngai Tahu chief, it was arranged that she would marry Matenga Te Rapa of Ngati Toa. Matenga was chosen for that role because of his relationship to Te Pehi (his cousin) and the others killed during the taua.

We believe that takawaenga were equally important on the West Coast and included marriages between Poutini Ngai Tahu and Ngati Apa, Ngati Rarua, Ngati Tama, and Te Atiawa. A notable example is the marriage of the daughter of Niho of Ngati Rarua to the principal chief of Poutini Ngai Tahu, Tuhuru. Sometimes, these people and their offspring maintained a distinct community identity, as, for instance, Ngati Apa; at other times, they

2. Ngarongo Iwikatea Nicholson, brief of evidence, 9 June 2003 (doc P4), pp 26–27

3. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 141

aligned themselves with Ngai Tahu, according to the then prevailing circumstances. We shall examine such alignments in detail in this and the next chapter.

There are also problems relating to the use of oral traditions to support one side or the other. As Ballara has written, oral traditions 'have a way of growing, even if only by the wish of the narrator to make a fine story'. She quotes the anthropologist Jeffrey Sissons that, 'rather than reflecting historical "truth", oral traditions can be political constructs, giving meaning to a contemporary political order'.⁴ Perhaps there were elements of this in the submissions we received, but more important to us was the entanglement of those traditions with land purchase activity. It would not be surprising that when important rangatira were recounting their traditions to Europeans, especially Crown land purchase officials, they chose the most expansive versions and the most useful historical incidents. Thus, on the east coast, Ngati Toa insisted that their southern conquests and take to land extended as far as Kaiapohia, the site of their victory over Ngai Tahu but where they also lost important rangatira such as Te Pehi. Ngai Tahu claimed the same coast as far north as Parinui o Whiti, on the strength of successful counter-attacks against Ngati Toa and their losses of rangatira at Oraumoa near Port Underwood. As we shall see in chapter 3, the Crown accepted both claims in later purchases of much of the same territory from Ngati Toa and Ngai Tahu. On the West Coast, the northern allies even claimed as far south as Tutarau (near Maitara in Murihiku, or Southland), where, during their defeat by Ngai Tahu, their leader, Te Puoho, was killed. This time, however, the Crown did not accept the northerners' claim to Murihiku, dealing only with Ngai Tahu for that area, but did accept both the northerners' claim and that of Ngai Tahu to the West Coast proper.

There is also the question of the ownership of historical traditions. This is always a problem when the victors gather the traditions and write the history, or allow a sympathetic soul to do so. We have some examples from both sides that we shall discuss below, including some cases discussed by Te Maire Tau, who argues that Pakeha collectors and historians such as William Elvy wrongly attributed and interpreted oral traditions. We discuss Tau's arguments and criticisms below.

2.2 THE ISSUE OF BOUNDARIES IN MAORI CUSTOM

Much of the argument from the two sides relates to the question of whether, under their customary arrangements, Maori iwi or hapu were divided from one another by strictly defined and rigidly observed territorial boundaries, within which they had exclusive rights. Put briefly, Ngai Tahu submissions argued that they had such customary boundaries and that the Maori Appellate Court in its 1990 decision, the Ngai Tahu Tribunal, and the Crown

4. Angela Ballara, *Taua: 'Musket Wars', 'Land Wars' or Tikanga? Warfare in Māori Society in the Early Nineteenth Century* (Auckland: Penguin Books, 2003), pp 36, 40

were correct in recognising them for their statutory takiwa. The Te Tau Ihu claimants were more intent on asserting that, while iwi and hapu had 'core territories', they were divided from one another by broad zones in which they had overlapping rights. We need to consider this issue before examining whether Te Tau Ihu iwi possessed customary rights within the Ngai Tahu takiwa.

We concentrate our discussion on the two main submissions on the boundary issue provided by Anderson and Phillipson. The Ngai Tahu case was anchored by Anderson, an archaeologist, who considered the suitability for New Zealand of various models based on anthropological work on Polynesian societies of the eastern Pacific. Anderson eventually selected a model 'based on the idea of the island as a captured fish, which was divided into portions according to status'.⁵ He applied this model by describing how the canoe commanders asserted claims to lands as they approached the shores of Aotearoa, and how, in a second phase of exploration, the chiefs appropriated parts of the interior. However, Anderson admits that the historical evidence on boundaries is contradictory. He says that there were 'no references to precise boundaries and the principal method of claim seems to have been by setting up altars (tuahu) in preferred places'.⁶ He also notes that the British army historian A S Thomson, writing in 1859, and later others, were aware that there was a lack of clear references to boundaries.⁷ Indeed, Anderson himself admits that 'not all tribal territories were well-defined. The existence of unoccupied ground, some miles wide, was commonly noted.' He adds that 'multiple levels of territoriality tended to concentrate around the main settlements and towards the centre of tribal territory, declining towards the periphery'.⁸ This is virtually to admit the argument of Anderson's adversaries, who maintain that tribes had core territories that were edged by zones of overlapping occupation. But elsewhere Anderson sticks to his main thesis: that tribal boundaries were necessarily exclusive and that shared zones of influence or overlapping rights were 'inimical to traditional concepts'.⁹

Anderson's information on foundation narratives relates mainly to the North Island and he admits that not much is known for the South Island. He also acknowledges that the Pacific islands model hardly fits, since New Zealand is 'vastly different from East Polynesia' in terms of its much greater size, its cooler climate, and its different environment. Land 'was effectively limitless during the colonization phase and even up to the point of European contact large areas were seldom visited'. These differences were especially accentuated in the South Island, with its small Maori population and expansive plains and mountains. 'Nevertheless,' Anderson continues, 'given the relationship of mana to territory, we can be

5. Atholl Anderson, 'Kin and Border: Traditional Land Boundaries in East Polynesia and New Zealand with Particular Reference to the Northern Boundary of Ngai Tahu', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q2(a)), p144

6. Ibid, p 51

7. Ibid, p 53

8. Ibid, pp 74-75

9. Ibid, p 72

sure that from an early point all land was claimed by somebody, and that it had notional boundaries, although these might often have been imprecise.”¹⁰ He admits that the situation massively changed with European contact, which in turn, by providing Maori with new weapons to pursue traditional warfare, led to further upheavals in Maori settlement patterns. Finally, with the coming of British rule and European settlement, there was (and here Anderson quotes the anthropologist MD Lieber) an ‘ossifying [of] ethnic and tribal boundaries [which] . . . served indeed as integral to colonial structures.’¹¹ We agree with this statement and examine the role of the Crown in ‘ossifying’ boundaries in chapter 3.

Anderson notes that prevailing views about Maori territoriality and boundaries have been much discussed in the last 15 years. He quotes several authorities who differ from him. These include Professor Alan Ward, who questions whether a Maori right-holding group would ever have claimed exclusive rights to a given area of land, and he argues that their interests intersected and overlapped. As Anderson also notes, several other scholars who have presented submissions to our inquiry, including Angela Ballara, David Williams, and David Armstrong, have presented similar arguments to Ward’s, as has the Tribunal in some of its previous reports, such as the *Ngati Awa Raupatu Report*.

We turn, however, to Phillipson as representing the alternative explanation on boundaries. We refer mainly to his statement of response to the submissions of the Ngai Tahu professional witnesses, where he starts with the alternative model, presented by the Tribunal in its *Ngati Awa Raupatu Report*, that hapu and iwi:

had no settled political boundaries of the kind associated with Western states. The hapu were more concerned with the maintenance of connections with other groups, mainly through whakapapa, or genealogy than with establishing areas of exclusivity. They had also been mobile over the years. The result today is that many hapu may have customary interests in a particular area or, at least, have ancestral associations with it.¹²

The pattern of occupation described by the Tribunal in the eastern Bay of Plenty was one of core territories, combined with migratory use of resources sometimes located beyond that area, and overlapping interests in boundary zones. There was an emphasis on whakapapa and marriage with other groups, rather than the maintenance of fixed political boundaries between different hapu or iwi. Phillipson also cites examples of multiple or overlapping claims that have been investigated by the Tribunal from the Hauraki area, Tauranga, the Mokau-Mohakatino blocks, and Waikaremoana. In the case of Hauraki, the different tribes of Ngati Paoa, Ngati Maru, Ngati Tamatera, and Ngati Whanaunga had established

10. Anderson, ‘Kin and Border’, pp 146–147

11. Ibid, p 154

12. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 3 (cited in Grant Phillipson, statement of response, 22 September 2003 (doc Q19), p 6)

core areas but held 'kainga pockets' in each other's territories.¹³ While these were allies, and the boundaries were internal to a confederation of tribes, the principle held true for lands situated between peoples in conflict. The Mokau block was one such example that was long debated between Ngati Maniapoto and Ngati Tama. While the extent of influence changed over time, both tribes had valid customary interests throughout the boundary region.¹⁴

To establish exclusive rights within a rohe and an uncontested territorial boundary at 1840, one side or the other needed to have demonstrated a final and lasting military victory, confirmed by occupation that remained in effect. Leaving aside the question of ancestral association and ongoing connections through whakapapa and memory of tapu sites and tupuna buried, the losers of that conflict also had to have desisted in their periodic exercise of use rights in the lands formerly disputed. Phillipson appeals to Anderson's own evidence to demonstrate that this was not the case along the north-east coast of Te Tau Ihu. Anderson admits that the Kaparategau district was not one that was particularly suitable for permanent occupation and that, by the 1820s, 'it may be, [that it] . . . was used only for seasonal hunting and fishing by either or both Ngai Tahu and Rangitane'.¹⁵ It is difficult, in these circumstances, to see either side as having permanently won the area from the other, or as exercising exclusive control over it. We discuss this issue in more detail in section 2.4.1.

It is appropriate at this stage to sum up our response to the arguments on the boundary issue, since it will inform our approach to the remaining issues discussed in this chapter. We accept Phillipson's general thesis, based on previous Tribunal reports, that, instead of rigid boundaries between tribes, there were overlapping or contestable zones in which two or more iwi had interests. Though we have rejected Anderson's main argument, we appreciate the scholarship and earnest endeavour that lies behind his report. If he appears contradictory at times, this is largely because of the contradictory evidence that he honestly supplied, even where it went against his main argument. Contradiction is to be expected when a large number of reports from European observers are quoted. That might in turn reflect the fact that the observers were generalising from contradictory facts from different areas and different groups. However, we should not presume that Maori custom in relation to tribal ownership of land and boundaries would remain unchanged over the years. Customary rights evolved over time, not least when they came under European influence. Hapu, the primary unit of social organisation in Maori society, were forever enlarging, fragmenting, and migrating, often as a consequence of warfare but perhaps just as often following internal, domestic disputes. Some groups stayed in their historical territories; other splinter groups went off to acquire new territories; but no group was necessarily fixed in one location for all time. On the eve of British annexation and European colonisation, Maori became embroiled

13. Taimoana Turoa, *Nga Iwi o Hauraki – The Iwi of Hauraki* (Paeroa: Hauraki Maori Trust Board, 1997), p 4 (cited in Phillipson, statement of response, pp 9–11)

14. Phillipson, statement of response, p 103

15. Anderson, 'Kin and Border', p 109

in what was probably an unprecedented period of warfare in which some hapu populations were decimated, enslaved, or displaced. At the other extreme, new and enlarged hapu and iwi alliances went on conquering rampages, particularly in the thinly populated South Island. This further blurred the divisions of peoples and territories, as did the takawaenga marriages that we have mentioned, which served to make peace between warring factions. In the circumstances, it is difficult for us to accept the notion of fixed tribal or hapu territories within which one group possessed exclusive rights. We do not think Maori society operated like that, either before or after European contact.

We do, however, believe that the notion of fixed tribal boundaries was introduced to Maori by officials who dealt with them for land. Boundaries were fixed particularly by New Zealand Company purchases and then by subsequent Crown purchases of tribal land. Initially, land under negotiation was described with reference to prominent landed features such as a range of hills, as for instance in Colonel Wakefield's deed with Te Atiawa chiefs for the company's purchase of Wellington. Subsequently, however, in the company's Kapiti and Queen Charlotte Sound deeds, the huge area ostensibly purchased (including the northern third of the South Island) was based on boundaries described by degrees of latitude – a concept the Maori signatories could hardly have understood. Purchase deeds commonly had maps of the territory being purchased attached, and sometimes European purchasers encouraged Maori to sketch maps of their lands. In one example, Ihaia Kaikoura sketched a map in the sand of Rangitane's rohe and this was copied on paper by the Surveyor-General, Charles Ligar. Armstrong reproduced it on the front cover of his historical report for Rangitane.¹⁶ What that sketch meant to Kaikoura and Ligar were probably quite different things – for instance, Kaikoura merely sketched in the coastal limits of his rohe and simply refused to name an internal boundary, though Rangitane clearly had claims to land in the interior. Maori were more inclined to name and locate places that were important to them, often in relation to distant events, but it was the European negotiators who linked those places together with boundary lines. Crown officials dealt with those groups most susceptible to selling land, flattered them by accepting the full extent of their claims, and purchased the total area enclosed. If those initial purchases provoked complaints from others of importance who had been left out, the Crown accepted those claims to their fullest extent, even where they overlapped with those of the previous sellers, and simply purchased the land again. We discuss instances of this practice in our next chapter. It was a clear recognition that there were overlapping claims to some rather large contested territories. But, as we shall also note, some with valid claims could be left out because Crown officials misunderstood or ignored the claimants' legitimate customary rights. Two significant examples were Rangitane and Ngati Apa, who were said to have been conquered or enslaved, even

16. David Armstrong, "The Right of Deciding": Rangitane ki Wairau and the Crown, 1840–1900, report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, 2000 (doc A80)

though it was no longer possible, under the Treaty, to treat them in that way after 1840. Moreover, they were entitled to peacefully recover their customary rights over land under both British and Maori law.

2.3 CUSTOMARY RIGHTS IN THE STATUTORY TAKIWA TO CIRCA 1820

We begin by discussing customary rights within the Ngai Tahu takiwa before they were disturbed by the northern invasions in the 1820s and 1830s. In this discussion, we concentrate on the claims submitted by Te Tau Ihu iwi and the criticisms of them by Ngai Tahu witnesses.

2.3.1 The east coast

According to the evidence of Dr and Mrs Mitchell, Rangitane interests had extended down to Waiau-toa before their occupation was disturbed by invasions from the north. This view was supported by Rangitane historian David Armstrong and by claimant witnesses Richard Bradley and Graham Norton. Bradley stressed the importance of mahinga kai and the cultural significance of this area to his people and listed a number of Rangitane mahinga kai sites, including Matariki, on the north side of the Waiau-toa river mouth.¹⁷ Norton listed a number of pa occupied by Rangitane and said that Matariki Pa was occupied until the late 1820s.¹⁸ Armstrong presented the main account of Rangitane's traditional history.¹⁹ He explained that most Rangitane in the Wairau traced their ancestry back to Te Huataki, who migrated to the region from the North Island in the mid-seventeenth century. Huataki was said to have established a pa called Mokinui at the southern end of Mataroa (inland of Parinui o Whiti), and another at the mouth of the Waiharakeke (Flaxmere) River. Armstrong cites Edward Shortland in support of Rangitane's claim to their early ancestral control of the region. In 1843, Shortland was told by the Ngai Tahu rangatira Tuhawaiki that Te Huataki had controlled the territory north of Waipapa from 10 generations earlier.²⁰ Waipapa is some eight kilometres south of the Waiau-toa. However, Ngai Tahu witness Te Maire Tau has challenged this use of Shortland. We discuss his interpretation below.

Subsequent heke from the lower North Island augmented the Rangitane position in Te Tau Ihu. These later migrants are said to have arrived at Totaranui and then migrated into Te Hoiere (Pelorus Sound) and the Kaituna Valley, intermarrying with Ngati Mamoe. By about

17. Richard Bradley, brief of evidence, 22 April 2003 (doc M2), pp 15–16

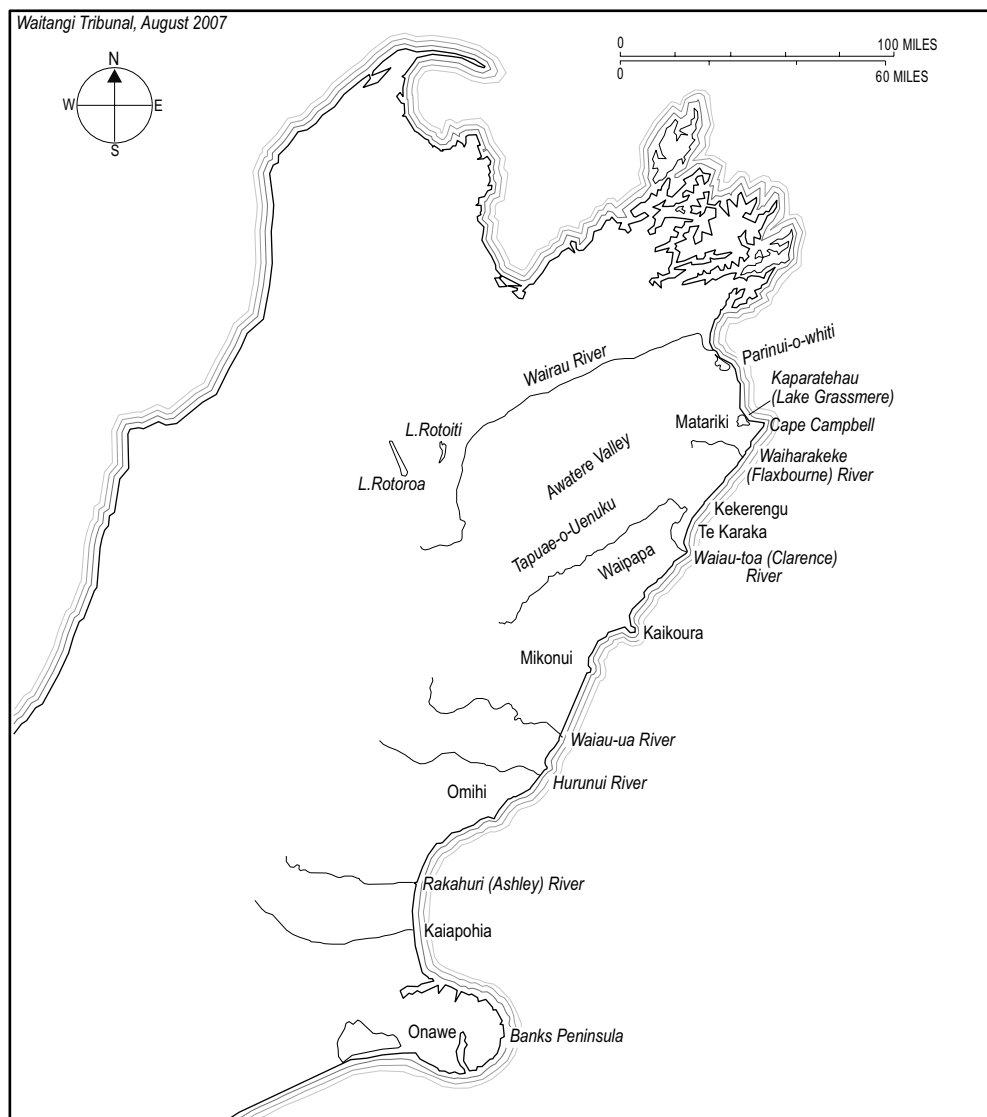
18. Graeme Norton, brief of evidence, 22 April 2003 (doc M1), pp 20–28

19. Armstrong, 'The Right of Deciding', pp 4–11

20. Edward Shortland, *The Southern Districts of New Zealand: A Journal, with Passing Notices of the Customs of the Aborigines*, 2nd ed (Christchurch: Capper Press, 1974), p 98 (cited in Armstrong, 'The Right of Deciding', pp 4–5)

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2.3.1



Map 2: East coast place names

1800, Rangitane were said to be in secure occupation of the lands around the head of Te Hoiere, in the Kaituna, Wairau, and Awatere Valleys, and at Kaparatehau (Lake Grassmere). According to Elvy, Rangitane consolidated their control of the eastern Te Tau Ihu region and their boundary at Waiau-toa after a period of warfare with Ngai Tahu. A key event was a battle at Matariki Pa, in which, Elvy states, Rangitane and Ngati Mamoe overcame Ngati Kuri, a hapu of Ngai Tahu. The battle was named Kai-karoro because seagulls feasted on the flesh of dead Ngati Kuri.²¹

21. William John Elvy, *Kaikoura Coast: The History, Traditions and Maori Place Names of Kaikoura* (Christchurch: Whitcombs and Tombs, 1949), pp 21–22

The Rangitane perspective of the course of the conflict, migration, and eventual distribution of power in the region was summarised by the Mitchells as follows:

The shift of attention to the Kaikoura coast saw Ngati Kuri abandon their Wairau holdings, 'encouraged' on their way by contingents of Rangitane assisted by the remnants of Ngati Mamoe who were still surviving in that district, and from parties of Ngai Tara and Ngati Kuia. In the Wairau Valley itself Rangitane defeated Ngati Kuri at Ruataniwha . . . and at Hikurangi . . . One of the final battles . . . was at 'Matariki' pa at the mouth of the Waiau-toa (Clarence River) where Rangitane, with assistance from residual Ngati Mamoe, forced Ngati Kuri to the south of the river, which thereafter became the boundary between these tribes for several generations.²²

The Mitchells see this boundary as persisting into the early nineteenth century. They argue that in the years prior to the northern taua, Rangitane and their allied kin held 'major pa and kainga in numerous localities' which, in the south-eastern part of their rohe, ran 'from Te Karaka (Cape Campbell) and Matariki (Clarence River mouth)'.²³ Phillipson is a little more cautious. He says that by 1820 'Rangitane were pre-eminent in Totaranui, the Wairau, and the Kaikoura coast, possibly as far south as Waiau-toa'.²⁴

Ngaui Tahu witnesses disputed this version of events. They questioned the extent of control exercised by Rangitane, the location of the 'traditional boundary' between the two peoples, the significance of the battle at Matariki, and the weight that can be placed on the evidence in support of the narrative as outlined above.

For instance, Anderson makes some important qualifications for the use of oral traditions. In explaining the divergence between the Rangitane and Ngaui Tahu historical narratives, he suggests that the narratives 'take on a lineal or radial form in which we trail after invasion, victory or disaster like war correspondents, and traditional histories are constructed accordingly (including in my own work, I have to admit)'.²⁵ Anderson argues persuasively for 'more complex activity on the northeast coast than is allowed in most historical constructions'. He challenges the simple model of Ngati Kuri being forced peremptorily out of Tory Channel and the Wairau to beyond the Waiau-toa. Alternatively, he suggests a three-way tussle between Rangitane and Ngaui Tahu, with Ngati Mamoe sometimes siding with one and sometimes the other. There was, he suggests, a significant period of competition between the various iwi, which moved to and fro over the north-east coast region from Tory Channel to Waipapa.²⁶

22. Hilary Mitchell and Maui John Mitchell, 'Te Tau Ihu o te Waka: A History of Maori of Nelson and Marlborough', 2 vols, revised ed, report commissioned by Te Runanganui o Te Tau Ihu o Te Waka a Maui, 1999 (doc A63), pp 98–99

23. Ibid, p 119

24. Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995 (doc A24), p 19

25. Anderson, 'Kin and Border', pp 86–7

26. Ibid, p 110

There was also, Anderson argues, some agreement between them, with ‘some kind of border established, if only temporarily, between Ngati Mamoe and Ngai Tahu at about Wai-papa.’ Anderson even suggests that ‘Ngai Tahu and Rangitane had been in [a] recent alliance,’ which allowed some Ngati Kuri settlements in the sounds and Wairau, since ‘there was probably no fixed boundary between the two iwi at this time.’²⁷ That is a rather revealing admission and one which runs counter to Anderson’s central thesis of fixed boundaries with exclusive rights within them. Instead, there seems to be a pattern of overlapping intra-iwi interests. Anderson says that there is evidence for Ngati Kuri and Ngai Tahu occupation in the Wairau in manuscripts from the Beaton–Morell (Pitini–Morere) family of Oaro, Kaikoura. While there may have been greater early Ngati Kuri settlement in the Wairau and sounds than has previously been thought, Anderson does not claim a boundary for Ngai Tahu quite so far north.²⁸ He does, however, argue that there was an implicit boundary between the two peoples at Parinui o Whiti. But, later, when he argues that there is ‘no evidence’ of a Ngati Kuri–Rangitane boundary at Waiau-toa, he admits that, ‘Equally, it is not possible to show that there was a boundary at Paranuiowhiti.’²⁹ Since the historical documentary evidence is inconclusive, Anderson falls back on a hypothetical view that the territorial boundary at Parinui o Whiti was suggested by the pattern of resource use. From a Ngai Tahu perspective, Kaparatehau was an outflung resource area, separated by shingle beaches from the resource-rich rocky outcrops of Kaikoura.³⁰

We accept much of Anderson’s argument, including his view that Ngai Tahu had strong traditions linking them with Kaparatehau. They may have continued to use resources at least that far north in the early nineteenth century. Anderson’s account of the complexities of tribal interaction, with their frequently shifting allegiances, is in our view preferable to the neater, standard, and generally accepted accounts of the migration patterns of this period. However, we are not persuaded by the contention that the boundary at Parinui o Whiti was somehow natural; attractive resources are not in themselves proof that Ngai Tahu controlled them. Others were just as likely to do so, or to at least contest Ngai Tahu’s right to exclusive use. We have already discussed Anderson’s model of territorial division with no overlap of rights in the land, and we do not accept it. However, as we also noted above, he sometimes admits that rights were shared in places of overlapping settlement, and with this we agree.

The key question for us remains whether Anderson’s account precludes a legitimate claim by Rangitane to shared customary rights in the area south of Parinui o Whiti. Though we sympathise with Anderson’s argument that Ngai Tahu had rights of occupation and resource use as far north as the sounds and Wairau, we are not persuaded by his refusal to concede

27. Anderson, ‘Kin and Border’, p 100

28. Ibid, pp 92–105

29. Ibid, p 110

30. Ibid, p 94

that Rangitane might have had similar rights to the south and a boundary as far south as Waiau-toa. Anderson claims that the traditional account of the battle of Matariki, which comes mainly from Elvy, is in error. Elvy had written that it was ‘a battle between the Ngati-Mamoe and their Rangitane allies against Ngai Tahu’. But Anderson and Tau claim that Elvy himself had admitted in a private letter that Matariki was merely a battle between Ngati Mamoe and Ngai Tahu and that no Rangitane were involved.³¹

The battle of Matariki has thus become of vital significance for both sides, and battle continues to be waged over historical documentation and interpretation. We must examine this history war in more detail, as best we can. Before we do so, however, we note a parting remark from Anderson that the historical traditions that were to be the subject of so much argument extended only to the mid to late eighteenth century. He notes that there is ‘a scarcity of evidence relating to the boundary districts extending from the late 18th century to the 1820s.’³² Since there are apparently no reports of warfare, the very stuff of traditional narratives, we are tempted to conclude that Rangitane, Ngati Mamoe, and Ngati Kuri were getting along amicably, sometimes living side by side, sometimes apart, and always sharing the seasonal gathering of resources. These peaceful relations appear to have lasted until the irruption of Ngati Toa and their allies into the South Island around 1820.

Since the main authority on Ngai Tahu traditions is Te Maire Tau, we must now turn to him. Tau argues that Rangitane traditions are a modern invention or are corrupted versions of sources that originally go back to Ngai Tahu. He challenges whether Waiau-toa can be shown as a traditional marker between the two iwi or that the battle at Matariki had involved Rangitane at all.³³ Tau is critical of Armstrong’s use of Shortland. Armstrong relies on a statement from the Ngai Tahu rangatira, Tuhawaiki, that Te Huataki and his Rangitane people controlled the east coast as far south as Waipapa. Tau argues that Armstrong has misconstrued the quotation. Tuhawaiki, Tau says, had been referring to the period when Ngati Mamoe held sway over the South Island, and before Ngai Tahu arrived from the North Island. We accept that that may have been the case, although Tuhawaiki had told Shortland that Ngati Mamoe had possessed all of the territory down the east coast from ‘Waipapa . . . to “Rakiura” or Stewart’s Island’, and much of the West Coast as well. However, Shortland, still quoting Tuhawaiki, then wrote that ‘Bordering on them, to the north [of Waipapa], was a tribe called Te Huataki, whose ancestors had crossed over from the North Island.’³⁴ If we take the ‘tribe of Te Huataki’ to be Rangitane, as we think we must, then Tuhawaiki is locating them as far south as Waipapa, and Armstrong is not misrepresenting him at all. Elsewhere, Tau says that Ngai Tahu tradition claims Te Huataki as ‘of Ngai Tahu origin’ but Tau himself admits that Te Huataki ‘married into the people of Rangitane and

31. Ibid, p100

32. Ibid, p155

33. Te Maire Tau, ‘The Oral Traditions Concerning the Areas in Dispute [Ngai Tahu]’, revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q5(a)), p 12

34. Shortland, p 98

became accepted as one of them.³⁵ Whatever his origins, we consider that Te Huataki was generally regarded as Rangitane. We conclude that when Tuhawaiki was speaking of the ‘tribe of Te Huataki’ he was referring to Rangitane and acknowledging their occupation of the east coast as far south as Waipapa, just south of Waiau-toa.

In Tau’s view, the Rangitane assertion that Ngai Tahu had been driven south of Waiau-toa after the battle at Matariki is based on the unreliable scholarship of two mid twentieth century amateur historians, William Elvy and W A Taylor, whose sources, Tau claims, were all Ngai Tahu.³⁶ We do not entirely accept this. Although Elvy and Taylor relied considerably on the Ngai Tahu kuia Hariata Beaton of Oaro, Elvy in particular also had Rangitane contacts, including kaumatua Peter Macdonald and Haani Makitanara.³⁷ Tau regards a third Pakeha historian, Arthur Carrington, as the more dependable. Carrington was also in touch with Mrs Beaton and, through her, had access to a tribal history written by Tapiha Te Winikau. In 1934, Carrington completed a draft of ‘Ngaitahu: The Story of the Invasion of the South Island of New Zealand’.³⁸ Though Tau appears to regard this as an authoritative source, we have a different view of it. The typescript is untidy and incomplete. It does not cite sources and makes little reference to Mrs Beaton, Te Winikau, or any other Ngai Tahu elders. Yet it repeats, in quotation marks, speeches allegedly made by Ngai Tahu rangatira hundreds of years ago. It is romance, not history. On one occasion, after a Ngai Tahu victory, we are told that ‘As is only proper the prince married the princess and was given half the kingdom.’³⁹ Earlier, we quoted a timely admission from Anderson that the historians of oral tradition are ‘like war correspondents’ who trail after ‘invasion, victory or disaster’, and that their traditional histories are constructed accordingly. Carrington, who was a journalist, was one such correspondent who imagined and romanticised a Ngai Tahu past that could hardly have existed. In so far as his history has shape at all, it comes from Stephenson Percy Smith and other elders of the Polynesian Society, not Mrs Beaton. They had constructed a narrative of successive waves of tribal migration from the North Island to the South Island, whereby the more ‘primitive’ inhabitants, such as Ngati Mamoe, were eliminated or pushed to the far reaches of the island. In accepting this, Carrington was no different from Elvy and Taylor, whom Tau condemns.

Yet, Tau relies on Carrington for some of his most important conclusions: for instance, that it was Ngai Tahu, not Rangitane (who were not there) who were the victors at Matariki. In fact, Carrington has only one brief paragraph on the matter, and he portrays Matariki as

35. Tau, pp 34, 40, 63

36. Ibid, pp10, 63

37. William John Elvy, *Kei Puta te Wairau: A History of Marlborough in Maori Times* (Christchurch: Whitcombe and Tombs, 1957), pp 41, 45, 54–55, 68, 78

38. We have examined the photocopy version reprinted in Te Maire Tau’s supporting documents (doc Q5(b), vol1(8)).

39. Arthur Carrington, ‘Ngaitahu: The Story of the Invasion of the South Island of New Zealand’, unpublished manuscript, 1934 (doc Q5(b), vol1(8)), p 60

a victory for Ngai Tahu over Ngati Mamoe, and one which followed a previous victory at Waipapa.⁴⁰ Carrington quotes a slightly different version of the birds feasting on the remains of the slaughtered, who he says were Ngati Mamoe, not Ngai Tahu. Elvy was later to tell the story from a Rangitane perspective and had Rangitane and Ngati Mamoe the victors and the birds feasting off the remains of the vanquished Ngai Tahu. Though Tau says that ‘We should not privilege Elvy, Taylor or Carrington’ and that they were merely ‘shuffling metaphors’ about the same event, he does in fact elevate Carrington’s account over those of Elvy and Taylor. Tau quotes a letter from Elvy to Carrington of 25 June 1934 (when Carrington was writing his history) in which Elvy admits that Matariki was a battle between Ngai Tahu and Ngati Mamoe. This seems to contradict Elvy’s view in his 1948 book *Kaikoura Coast* that it was a battle between Ngai Tahu and Rangitane. We can only presume that he had changed his mind by 1948. In *Kaikoura Coast*, Elvy admits that he had obtained his account of the battle of Matariki from ‘a Rangitane source,’ perhaps Peter Macdonald.⁴¹ However, Tau also eventually admitted, on the basis of Te Winikau’s version of the oral traditions, that there could have been a Rangitane presence at Matariki ‘as a contingency to the Ngai Tahu war party.’⁴²

According to Te Winikau’s account, Ngati Mamoe gifted land at Waiau-toa for the return of their chieftainess, Hine-rongo. She had been captured originally by Rangitane in an attack on Matariki Pa, and from them, in turn, by Ngati Kuri, in a subsequent conflict called Te Wai-kotero a Tu-te-urutira. Ngati Mamoe and Tu-te-urutira’s people lived together peacefully at first, but Ngati Kuri subsequently attacked Ngati Mamoe at Waipapa and Matariki. According to this account, Rangitane assisted Ngati Kuri in their taua before returning to the Wairau.⁴³

To sum up on the conflicting versions of the battle of Matariki, we have Rangitane either not being there at all, or fighting on one side, or on the other side. According to Rangitane tradition, they fought with Ngati Mamoe against the Ngai Tahu hapu, Ngati Kuri. According to Tau, they were not present in a battle fought by Ngati Kuri against Ngati Mamoe, though he subsequently quotes a tradition that has them fighting with Ngati Kuri in that battle against Ngati Mamoe. These apparent contradictions are not surprising, since it is only to be expected that different kaumatua will recount different versions of a battle fought in distant times. Indeed, they may well have been talking about different battles that have been conflated into one crucial battle for Matariki. Though neither Tau nor anyone else has estimated a date for Matariki, we presume it was fought in the mid to late eighteenth century. Matariki Pa was located at the Waiau-toa river mouth and was a gateway from the resource-poor coast to the north to the richer resources further south towards Kaikoura.

40. Ibid, p 65

41. Elvy, *Kaikoura Coast*, p 21

42. Tau, p 72

43. Ibid, pp 67–72

We therefore think that it is highly likely that there was more than one battle for Matariki Pa. But we remain puzzled as to why, if there was so much rivalry for Matariki in the mid to late eighteenth century, there was so little competition for it in the two or three decades between then and the Ngati Toa invasions.

It is difficult for us to come to any definite conclusion about the conflicting interpretations of traditional accounts that have been recycled through several generations of kaumatua and European scholars. Nevertheless, we think that Rangitane were involved, in one way or another, in conflict over Matariki and that the Waiau-toa represented not so much a boundary between Rangitane and Ngai Tahu as an overlapping zone in which both had customary rights, on both sides of the river. We think it is highly likely and not at all strange that Rangitane may have fought against Ngai Tahu on one occasion and with them on another. Such shifting allegiances were not uncommon in Maori history. Though we cannot be sure that Waiau-toa was permanently occupied and, if so, by whom, it was evident from our site visit that there are still archaeological remains, in the form of pa sites and hill side terraces, of frequent occupation. But we accept Anderson's reminder that it is usually impossible to tell the hapu or iwi identity of the occupants from the archaeological remains. We note, however, that Rangitane did claim the sites as theirs. Whether or not it was permanently occupied, the Waiau-toa was clearly an important staging post for expeditions along the coast, or inland up the valley. There were well-known tracks to the bird-snaring places in the mountains and lakes of the interior and down the Awatere Valley to the rich resources of Kaparategau. It is likely that they were used by Rangitane and Ngai Tahu.

Tau also questions whether the mountain Tapuae-o-Uenuku could be sacred to Rangitane, because in his view the traditions about it lie with Ngai Tahu. However, Tau's interpretation seems contrary to that argued by Ngai Tahu kaumatua Tipene O'Regan in the Maori Appellate Court in 1990, when the customary ownership of lands contained in the Arahura and Kaikoura deeds was examined. According to the judgment of that court, O'Regan did not challenge, or seek to discredit, Rangitane's association with Tapuae-o-Uenuku:

Mr O'Regan stated that historically the real issue to them always had been the Awatere Valley and the control of the route right into the heartland of the Ngai Tahu. He said Ngai Tahu have never argued the Rangitane right to look upon Tapuae-o-[U]enuku. He thought two peoples can look at different sides of the same mountain. What they differed with is where it stands.⁴⁴

The court made the same point when it recognised the 'special significance' of the Waiau-toa in Rangitane's traditional history, even though it rejected (on the ground of insufficient

44. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court minute book 4, fol 681

evidence) their claim to the river as the boundary with Ngai Tahu at the time of Te Rau-paraha's incursions.⁴⁵

In summing up on the value of the oral traditions, we would expect those of the Kurahaupo tribes to be more fragmentary and less detailed than those of Ngai Tahu, because of the Kurahaupo tribes' greater losses after 1820. As James Stack notes in his 1898 study *South Island Maoris*, 'little of their history worth recording has been preserved by the remnant of their descendants who escaped destruction at the hands of Te Rau-paraha'.⁴⁶ This has proved to be the case. But it is a long step from this to the conclusion that where traditions were shared they must belong only to Ngai Tahu. Elvy supports the Rangitane association with the Kaparatahau area, attributing to them a narrative regarding the rock pools found there. We should not be surprised if traditions such the naming of these rock pools (in a story involving Kupe) should be held by a number of different groups with an association with that area. Kupe stories were widely shared and were not the preserve of any one iwi. We are reluctant on the grounds of either custom or natural justice to penalise the descendants of those whose traditions have been disrupted by calamity, whether through tribal warfare in the early nineteenth century, or the social disruption of colonisation in the years that followed.

Phillipson examines the allegations that witnesses had borrowed Ngai Tahu traditions from twentieth-century Pakeha ethno-historians such as Elvy to demonstrate interests at Waiau-toa, Matariki, and Kaparatahau. Phillipson finds that Elvy's sources extended beyond Ngai Tahu. In his recording of the traditions of Arai-te-uru canoe, from which the origins and naming of Tapuae-o-Uenuku arise, Elvy names only one of his sources (J H Beattie) but refers to having gathered his stories from different tribes. While Elvy's informants included Hariata Beaton and other Ngai Tahu authorities, he also consulted Rangitane-Kurahaupo repositories of tribal knowledge such as Eruera Hemi and Frank MacDonald (who was the successor to many such noted authorities in the MacDonald family). Phillipson notes that the Rangitane and Ngati Kuia witnesses cited those same tribal authorities as the source of their stories about the mountain and the rock pools.⁴⁷

We are not persuaded by Tau's argument that witnesses for the Kurahaupo iwi borrowed and misused Ngai Tahu narratives and had none of their own showing ancestral connection and rights. We do not accept the Ngai Tahu claim that these stories are their exclusive preserve, even though more of their recorded traditions have survived. But, equally, we do not accept that Rangitane can use their traditions to claim exclusive rights along the Kaikoura coast to Waiau-toa. Neither group can show exclusive ownership of traditions

45. Ibid

46. James Stack, *South Island Maoris: A Sketch of their History and Legendary Lore* (Christchurch: Whitcombe and Tombs, 1898), p 32

47. Phillipson, statement of response, pp 24–28

concerning the area, nor establish the dominance of one narrative over the other, nor demonstrate exclusive control of the sources. This outcome is as one would expect in the case of border lands utilised jointly by tribes whose core lands lay elsewhere. In one sense, these were debatable lands, but the lack of recorded incidents over the area in the late eighteenth and early nineteenth centuries – no conflicts are remembered by either side as having taken place – suggests that the overlap of use rights was accepted.

2.3.2 The West Coast

We turn now to the western side of the South Island. Here too the reconstruction of traditional history is a difficult task. The narratives of Kurahaupo about their early history in the northern part of the West Coast region, including their relations with other tribal groups there, are fragmentary, mainly because of the disruption caused by the arrival in Te Tau Ihu of iwi from the north in the 1820s and 1830s. Furthermore, as in the east coast region we have just discussed, Ngai Tahu (as the iwi controlling the long stretch of coast to the south of the districts that are the focus of our consideration here) have a different understanding of the historical situation on the northern West Coast before 1820.

The focus of our consideration in this part of the chapter is the stretch of coast running south nearly 150 kilometres from Kahurangi Point to an area of flat land in the vicinity of Cape Foulwind and the mouth of the Kawatiri (Buller River), together with large tracts of land extending east from the coast into the mountainous interior. The historical geographer Murray McCaskill comments on the remoteness of the West Coast as a whole: 'It is quite probable that the shores of Westland, the first part of New Zealand to be seen by European eyes [in 1642], were among the last parts of the country to be occupied by Polynesian settlers.'⁴⁸ Ngati Apa claim that their interests in this area date back to the eighteenth century and that they have a long history of resource use and occupation there. In their amended statement of claim, Ngati Apa defined the extent of their rohe on the West Coast. They asserted that they had customary interests in 'the whole block of country from the southern bank lands of the Kawatiri (including Tauranga Bay) north to Kahurangi Point and inland of that coastline in an easterly direction to the Nelson Lakes area.'⁴⁹ In their closing submissions, the iwi maintained that the customary rights they unquestionably possessed in this area – rights that existed before the northern conquest and were not extinguished by it – were entirely ignored by the Crown in its purchasing activities, except for the very limited recognition given in the Arahura transaction of 1860.⁵⁰ They accepted that Ngai Tahu also had a history of activity in the area, but vigorously denied that the southern iwi

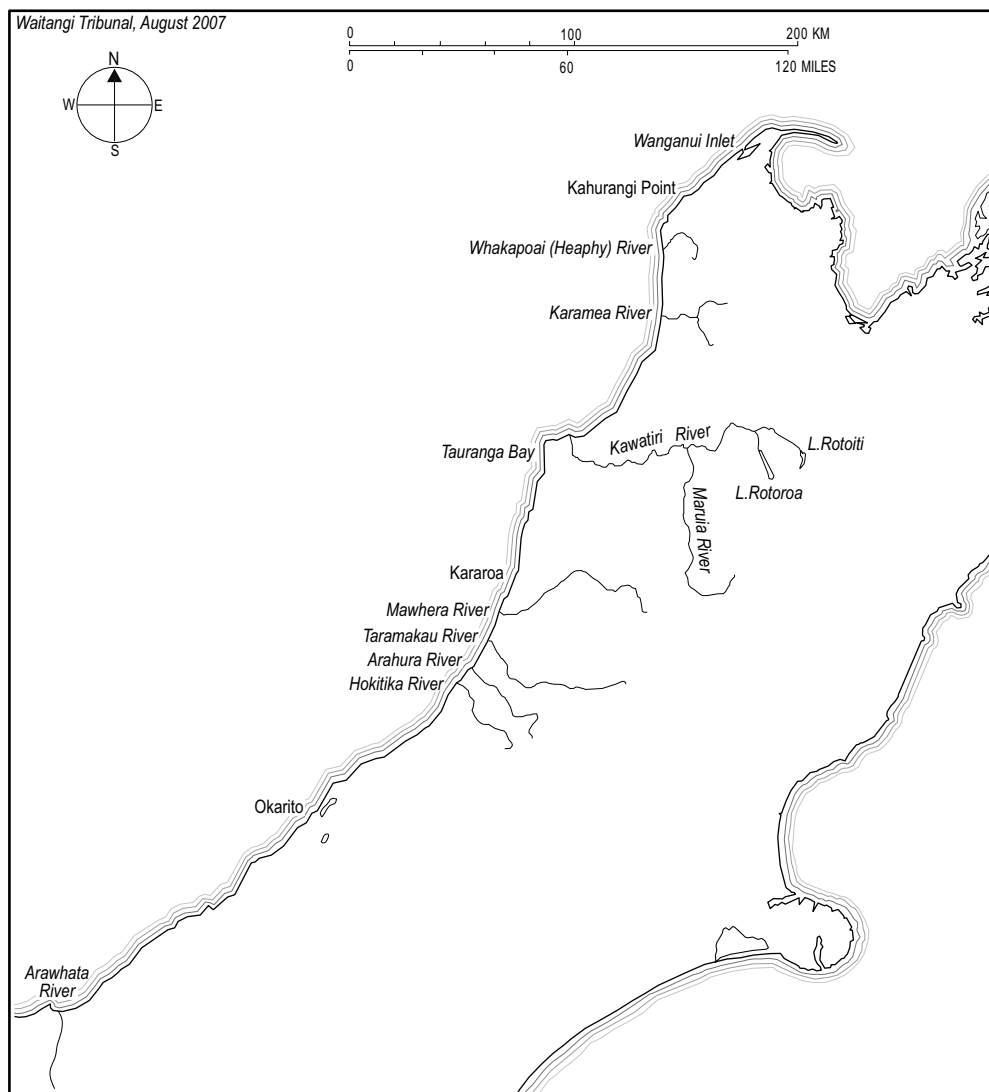
48. Murray McCaskill, 'The Poutini Coast: A Geography of Maori Settlement in Westland', *New Zealand Geographer*, vol 10, no 2 (1954), p 134

49. Ngati Apa, amended statement of claim, 14 February 2003 (claim 1.10(a)), p 5

50. Counsel for Ngati Apa, closing submissions, pp 2, 7, 9

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2.3.2



Map 3: West Coast place names

had exclusive rights there – a claim that they rejected as a ‘myth’.⁵¹ Ngati Apa regard the 1990 decision of the Maori Appellate Court, which ruled that Ngai Tahu has sole customary rights of ownership as far north as Kahurangi, as incorrect and unjust.⁵² We will examine Ngati Apa’s submissions in more detail later in the chapter.

To begin our consideration of the early Maori settlement of the West Coast, we turn to the account given by Te Tau Ihu claimant historians Maui John and Hilary Mitchell as part of their Maori history of the northern South Island. Referring to Te Tau Ihu as a whole, these authors admit that it is difficult to be confident in reconstructing the sequence of tribal

51. Ibid, pp 34–35

52. Ibid, p 43

occupation, and point out that the occupation of particular areas by particular groups often coincided with the presence of quite different groups in adjacent areas.⁵³ They have commented on the difficulties posed by the nature of the available evidence (which is affected by questions about its authenticity) acknowledging that it is difficult to date, contains contradictions about particular events, and nearly always has ‘a particular iwi or hapu gloss.’ Nevertheless, they have been able to provide an account based on primary sources such as oral traditions and unpublished whakapapa (much of this material is not available in the public arena) as well as on a number of secondary sources.⁵⁴

In the Mitchells’ account, there is mention of Ngati Wairangi, who are said to have resided in the western districts of Te Tau Ihu at one time. Certainly they were living further south, in the middle part of the West Coast (Te Tai Poutini), in the seventeenth century, when Ngai Tahu first came to that district. Later they were conquered by Ngai Tahu and incorporated into that iwi.⁵⁵ A more substantial presence in Te Tau Ihu was that of Ngati Tumatakokiri, who are seen as having Kurahaupo origins and are thought to have migrated to the region in the late sixteenth century. Later, they established themselves strongly in the western districts, from which they displaced Ngati Wairangi southwards. Eventually, they also moved south to the Nelson Lakes district (Rotoiti and Rotoroa) and from Te Tai Tapu to the Kawatiri (Buller) and Mawhera (Grey) districts on the West Coast – vast areas that remained ‘under their domination for several generations.’⁵⁶

One of the early written sources for this account is Alexander Mackay’s *Traditionary History* of 1873, which outlined the history of Ngati Wairangi and Ngati Tumatakokiri.⁵⁷ Mackay states that Ngati Tumatakokiri settled on the West Coast ‘as far south as the River Karamea’, and he suggests that for over a century they ‘held undisturbed possession of the country to the north of the Buller.’⁵⁸ This account is based almost entirely on the unpublished ‘Sketch of the History of the Aboriginal Native Tribes of the Middle Island’, which was written by Alexander Mackay’s cousin James in 1859. As Dr McAloon shows, in a report commissioned by Ngai Tahu, James Mackay gathered his information from Ngai Tahu informants on the West Coast while he was negotiating the Crown’s purchase of the area.⁵⁹

53. Hilary Mitchell and Maui John Mitchell, ‘A History of Maori of Nelson and Marlborough’, 2 vols, report commissioned by Te Runanganui o Te Tau o Te Waka a Maui, 1992 (doc A9), vol 1, ch 2, p 1

54. Hilary Mitchell and Maui John Mitchell, statement of response on behalf of Ngati Tama concerning evidence of Ngai Tahu, 26 September 2003 (doc Q21), pp 26–27

55. Mitchell and Mitchell, ‘A History of Maori of Nelson and Marlborough’, vol 1, ch 2, p 38

56. Ibid, ch 2, pp 43–45, 70–71, 83

57. Alexander Mackay, ‘The Traditionary History of the Natives of the South Island up to the Time of their Conquest by the Northern Tribes under Te Rauparaha’, *A Compendium of Official Documents Related to Native Affairs in the South Island*, 2 vols, compiled by Alexander Mackay (Wellington: Government Printer, 1873), vol 1, intro, pt 3, pp 37–53

58. Ibid, vol 1, intro, pt 3, pp 39, 45

59. James McAloon, ‘The Position of Ngai Tahu on the West Coast during the 19th Century’, revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q4(a)), pp 73–78

Clearly, Mackay's account of West Coast history is likely to be oriented towards a Ngai Tahu perspective.

The power of Ngati Tumatakokiri in western Te Tau Ihu was severely challenged on several fronts in the eighteenth century. One of their enemies was Ngati Apa, a Kurahaupo iwi that had come to Te Tau Ihu from the North Island.⁶⁰ In the south, Ngati Tumatakokiri were assailed by the Ngai Tahu communities established on the West Coast (who were known as Poutini Ngai Tahu), and by other Ngai Tahu parties travelling across the mountains from the east. According to the Mitchells, in the 1760s and 1770s Ngati Tumatakokiri still 'traversed and occupied much of the hinterland to as far south as Lake Brunner and coastal districts of Te Tai Poutini' and shared the coast with Ngai Tahu. Eventually, however, they suffered serious defeats at the hands of the southern tribe, including one inflicted by a taua that penetrated right into their Te Tai Tapu heartland. Remnants living in Mawhera and its hinterland were soon afterwards dealt with by the Poutini Ngai Tahu leader Tuhuru, a recent arrival from the east, and the final defeat of Ngati Tumatakokiri was accomplished. One of the men killed in the last battle with Ngai Tahu in the Paparoa Ranges near the Mawhera Valley was Tamane, the father of a boy (Kehu) who was taken prisoner by Ngai Tahu and later became a source of evidence relevant to the claims we are considering. At the same time as Ngati Tumatakokiri were being routed in the south, Ngati Apa were attacking them from the north. Their longstanding mana in the northern South Island was virtually at an end by about 1810 (a date that comes from Mackay). Most were absorbed by the incoming tribes, and Ngati Tumatakokiri survived as an identifiable entity only in a few isolated areas.⁶¹ On their several visits to the inland lakes Rotoiti and Rotoroa in the 1840s, Heaphy and Brunner found this district completely uninhabited, although they understood from their guide, Kehu, that Ngati Tumatakokiri had lived there in the past.⁶²

We were told that after the defeat of Ngati Tumatakokiri, Ngati Apa intermarried with them and established themselves in their former territories; on the West Coast they had important settlements at Karamea and Kawatiri and perhaps further south.⁶³ In the words of Alexander Mackay, writing in 1873, Ngati Apa enjoyed 'entire possession of the country formerly occupied by the Ngatitumatakokiri'.⁶⁴ Ngai Tahu were similarly well established in Te Tai Poutini. The Mitchells acknowledge that links were created between Ngati Apa and Ngai Tahu at this time, although they are uncertain about their extent. They point, however, to the many Kurahaupo whanau with whakapapa links to Ngai Tahu, giving the notable

60. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol 1, ch 2, pp 57–58, 83–84, 89

61. Ibid, ch 2, pp 71–72, 83, 86–90; *Compendium*, vol 1, intro, pt 3, p 45

62. Nancy Taylor (ed), *Early Travellers in New Zealand* (Oxford: Clarendon Press, 1959), pp 191–192

63. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol 1, ch 3, pp 1–3; Hilary Mitchell and Maui John Mitchell, 'Boundary Issues: West Coast of the South Island', report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1990 (doc A82), p 5

64. *Compendium*, vol 1, intro, pt 3, p 45

nineteenth-century example of Mata Nohinohi (Kehu's mother), a woman descended from both Ngati Apa and Ngai Tahu and married first to the Tamane mentioned above.⁶⁵

Except for the Mitchells, historians have given little attention to the question of how far south Ngati Apa's influence on the West Coast extended in the years after Ngati Tumatakokiri were vanquished. In a report prepared in 1988 for the Tribunal's Ngai Tahu inquiry, Dr Donald Loveridge writes that it was 'unclear' how far north the Ngai Tahu mandate ever ran, and he suggests that the fact that Ngati Apa were later recognised in the Arahura purchase 'may indicate that the Poutini Ngai Tahu did not exercise exclusive control over the area north of the Grey River before the 1830s'.⁶⁶ The issue of pre-1820 'boundaries' was not addressed in the *Ngai Tahu Report* itself, which was released in 1991 and relied on the Maori Appellate Court's decision the previous year that Ngai Tahu had exclusive rights up to Kahurangi Point – a matter to which we will return in chapter 4. In the early stages of the Tribunal's present inquiry, Phillipson's 1995 overview report simply accepts the Mitchells' account and again states that by 1820 Ngati Apa were dominant in western Te Tau Ihu and on the West Coast, 'possibly as far south as the Mawhera Valley'.⁶⁷

Ballara's investigation of customary land rights in Te Tau Ihu does not attempt to extend the Mitchells' study of the pre-1800 West Coast. In her 2001 report, Ballara accepts that Ngati Apa were associated with the area from Whakatu 'westwards and inland as far south as Buller'.⁶⁸ She does, however, state that in 1820, on the eve of the northern invasion, the boundaries between Ngati Apa and Poutini Ngai Tahu on the West Coast were 'still fluid and unsettled'.⁶⁹

In the first report written from Ngati Apa's perspective, David Armstrong argues that, by defeating Ngati Tumatakokiri, Ngati Apa acquired customary rights in the northern part of the West Coast. He asserts, as earlier writers had done, that the area controlled by Ngati Apa after about 1800 included the coast north of Mawhera. He adds that they had been 'in the habit of visiting the district to harvest its resources from a much earlier date, perhaps as early as the mid-fifteenth century'.⁷⁰ Armstrong accepts that the occupation of the West Coast involved relatively small numbers of people. In this connection, he refers to McCaskill's conclusion that the region could not have supported a population of more than a few hundred in this period, and that the occupants were largely migratory food-gatherers with only a few semi-permanent settlements and cultivations (such as those at Kawatiri

65. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol 1, ch 2, p 89; ch 3, p 4

66. Donald Loveridge, 'The Arahura Purchase of 1860', report commissioned by the Crown Law Office, 1988 (doc Q1), pp 4–5

67. Phillipson, *The Northern South Island*, p 19

68. Angela Ballara, 'Customary Maori Land Tenure in Te Tau Ihu (The Northern South Island), 1820–1860: An Overview Report on Te Tau Ihu', report commissioned by the Crown Forestry Rental Trust, 2001 (doc D1), p 18

69. Ibid, p 20

70. David Armstrong, 'Ngati Apa ki te Ra To', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997, p 2

and a few inland valleys).⁷¹ Indeed, McCaskill wrote that the physical features of the West Coast made it ‘one of the least promising environments’ for Maori in the whole country.⁷² Armstrong’s findings on the extent of Ngati Apa’s rohe do not go beyond those of earlier writers, but he makes the suggestion that the site of Ngai Tahu’s final victory over Ngati Tumatakokiri (in the Paparoa Range between the Mawhera and Kawatiri Valleys) may have represented ‘a rough “boundary” thereafter adopted between Ngati Apa and Ngai Tahu.’⁷³ In a later report, he refers to additional evidence, contained in a letter written in 1852 to Donald McLean by a group of North Island Ngati Apa chiefs. The letter lists some of the north-western South Island districts formerly controlled by Ngati Tumatakokiri, including places from Te Tai Tapu down to Karamea and Kawatiri, and appears to say that Ngati Apa claimed these areas in the customary way through defeat of and intermarriage with Ngati Tumatakokiri.⁷⁴

Armstrong also points us to a petition sent to Parliament in 1923 by Hoani Mahuika and other Kawatiri residents, in which they referred to the use of the resources of that area by many generations of their ancestors.⁷⁵ The petitioners did not specify the iwi to which they belonged, but when the Mahuika family’s case came to the Native Land Court in 1926 they said that their claim was through Ngai Tahu, Ngati Tama, and Ngati Apa. Tuiti Makitanara spoke for the applicants, mentioning their Ngati Apa, Ngati Tumatakokiri, and Ngati Wairangi connections but emphasising the first. He referred to the Ngati Apa conquest down to Kawatiri and said that, while the applicants had Ngai Tahu rights to all the West Coast lands, their rights ‘under Ngati Apa’ were particularly strong between the Heaphy and the Kawatiri. He stated that:

Kawatiri was the main pa of the Mahuikas and their elders. They also lived at Karamea. Old Mahuika got his right from Ngati Apa. He came with the Ngati Apa taua about 1800 . . . Mahuika got his right through conquest [of Ngati Wairangi] and continuous occupation . . . Puaha Te Rangi got a right through [his grandfather] Te Ao of Ngati Apa.⁷⁶

At this point, we can say that undoubtedly there is traditional and historical evidence for a Ngati Apa presence south of Kahurangi Point but it is not extensive or conclusive. It seems that very little is known about the history of Ngati Apa’s occupation of the region, the precise nature of that occupation, or its geographical extent. Evidently, the population

71. Ibid, p 12; see also McCaskill, ‘The Poutini Coast’, pp 137–141

72. McCaskill, ‘The Poutini Coast’, p 135

73. Armstrong, ‘Ngati Apa ki te Ra To’, p 65

74. Kawana Hunia and others to McLean, 15 March 1852, translated by Takirangi Smith, McLean papers, copy-micro-0535, Alexander Turnbull Library, Wellington (doc A78(a)), p 188; David Armstrong, ‘The Fate of Ngati Apa Reserves and Ancillary Matters’, report commissioned by the Ngati Apa ki te Waipounamu Trust in association with the Crown Forestry Rental Trust, 2000 (doc A78), p 2)

75. Armstrong, ‘Ngati Apa ki te Ra To’, p 88

76. Ibid, pp 91–92

was small and the occupants were more mobile than those living in more well-endowed districts. It is also clear that Ngai Tahu had a history here too, and it is to their understanding of the situation that we now turn.

Concerning this side of the South Island, too, Ngai Tahu witnesses questioned the Kurahaupo representation of the pattern of tribal occupation in the period before the coming of the North Island taua.

We begin with Professor Anderson's comments on the sources for this topic. Describing traditional group relationships in the northern South Island as 'murky waters', Anderson emphasises the difficulty of arriving at an agreed narrative of traditional history in this region. Since there is no way of describing the pre-European socio-political landscape without relying on the relevant traditional histories, the disorder brought to the Kurahaupo iwi and their transmission of traditional knowledge when they were invaded greatly reduced what can be known of the region's past. Concerning the early nineteenth century in Te Tau Ihu, there is, in Anderson's view, a shortage of 'historical traditions of reasonable quality'.⁷⁷ He is critical of the sources used in the accounts of West Coast history put forward by the Te Tau Ihu claimants, saying they are not 'based sufficiently on explicit and defensible historical traditions'.⁷⁸

On the basis of the probable birth dates of the Ngai Tahu named as taua leaders, Anderson argues that the defeat of Ngati Tumatakokiri in Te Tai Tapu was much later than the 1780s date given by Mackay and the Mitchells. In his view it probably occurred between 1810 and 1815, and the defeat in the Paparoa ranges was probably later too (perhaps closer to 1820 than 1810). He points out that this revision of the chronology lengthens the period of Ngati Tumatakokiri presence in the area, which means that neither Ngati Apa nor Ngai Tahu had been in effective control of their territories on the western side of the island until very shortly before the northern invasion.⁷⁹

Anderson also argues that Ngati Tumatakokiri did not occupy lands further south than Kahurangi Point, declaring that evidence to the contrary 'is elusive, to say the least'. While Alexander Mackay's history tells of Ngai Tahu attacks on Ngati Tumatakokiri in Te Tai Tapu, there are no records of clashes between the two iwi further south, in the Buller area. There is no explicit mention of a Ngati Tumatakokiri invasion of the Kawatiri area. Rather, the battles between the two tribes are recorded as being in inland areas south and south-west of the Nelson lakes. Anderson is aware of the information given by Kehu to the Heaphy expedition in 1846, to the effect that the Ngati Tumatakokiri rohe included 'the western coast', but indicates that this did not specifically include Kawatiri and probably meant Te Tai Tapu.⁸⁰ He points out that Mackay, whom he identifies as the most influential source for what has

77. Anderson, 'Kin and Border', pp 80–82

78. Ibid, pp 82–83

79. Ibid, pp 88–90

80. Taylor, *Early Travellers in New Zealand*, p 191

been written about the pre-1820 occupation of the area, has Ngati Tumatakokiri occupation extending no further south than Karamea, this reference in Mackay being the only mention of settlement in the area by that iwi. Mackay's statement in 1873 was that Ngati Tumatakokiri had possession of the district 'north of the Buller', by which Anderson thinks he meant 'north of the Buller district'; that is, north of Kahurangi, which was where the Buller district adjoined Te Tai Tapu. (It was Stephenson Percy Smith who later added 'River', which has often been followed by others.) In Anderson's view, it is unlikely that Mackay meant north of the Buller River, since he had already said that Ngati Tumatakokiri influence extended only as far south as Karamea, and his account of the fighting north of Karamea 'suggests that there were no Ngati Tumatakokiri settlements in Buller, at least south of Karamea, and perhaps south of Kahurangi Point'.⁸¹

In Anderson's opinion, accounts that have Ngati Apa expanding into Buller and Westland are similarly 'very much open to question'.⁸² He cites Mackay's statement (to Parliament's Native Affairs Committee in 1896, when he was providing background for the Wakapuaka dispute) that at the time of the northerners' invasion Ngati Apa was in possession of 'the country extending as far as the West Wanganui'.⁸³ He rejects Makitanara's testimony to the Native Land Court in 1926, which asserted that Ngati Apa conquered the Kawatiri area about 1800: to Anderson this is 'implausible' and unsupported by any other evidence.⁸⁴ He has seen no specific evidence of battles between Ngati Apa and Ngai Tahu south of Te Tai Tapu, nor of any Ngati Apa settlement in Buller and Westland at this time. In contrast with this lack of evidence for Ngati Apa occupation of the area, however, there is much evidence for Ngai Tahu's main settlements and activities further down the coast. As for the inland districts, Anderson believes that the Ngati Apa evidence is 'slim indeed' and not able to tell us much about who occupied which area. He does not doubt that Ngati Tumatakokiri occupied some parts of the interior districts and competed there with Ngai Tahu, but with the demise of Ngati Tumatakokiri about 1820, Ngai Tahu 'became essentially the exclusive users of the inland valleys up to about 1840'. The defeat of Ngati Tumatakokiri 'had the result of freeing access to the borderlands by Ngai Tahu'. Ngai Tahu were a strong tribe militarily, especially when they had the support of their kin from the eastern side of the island. Other tribes 'could nibble at the edges, but they stood no chance of making any significant inroad on territory which Ngai Tahu were determined to defend'.⁸⁵

In a detailed analysis of sources relating to the invasion of the West Coast by Ngati Rarua and other northern tribes at the end of this period, Anderson finds only Ngai Tahu

81. Anderson, 'Kin and Border', pp 111–120. For Kahu's statement to Heaphy, see Taylor, *Early Travellers in New Zealand*, p 191.

82. Anderson, 'Kin and Border', p 90

83. Mackay to chairman, Native Affairs Committee, 24 August 1896, AJHR, 1936, G-6B, p 29 (as quoted in Anderson, 'Kin and Border', p 121)

84. Anderson, 'Kin and Border', pp 119, 121

85. Ibid, pp 120–123, 142, 155–156, 158–160

occupying the area south of Kahurangi. Referring to persons named in the Ngati Toa narrative sent to Grey in 1851 and 1852, he agrees that the well-known chief Te Rato, who was killed in Te Tai Tapu, was Ngati Apa, but identifies the other chiefs named in this source, and encountered south of Kahurangi by the taua, as Ngai Tahu. To him the indications are that 'Poutini Ngai Tahu had managed to establish the Kahurangi point area as their northern border by the late 1820s'.⁸⁶ Against this, we mention the evidence given to the Native Land Court in 1892 by Ngapiko, who stated that his Ngati Rarua forbears had proceeded down the coast past Kahurangi and 'fought with the Ngatitumatakokiri at Karamea'.⁸⁷

In summary then, Anderson's contention is that the Kurahaupo reconstruction of events 'pays too little attention to the role of Ngai Tahu, while promoting views about the distribution of other iwi in districts south of the Ngai Tahu boundary on evidence which leaves much to be desired'. The evidence relating to the boundary districts from the late eighteenth century until the 1820s is scarce, but it is unlikely that either Ngati Tumatakokiri or Ngati Apa settled permanently south of Te Tai Tapu or west of the Nelson lakes, at least 'in separate communities'. In fact, scarcity of resources meant that the area between Karamea and Kawatiri 'seems to have been avoided as an area of long-term settlement by all iwi until the 1840s'. Anderson admits that Ngai Tahu 'are similarly invisible in the Buller', at least as far as occupation is concerned. Although he does not use the word 'boundary', Anderson believes that there was a 'distinction' between, on the one hand, the Ngati Tumatakokiri–Ngati Apa rohe in Te Tai Tapu and, on the other, the West Coast below about Kahurangi Point. He suggests that Ngati Apa, like Ngati Tumatakokiri before them, 'might have regarded the broad area between West Whanganui and Karamea as a borderland between themselves and Poutini Ngai Tahu, but they established no known settlements in the Buller'.⁸⁸ Under cross-examination, Anderson admitted that the evidence 'just isn't very clear on this at all' and said that, 'to some extent', he would agree that his case was 'a supposition' based on pieces of traditional information describing the history of occupation in the districts to the north of Te Tai Tapu and to the south of Kawatiri. While agreeing that the evidence could point in favour of either Ngati Apa or Ngai Tahu, Anderson still maintained that there was a great deal more evidence on the Ngai Tahu side than there was on the Ngati Apa side. Nevertheless, 'possibly the whole area was a zone of contention'.⁸⁹

Dr Te Maire Tau also casts doubt on the quality of the traditional evidence used by the Te Tau Ihu claimants.⁹⁰ He places considerable importance on Ngati Wairangi, to whom Ngai Tahu were closely related. Indeed, in Tau's view Ngai Tahu is the only tribe able to

86. Anderson, 'Kin and Border', pp 128–134, 159

87. Nelson Native Land Court minute book 2, fol 173 (as quoted in Tony Walzl, 'Ngati Rarua and the West Coast, 1827–1940', report commissioned by the Ngati Rarua Iwi Trust, 2000 (doc B5), p 7)

88. Anderson, 'Kin and Border', pp 124, 135–137, 141, 155–156, 158–159

89. Atholl Anderson, cross-examination, seventeenth hearing, 13–17 October 2003 (transcript 4.17, pp 23–24)

90. Tau, pp 27–28

demonstrate a customary claim to the northern West Coast and its hinterland, by conquest and by way of descent from the former occupiers (Ngati Wairangi).⁹¹ Tau quotes Alexander Mackay's mention of a limited Ngati Tumatakokiri presence south of Kahurangi Point and points to a lack of traditional evidence that this former Ngati Wairangi area ever came under Ngati Apa authority.⁹²

Using more recent evidence, Dr McAloon points out that in 1923 the Mahuika whanau mentioned their descent from Ngati Wairangi in their petition to Parliament, as they did when their claims were heard in the Native Land Court in 1926. Hone Mahuika did indeed tell the court that the Mahuika claim was through both Ngai Tahu and Ngati Apa, writes McAloon, but he also stated that they 'got into Westland land through Mata Nohinohi'. Mata was the wife of their Ngati Apa forebear Mahuika but of Ngati Wairangi and Ngai Tahu descent herself.⁹³

On these grounds, Ngai Tahu asserted in their closing submissions (which we will discuss in greater detail later in the chapter) that all the evidence supported their claims to customary rights in the disputed area. They did not accept that there was any traditional evidence for a claim by Ngati Apa to customary title based on conquest, discovery, or ancestral rights.⁹⁴

Some of these matters will be relevant later, when we look at how the contending parties have explained the presence at Kawatiri of a community that, at the time of the Arahura purchase in 1860, called themselves and were identified by Ngai Tahu as Ngati Apa. First, however, we state our understanding of the history of tribal occupation of the region between Kahurangi and Mawhera in the early nineteenth century, before the arrival of the northern invaders.

At the outset, we agree with contentions, made principally by Anderson but also by Tau, that the evidential basis offered by traditional accounts of this history is not strong. The Mitchells, who provided the main Kurahaupo account, were well aware of the difficulties posed by the nature of the evidence, and it will be widely understood that the disruption brought to the Kurahaupo occupants of western Te Tau Ihu by the destructive invasion by northern tribes in the early nineteenth century made it difficult to pass on any substantial record of the traditional history of this area, just as on the east coast. It is understandable, too, that the traditions of various iwi often conflict with each other. Such differences are not easy to resolve, and it is probably misguided to attempt a resolution, certainly when the divergences concern a disputed area. One of the main written narratives, the compilation of traditional information gathered soon after mid-century by Alexander Mackay, does

91. Ibid, pp 28, 78–119

92. Ibid, pp 147–150

93. McAloon, pp 107–118

94. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), p 54

not strongly support the Ngati Apa case. It should be remembered, however, that Mackay's source for most of his statements about the traditional history of this region was in fact the information gathered from Ngai Tahu by his cousin James.

Ngati Apa's claim, backed up by historical accounts such as those of the Mitchells and Armstrong, that after their attacks on Ngati Tumatakokiri they occupied the West Coast districts down to Kawatiri (though not exclusively), is rejected strongly by Ngai Tahu. With support from Anderson and Tau, Ngai Tahu assert that before 1820 they held exclusive rights on the West Coast as far north as Kahurangi Point. We accept the extremes of neither side. In our view it is not possible to deny altogether that Ngati Apa had a presence south of Kahurangi Point, but it was probably small and mobile and challenged from time to time by a similarly itinerant and insubstantial Ngai Tahu presence.

We accept the major import of Anderson's argument that the narrative was more complex than is often allowed, and that Ngati Tumatakokiri's and Ngati Apa's influence may not have extended south to Kawatiri, at least in the form of permanent occupation. We also note Tau's arguments for the occupation of the area by Ngati Wairangi and his statement that it was Ngai Tahu who inherited their rights in this district, one that was never settled by either Ngati Tumatakokiri or Ngati Apa. We do not accept, however, that people who traced their descent to Ngati Wairangi must necessarily be Ngai Tahu. Overall, we can do no more than agree with Anderson that the historical evidence about the occupation of the district in the period before 1820 is 'ambiguous'.

We also accept, again following Anderson, that the previously understood chronology of traditional history needs revision: the main victories of Ngati Apa and Ngai Tahu over Ngati Tumatakokiri could well have come significantly later than the 1780s and even as late as 1820, meaning that whatever rights were held in the region by the two expanding tribes after the eclipse of Ngati Tumatakokiri were relatively new when the northern invaders arrived.

Finally, we acknowledge the validity of Anderson's view that the district was probably an area of migratory resource use rather than permanent occupation. This perception of the area is in agreement with that of Ngati Apa's historian Armstrong, who draws on the conclusions of the historical geographer McCaskill that at this time the West Coast supported only a small population of migratory people relying on only a few semi-permanent settlements and cultivations. Some places were unsuitable even for that. The people killed some distance south of Kahurangi Point during the Ngati Rarua invasion (identified by Anderson as Ngai Tahu), for instance, were unlikely to have been living there. When Heaphy struggled through this district in 1846 he commented that it was 'far too mountainous for cultivation, even in the native method'.⁹⁵ As Bryan Gilling suggests, a Ngai Tahu settlement in that locality would also have been extremely isolated, and cut off from the main tribal area

95. Taylor, *Early Travellers in New Zealand*, p 216

further south by the almost impassable coastline north of the Whakapoai River. Perhaps, says Gilling, these Ngai Tahu were ‘a hunting party’ or an ‘exploratory/reconnaissance group attempting to determine the threat from the north.’⁹⁶

What we do not accept is an argument that Ngai Tahu enjoyed exclusive rights in the northern area between Kahurangi and Kawatiri. In our view, neither side can demonstrate that. In reaching this conclusion, we are persuaded less by the evidence of Ngati Apa’s ancestral association, although we do not discount it entirely, than by Ngai Tahu’s own historical acknowledgement (in 1860) of a community at Kawatiri, identified as Ngati Apa, whose rights should be respected by the Crown when purchasing the district. We note that the senior men of that community claimed descent from both Ngati Apa and Ngai Tahu – a whakapapa that, to our mind, supports an argument of long-standing association rather than otherwise – but we do not accept that it was through the Ngai Tahu line alone that rights were claimed. Indeed, it was as ‘Ngati Apa’ rather than as ‘Ngai Tahu’ that they identified themselves, and this was accepted by the local Ngai Tahu leadership at the time. We will return to this matter in section 2.5.2 and in chapter 3.

2.4 THE IMPACT OF THE NORTHERN INVASIONS ON CUSTOMARY RIGHTS IN THE TAKIWA TO 1840

The northern invasions and migrations that occurred in the 1820s and 1830s have been described in detail in our first preliminary report and need only be summarised here. During this period, when the tribal landscape of Te Tau Ihu was severely disrupted by the coming of tribes originating from Kawhia and Taranaki, several taua went far into Ngai Tahu territory on both coasts of the South Island and were to have significant consequences for customary rights in the Ngai Tahu takiwa. On the east coast between 1829 and 1832, Te Rauparaha led a series of expeditions of Ngati Toa and their allies to Kaiapoi and Banks Peninsula. Ngai Tahu were defeated but not obliterated. Ngati Toa also suffered some important casualties, including the chief Te Pehi Kupe, whose death was to have important consequences that we detail below. On the West Coast, following early raids and later the defeat of Poutini Ngai Tahu and the migration of northern settlers to the area, another expedition travelled south about 1836. Led by Te Puoho of Ngati Tama, the taua went through Haast Pass and on to Tukurau in Murihiku, where it was confronted by a Ngai Tahu force led by Tuhawaiki and Taiaroa. Te Puoho and many of his taua were killed. Most of the Ngati Tama and Ngati Rarua who had settled on the West Coast withdrew to Te Tau Ihu. On the east coast, Ngai Tahu were emboldened by their success against Te Puoho’s expedition to counter-attack against Ngati Toa, even to the extent of threatening their hold on Wairau.

96. Bryan Gilling, brief of evidence, 25 September 2003 (doc Q20), p18

These expeditions and counter-attacks were to have a very significant impact on existing customary land rights in the takiwa on both coasts.

2.4.1 The east coast

Ngati Toa's expeditions against Ngai Tahu followed their campaigns against Rangitane in retaliation for their involvement in the 1824 battle of Waiorua at Kapiti. Te Rauparaha had a personal mission: to get revenge against the Rangitane rangatira, Ruaoneone, who had threatened to pulp Te Rauparaha's head with a fern pounder.⁹⁷ Rangitane were comprehensively attacked by Ngati Toa, Ngati Rarua, and Te Atiawa in the sounds and at Wairau in 1827 and 1828. Although the precise chronology of the battles that took place is uncertain and sometimes disputed, the general outline of events is reasonably clear. Te Rauparaha attacked Rangitane at Totaranui. Then there were further attacks, sometimes also involving Ngati Rarua and Te Atiawa, on Rangitane Pa at Endeavour Inlet, Karaka Point, and Hikapu, and near Waitohi. Without muskets, Rangitane were heavily defeated. Ruaoneone was killed. According to a probably exaggerated estimate by Te Rauparaha's son, Tamihana, some 500 men and 1000 women and children were killed.⁹⁸ But, according to Armstrong, there were 'many survivors' who escaped into the interior or were taken as slaves.⁹⁹ Ngati Toa and Ngati Rarua settled mainly around the whaling stations on the western shore of Cloudy Bay, where they carried out a lucrative trade with the whalers, selling food and flax that was provided as tribute by Rangitane.¹⁰⁰ Some of the Rangitane who fled inland went in the direction of the Nelson lakes; others went up the Awatere Valley. In the 1830s, a pa in the Avon Valley south of Blenheim was periodically occupied by the Rangitane–Ngati Apa chief Tamaherangi. This was connected by a track to the Awatere Valley.¹⁰¹ Such groups maintained a precarious independence and were familiar with the inland tracks that followed the river valleys, such as Waiau-toa, to the east coast or the mountain passes through to Canterbury.

In the whaling off-season, the rangatira, including Te Rauparaha, enjoyed seasonal activities such as hunting ducks in moult at Kaparathau. According to Elvy, Te Rauparaha, having reduced the Rangitane settlements at Wairau, 'then "mopped up" the small villages along the coast, the principal one at Te Karaka, near Cape Campbell, being taken and burnt to the ground'.¹⁰² Evison says that Te Rauparaha's force then sailed around the coast to Kaikoura 'where [the Ngai Tahu hapu] Ngati Kuri mistook their visitors for friends and greeted them

97. Ballara, *Taua*, p 94

98. Armstrong, 'The Right of Deciding', p 16; Ballara, *Taua*, p 363

99. Armstrong, 'The Right of Deciding', p 17

100. Ibid, p 21

101. Ibid, pp 17–18

102. Elvy, *Kei Puta te Wairau*, p 74

on the beach, only to be set upon with musket fire. All were massacred or captured, except those who escaped to the mountains.¹⁰³

This sortie can be regarded as a preliminary to a series of mainly sea-borne assaults on Ngai Tahu that were organised over the next three summers. It was during the first Ngati Toa assault on Ngai Tahu, in the summer of 1829–30, that Te Pehi Kupe and several other northern chiefs were killed. Te Rauparaha's retaliatory raid in December 1830 was facilitated by Captain Stewart, who, for a cargo of flax, transported the invading force from Kapiti to Akaroa. There, they launched attacks on several settlements and lured the rangatira Tamaiharanui on board, before returning to Kapiti, where Tamaiharanui was tortured and executed.¹⁰⁴

The final assault, in the summer of 1831–32, was the most elaborately organised of all. Two parties set off by separate routes. The main party of Ngati Toa under Te Rauparaha proceeded by a flotilla of waka to Waipara on the Canterbury coast, where they met with another party that had come through the inland passes, carrying supplies. Though there are various accounts of the composition of this party, we think the one by Ron Crosby is the most reliable. By his account, the party was led by Ngati Rarua, but it was joined at Waipara by a Rangitane contingent, who carried the supplies.¹⁰⁵ The two parties then proceeded overland to lay siege to the main Ngai Tahu pa at Kaiapohia. Although the siege lasted some time, Ngati Toa and their allies were eventually successful when they managed to set fire to the pa and slaughtered many of the Ngai Tahu defenders. Dr Ballara puts the Ngai Tahu casualties at between 300 and 400.¹⁰⁶ The Rangitane party assisted Ngati Toa in the assault, and one of their tohunga provided incantations to ensure the success of the fight. Because of this assistance to Ngati Toa, Ngai Tahu retaliated against Rangitane when they launched counter-attacks against Ngati Toa and their allies in Te Tau Ihu.¹⁰⁷

After the capture of Kaiapohia, Ngati Toa and their allies attacked and overwhelmed Onawe on Banks Peninsula, where again there was considerable slaughter but some Ngai Tahu escaped. After several further skirmishes, including an unsuccessful attack on Taumutu, Ngati Toa and their allies withdrew. Despite many threats to return, this was the last of their expeditions into Ngai Tahu country on the east coast.

Yet, Ngai Tahu were far from finished. They armed themselves heavily after Te Rauparaha's first taua. One rangatira, Te Whakataupua, obtained 60 muskets and 450 kilograms each of powder and ball as payment for the sale of land at Preservation Point in late 1832. Ngai Tahu reoccupied Kaiapohia within six months, although they were slower to reoccupy settlements along the coast towards Kaikoura. After the defeat of Te Puoho's expedition, Ngai

103. Harry Evison, *The Long Dispute: Maori Land Rights and European Colonisation in Southern New Zealand* (Christchurch: Canterbury University Press, 1997), pp 48–49

104. Ron Crosby, *The Musket Wars: A History of Inter-Iwi Conflict, 1806–45* (Auckland: Reed, 1999), pp 227–228

105. *Ibid*, p 237

106. Ballara, *Taua*, p 372

107. Armstrong, 'The Right of Deciding', p 25

Tahu rallied forces from the deep south, collected reinforcements in Canterbury and began a series of counter-attacks against Ngati Toa and their allies in Te Tau Ihu.¹⁰⁸ On the way, they took revenge on Rangitane for assisting Ngati Toa in the assault on Kaiapohia. The Ngai Tahu force that Tuhawaiki led up the east coast in early 1833 came ashore and attacked Ngati Toa and Rangitane wherever they were found in occupation. They:

- ▶ attacked and killed some Ngati Toa who had remained at Kaikoura;¹⁰⁹
- ▶ landed at Waipapa, where Rangitane ‘refugees’ were found and ‘many’ of them were killed;¹¹⁰
- ▶ assaulted the Rangitane pa, Kaitutae, at Kekerengu;¹¹¹ and
- ▶ attacked a settlement at Waiharakeke that was variously described as Ngati Toa and Rangitane.¹¹²

All of this is significant evidence that Rangitane and Ngati Toa were living at various places along the coast in the early 1830s. Although some were killed by Ngai Tahu, others who escaped may have resumed their occupation, though by the 1840s it seems that few, if any, people were left there. We discuss this matter below.

Tuhawaiki’s Ngai Tahu flotilla proceeded around Cape Campbell and surprised Te Rauparaha’s party at Kaparategau where they were collecting paradise ducks during the moulting season. Though many of the Ngati Toa party were killed, Te Rauparaha escaped by hiding in kelp and swimming to a canoe that was still afloat. There are differing versions of what followed. According to Alexander Mackay, the Ngati Toa who escaped made their way to Cloudy Bay where they obtained reinforcements and set out in pursuit of Ngai Tahu. Ngati Toa caught up with them at Waiharakeke near Cape Campbell, where there was a fight, with Ngai Tahu ‘getting worsted.’¹¹³ Ngai Tahu denied this and said that they retaliated with a successful attack on Ngati Toa at Port Underwood. In any event, Mackay probably truncated several events that occurred over some time.

Other accounts that do not mention the Waiharakeke fight say that, after the attack on Te Rauparaha at Kaparategau, Ngai Tahu pursued the fleeing Ngati Toa survivors to Cloudy Bay. Te Rauparaha’s party then fled over the hills to Opua, on the eastern side of Tory Channel, where another battle was fought. They were saved by the intervention of Te Manu Toheroa of Te Atiawa who drove off the Ngai Tahu war party.¹¹⁴ Meanwhile, Te Rauparaha had recruited Ngati Mutunga, Ngati Raukawa, and Ngati Rarua reinforcements from Kapiti.

108. Anderson, ‘Kin and Border’, pp 108–109

109. Evison, *The Long Dispute*, p 61

110. Tau, p 125

111. Counsel for Rangitane, closing submissions, p 13

112. Evison, *The Long Dispute*, p 63; John Moorfield, ‘The Natanahira Waruwarutu Manuscript and Letters by Ngai Tahu’, report commissioned by Te Runanga o Ngai Tahu, 2003 (doc Q5(b), voll 1(1)), p 32

113. *Compendium*, vol 1, intro, pt 3, p 50

114. Alan Riwaaka, ‘Nga Hekenga o te Atiawa’, research report commissioned by the Te Atiawa Manawhenua ki Te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2003 (doc A55), pp 113–115; Evison, *The Long Dispute*, pp 63–64

When they arrived, Ngati Mutunga went into action on their own but lost heavily. The main encounter that followed was indecisive. Ngai Tahu had to retreat when they ran out of ammunition, though the northern tribes claimed victory.¹¹⁵

Ngai Tahu sent another large expedition north in the summer of 1833–34. This force sailed along the Kaikoura coast, killing some Ngati Toa along the way. In Cloudy Bay, they discovered that most of Ngati Toa and their allies had left. Ngai Tahu had to be content with attacking Guard's whaling station at Oraumoa (Fighting Bay) to the east of Port Underwood.¹¹⁶ The northern tribes had evacuated the area, not through fear of Ngai Tahu but because they were engaged across Cook Strait, where, Ballara points out, a conflict was then brewing between Te Atiawa and Ngati Raukawa in the Otaki area. This split Ngati Toa allegiances and resulted in the major battle of Haowhenua in 1834. It was after this event that much of the settlement of Te Tau Ihu was to take place.¹¹⁷ The Ngai Tahu taua plundered whaling stations at Port Underwood and waited two months in vain for the northern tribes to reappear before they departed for home. Taiaroa attacked a Rangitane settlement at Wairau on the way, while Haereroa waited for five months at Omihi, near Kaikoura, in case Te Rauparaha should return, but he failed to appear.¹¹⁸ According to Edward Jerningham Wakefield, some whaling stations were sacked by Ngai Tahu taua four times before peace was finally made with Ngati Toa and the northerners.¹¹⁹

After these Ngai Tahu campaigns in Te Tau Ihu, there was no more armed warfare between the two groups. Though Ngati Toa planned several retaliatory expeditions, these were abandoned for various reasons. One in 1836 was abandoned because of an outbreak of measles. Another, which got as far as Wairau, was abandoned when Te Rauparaha discovered that some of his Te Atiawa allies had desecrated the graves of Ngati Toa who had been killed at Kaparathau. There can be no doubt that Ngai Tahu had recovered much of their strength after their military defeats at Kaiapohia and Banks Peninsula. Successful raids had been made into territory occupied by Ngati Toa and their allies, though Ngai Tahu had not remained in Te Tau Ihu. Likewise, Ngati Toa had shown no real interest in following through on their victories over Ngai Tahu with further raids into their territory, or any significant occupation of their lands. By the late 1830s, a stalemate had been reached and Ngati Toa and Ngai Tahu were more intent on making peace than war. Though there was debate over which side initiated the peace, there is no doubt that a peace settlement was made because both sides needed it.¹²⁰ According to Evison, Te Rauparaha sent a peace embassy

115. Evison, *The Long Dispute*, pp 63–65; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 124–125; McAloon, p 12

116. McAloon, pp 12–13

117. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 125

118. Ibid, pp 125–126

119. Edward Jerningham Wakefield, *Adventure in New Zealand, from 1839 to 1844: With Some Account of the Beginning of the British Colonization of the Islands* (London: John Murray, 1845), vol 1, p 47 (as cited in Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 126); see also McAloon, pp 18–20

120. Tau, pp 133–134

to the Ngai Tahu hapu, Ngai Tuahuriri, at Port Levy in 1836. Three Ngati Tuahuriri prisoners were released. The peace offering was accepted and formalised by marriages.¹²¹ Though Tuhawaiki led an expedition north in 1839, it returned without having engaged in fighting.¹²² By this time, Colonel Wakefield had arrived and was negotiating with Ngati Toa for what became, in his Kapiti deed, the alleged purchase of much of the lower North Island, and the South Island as far as 43 degrees south. At the same time, Tuhawaiki was about to embark for Sydney, where he ostensibly sold all of the South Island to Sydney speculators. A new form of ‘warfare’, selling land by rival deeds, was about to replace the old fashioned wars of the tribes. Te Rauparaha also threatened to send another expedition to the far south in 1839, but Ngai Tahu sent one of their chiefs to Te Rauparaha and asked him not to come. He apparently responded by saying that the ‘words were good’ and predicted there would be no more fighting against Ngai Tahu. Though there is some doubt whether Te Rauparaha intended to keep his word, the arrival of the gospel of peace preached by the missionaries was having an effect. In 1839, Ngati Toa released their Ngai Tahu slaves, who returned home. And, in 1843, Te Rauparaha’s son, Tamihana, and Matene Te Whiwhi led a peacemaking expedition into Ngai Tahu territory.¹²³ As part of those peacemaking endeavours, takawaenga marriages were carried out, as we were told by Ngati Toa kaumatua Iwi Nicholson.¹²⁴ This custom of arranging marriages, moreover, was long continued and included an arranged marriage of Ria Moheko Taiaroa, great granddaughter of Te Matenga Taiaroa, to Te Rauparaha Wineera, great grandson of Te Rauparaha, as a peace gesture in 1921.¹²⁵ It seems from these various accounts that there was not just one peace settlement, but several, carried out over a number of years. The peace arrangements involved, as Tau put it, a ‘swapping of names, children and tribal heirlooms’.¹²⁶

To sum up on the situation that had been reached by 1840, we note that, although Ngati Toa had made successful attacks on Ngai Tahu at Kaiapohia and Banks Peninsula, and Ngai Tahu in retaliation had raided as far north as Port Underwood, neither side had attempted to occupy the lands that had been over-run. They had not even made a significant attempt to reoccupy the disputed Kaikoura coast. It became virtually a no-man’s land. As Phillipson puts it, ‘The Kaikoura coast was basically empty by 1833, with Ngai Tahu driven south to Canterbury and the newcomers settling further north in Cloudy Bay.’¹²⁷ For Ngai Tahu, Anderson concludes that there is no evidence that Ngati Toa were in occupation of land further south than the Wairau.¹²⁸ We accept that this is probably correct if Anderson is

121. Evison, *The Long Dispute*, p 70

122. Ibid, pp 88–89

123. Bryan Gilling, “‘We Say that We Have the Authority’: Ngati Toa’s Right to Customary Rights in Relation to the “Ngai Tahu Takiwa””, report commissioned by the Waitangi Tribunal, 2003 (doc P29), pp 35–36

124. Nicholson, pp 27–30

125. Tau, p 139

126. Ibid

127. Phillipson, *The Northern South Island*, p 23

128. Anderson, ‘Kin and Border’, p 109

thinking of a distinct community. However, as we noted above, some Ngati Toa individuals continued to live in Kaikoura as a result of takawaenga marriages. It is likely that Ngati Toa continued to use various resources on a seasonal basis, as for instance in continuing to harvest ducks at Kaparategau during the moulting season. But when they claimed territory as far south as Kaiapoi during the negotiation of the Wairau purchase in 1847, they did so on the basis of conquest, and as utu for the loss there of their rangatira, Te Pahi Kupe, not on grounds of occupation.

Nor is there any evidence that Ngai Tahu remained behind and occupied land north of Waiau-toa following their counter-attacks at Kaparategau and Cloudy Bay in the 1830s. They reoccupied Kaikoura and some places as far north as Waipapa in the 1850s, but apparently no places north of there or Waiau-toa. McAloon, one of Ngai Tahu's witnesses, admitted during questioning that it 'is generally accepted that Ngai Tahu vacated the coast north of there [Waiau-toa] for some years as a consequence of Te Rauparaha's raids'.¹²⁹ Nevertheless, Ngai Tahu, in their subsequent negotiations with the Crown in connection with the Kaikoura purchase, were also to found claims as far north as Parinui o Whiti based on 'conquest' - if that is what we can call their largely indecisive conflicts with Ngati Toa. We return to this issue in our conclusions below.

There is still the question of Rangitane. We cannot be sure of the extent of their settlement along the coast after the Ngai Tahu raids that we listed above, but we think that some survived those raids and, by 1840, may have resumed occupation of the coast or at least made seasonal use of its rather slim resources. It is also likely that Rangitane who fled to the interior during the northern raids continued to use the inland resources and passes, as they had, for instance, when taking supplies to Ngati Toa and their allies for the attack on Kaiapohia. At 1840, some Rangitane were in occupation of land at Wairau and the Kaituna Valley through to Hoiere, and were in a tributary relationship to Ngati Toa. Others were at large in the interior and regarded as a danger by the northern iwi that occupied the coast. While these independent Rangitane certainly frequented the Nelson Lakes, they probably also ranged over the Awatere and Waiau-toa Valleys and perhaps the coast. We address this question further in section 2.5.1. As we explain in more detail in chapter 3, Rangitane's claims to the East Coast were ignored when the Crown dealt first with Ngati Toa and then with Ngai Tahu.

2.4.2 The West Coast

It is difficult to establish a precise sequence of events for the invasion of the West Coast by the northern tribes, but for our purpose the chronology is less important than the results. In an early raid, probably occurring before 1830, Ngati Rarua pushed westwards into Te

129. James McAloon, seventeenth hearing, 13–17 October 2003 (transcript 4.17, p 109) (quoted in Crown counsel, closing submissions, 19 February 2004 (doc T16), p 127)

Tai Tapu and down as far as Karamea, defeating the inhabitants before leaving the area. A few years later, Ngati Rarua, Ngati Tama, Te Atiawa, and possibly some members of other northern tribes came back to the western districts of Te Tau Ihu, where Ngati Apa had been overwhelmed, and began to settle the whole area west of Wakapuaka. At some point in the early 1830s Te Tai Poutini was invaded. From Te Tai Tapu, Niho Te Hamu and Takerei Te Whareaitu of Ngati Rarua and Ngati Tama led a taua, which also included some Te Atiawa, down the West Coast past Hokitika, attacking and defeating Poutini Ngai Tahu as far south as Okarito. Many Ngai Tahu were killed, and the chief Tuhuru was captured. He was taken to Paturau in Te Tai Tapu, where he presented the Ngati Rarua chief Matenga Te Aupouri with the pounamu (greenstone) mere Kai Kanohi. According to Alexander Mackay, 'Tuhuru and some of his people, as an act of submission, went to visit Te Rauparaha and the Ngatitao, at Rangitoto'. (We note that here this author was using material obtained from Ngai Tahu by James Mackay, though he added the phrase 'as an act of submission'.) Tuhuru's gift to Ngati Rarua and the marriage of his daughter to Niho were the first steps in establishing a relationship on the West Coast between Ngai Tahu and the northern tribes, and Tuhuru was eventually allowed to return home. Niho and Takerei and their followers established settlements in the central part of the West Coast, in the Mawhera–Arahura–Hokitika district, although the two chiefs apparently continued to live part of the time in Te Tai Tapu. On the West Coast, they controlled the pounamu trade with the help of their Ngai Tahu vassals. Some of the new arrivals from the north married into Poutini Ngai Tahu.¹³⁰ A later Ngati Toa source adds that the Poutini people 'were kept as slaves to grow food' for the victors.¹³¹

The situation on the West Coast changed substantially only a few years after this conquest. In 1836, Te Puoho of Ngati Tama led a taua from Golden Bay down the coast, passing through Mawhera where Niho and Takerei protected the remaining Poutini Ngai Tahu from attack. The Mitchells say that the two chiefs were protecting their 'investments' there – the pounamu resource, their Ngai Tahu vassal workforce, and their own settlements. It might also be said that they were following a traditional means of intensifying their connection with the tangata whenua by fulfilling obligations contingent upon settling and intermarrying with them. After a long and arduous journey down the coast and through the mountains to Murihiku, deep in Ngai Tahu territory, Te Puoho was attacked and killed by the southern Ngai Tahu at Tuturau (on the Maitai River) early in 1837. Many of his followers

130. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol 1, ch 3, pp 4, 40; Walzl, 'Ngati Rarua and the West Coast', pp 6–15, 19–20; Riwaka, p 82; Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', pp 115–123, 129–132. The visit to Te Rauparaha is mentioned in the *Compendium*, vol 1, intro, pt 3, pp 46–47, and see McAloon, p 77, for James Mackay's original wording.

131. Wiremu Naera Te Kanae, 'The History of the Tribes Ngati-Toa-Rangatira Ngati-Awa-o-Runga-o-te-Rangi and Ngati-Raukawa, Having Special Reference to the Doings of Te Rauparaha', translated by George Graham, 20 August 1888 (reprinted 20 April 1928), Alexander Turnbull Library, Wellington (as quoted in Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 36)

died with him.¹³² On hearing the news, the Ngati Rarua and others living on the West Coast left their settlements and withdrew north to Te Tai Tapu.¹³³

This narrative is not in dispute, at least in its outlines. It is clear that a northern raupatu of the West Coast (including the parts now recognised as the Ngai Tahu takiwa) did occur, and that during the 1830s the northern tribes did exercise control over that region and its defeated inhabitants (although there is not much information about the nature of the occupation). It is not asserted that Ngai Tahu lost their West Coast rights altogether, although the position of the tribe in the northern area towards Kahurangi may have been permanently affected. Other questions arise, however, and there is no agreement as to whether the invasion and occupation of the West Coast extinguished the rights (if any) of Ngati Apa or was of sufficient extent and duration to establish continuing rights for the northern tribes in the region.

As we have seen, Ngai Tahu do not accept that there is any traditional evidence for a claim by Ngati Apa to customary title based on conquest, discovery, or ancestral rights in this part of the West Coast.¹³⁴ In the Ngai Tahu perspective, then, the northern invasion had no implications for Ngati Apa because there was historically no Kurahaupo presence in the area. Ngati Apa, however, maintain that they did possess customary rights, established before the northern conquest, on the West Coast south of Kahurangi Point. They assert that these rights were not extinguished by the coming of the northern tribes.¹³⁵ Although Ngai Tahu reject these claims altogether, they are supported by the northern tribes.

Throughout the northern South Island, the Kurahaupo peoples were defeated by the invaders, but they were not completely obliterated. Some were enslaved and some fled into remote places, while others survived as tributary or vassal groups living among the newcomers.¹³⁶ Hoani Mahuika, a Ngati Apa resident of Kawatiri, gave evidence in the Native Land Court in 1883 concerning Te Tai Tapu at the time of the Ngati Rarua invasion. ‘The conquerors allowed some of the conquered to live, of whom I am the representative. If they had killed them all, they would now be able to have undisputed possession.’¹³⁷ As we noted in our first preliminary report, the annihilation of defeated tribes was not the invariable or even the most usual outcome of a victorious campaign. Potentially, the mana of these surviving groups could be recovered, and Ngati Apa see the community that existed at Kawatiri in 1860 in this light. The Mitchells say that the Ngati Apa chief Puaha Te Rangi,

132. Atholl Anderson’s book *Te Puoho’s Last Raid: The March from Golden Bay to Southland in 1836 and Defeat at Tukurau* (Dunedin: Otago Heritage Books, 1986) is the most detailed account. See also Hilary Mitchell and Maui John Mitchell, ‘West Coast of the South Island’, report commissioned by the Ngati Tama Manawhenua ki te Tau Ihu Trust and Te Atiawa Manawhenua ki te Tau Trust, 2002 (doc K4), pp 11–13.

133. Anderson, *Te Puoho’s Last Raid*, p 62

134. Counsel for Ngai Tahu, closing submissions, p 54

135. Counsel for Ngati Apa, closing submissions, pp 2, 7, 9

136. Mitchell and Mitchell, ‘A History of Maori of Nelson and Marlborough’, vol 1, ch 3, p 5; Phillipson, *The Northern South Island*, pp 41–42

137. Nelson Native Land Court minute book 3 (as quoted in Boast, vol 2, p 327)

whose wife was the sister of the slain chief Te Rato, ‘appeared to have complete freedom of movement throughout the conquest and early years of occupation of the West Coast and north-west Nelson’. According to these authors, Puaha Te Rangi reached an accord with the conquerors.¹³⁸ Certainly, as we will see, he later successfully claimed rights at Kawatiri. Ngai Tahu do not regard this as evidence of historical Ngati Apa rights in the area, however, and Anderson says that there is no evidence at all that Ngati Apa refugees were present on the West Coast after the northern invasion.¹³⁹ We will return to this matter in section 2.5.2.

The other issue is whether the rights of the northern tribes survived more than a few years after the conquest. Did Niho and Takerei abandon any claims that they and their iwi might have developed on the West Coast when they moved their residence north to Te Tai Tapu in the late 1830s, apparently in response to the military resurgence of Ngai Tahu and their victory over Te Puoho and Ngati Tama? Or did they continue to demonstrate rights in the region, maintaining an ongoing relationship with the Mawhera area by visiting it for its resources and by leaving some of their people there to keep their interests alive? Ngati Rarua, Ngati Tama, and Te Atiawa all claim that they established rights in the takiwa by conquest, and that these rights continued after 1840 by virtue of ongoing settlement and resource use. The three iwi do not dispute that Ngai Tahu rights in the area also continued.¹⁴⁰ Ngai Tahu, however, deny that the northern tribes have any customary claim in the takiwa, since their occupation was for a limited time only and came to an end when Niho and Takerei departed before 1840.¹⁴¹

Again, we heard conflicting evidence on this question. On one side, Ngai Tahu witnesses brought forward evidence to show that Niho had withdrawn from his over-exposed position when Ngai Tahu defeated Te Puoho. This account of the northerners’ ‘abandonment’ of the district is not new. Probably it was first explicitly stated by James Mackay in 1859 when he began negotiating with Ngai Tahu for their interests at Arahura. Mackay wrote:

I find the Ngaitahu title to the West Coast to be good, although they were partially conquered by Ngatirarua, . . . under Niho and Takerei, and those Chiefs resided some time at Mawhera. As it appears the conquerors withdrew to Massacre Bay, after the death of Te Pohow [Te Puoho], chief of the Ngatitama, at Tuturau (Molyneux plains), being afraid of an attack from the Otakou Ngaitahu and although Takerei and Niho resided for many years after at Massacre Bay – they never resumed possession of the West Coast further South than Kaurangi (North of Rocks point).¹⁴²

¹³⁸ Mitchell and Mitchell, ‘A History of Maori of Nelson and Marlborough’, vol 1, ch 3, p 51; Mitchell and Mitchell, ‘Boundary Issues’, p 8

¹³⁹ Anderson, ‘Kin and Border’, p 121

¹⁴⁰ Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 3–4, 131, 138; counsel for Ngati Tama, closing submissions, [2004] (doc T11), pp 7, 103; counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 13, 44

¹⁴¹ Counsel for Ngai Tahu, closing submissions, pp 58–59

¹⁴² Mackay to McLean, Collingwood letterbook, 27 September 1859 (as quoted in McAloon, p 71)

Alexander Mackay's 1873 account drew on this, stating that Takerei and Niho, fearing Ngai Tahu attacks, 'resolved on abandoning the country [Mawhera]'; they returned to Golden Bay 'with the remnant of their party, and never resumed possession of the West Coast farther south than Kahurangi Point'.¹⁴³ Other writers followed the same line, and it is accepted by Ngai Tahu's professional witnesses (Anderson, Evison, and McAloon) in the present inquiry. Anderson adds, however, that some of the northerners stayed because they had established family relationships.¹⁴⁴

On the other side, witnesses for the Te Tau Ihu iwi argued that Te Puoho's death had a less drastic effect, since some northerners stayed and contact continued. For the Te Tau Ihu tribes, and contrary to what Mackay wrote, the Mitchells argue that the withdrawal of Niho and Takerei in 1837 was not through fear of Ngai Tahu retaliation, but simply because after Te Puoho's defeat there was no longer any threat to the Ngati Rarua 'investments' on the West Coast: life could return to normal and the northern chiefs could resume their usual pattern of visits.¹⁴⁵ Be that as it may, the position taken by the Mitchells and other Te Tau Ihu historians is that the interests of the northern tribes in the West Coast did not terminate in the aftermath of Ngai Tahu's victory over Te Puoho. Walzl, for instance, challenges the view of Mackay and the Ngai Tahu historians by offering evidence from closer to the time – the 1840s – to show that Niho still thought then that he and Ngati Rarua had rights to the West Coast south of Kahurangi Point even after their move back to West Whanganui. He had left people in the central West Coast and maintained ongoing contact with the Mawhera pounamu districts.¹⁴⁶ Was the 'abandonment' of the coast by the allied northern tribes as complete as Mackay suggested? The evidence from the 1840s and 1850s is indeed crucial, and we will discuss it further in section 2.5.2.

Before concluding this section, we note here that while the West Coast invasion was carried out by Ngati Rarua, Ngati Tama, and Te Atiawa, the claim is made by Ngati Toa that it took place under their overriding authority. In letters to Governor Grey in 1851 and 1852, Ngati Toa chiefs at Porirua set out their understanding that the raupatu was carried out under Ngati Toa control and established the rights of that iwi down the West Coast as far as Arahura.¹⁴⁷ This is the position still taken by Ngati Toa. The iwi acknowledges that its rights were acquired 'in conjunction with its allies and relations', but asserts that the allied tribes have always been under the obligation to acknowledge Ngati Toa mana. With regard to Ngai Tahu, Ngati Toa do not deny that they have rights on the West Coast too. Ngati Toa

143. *Compendium*, vol 1, intro, pt 3, p 49

144. Anderson, 'Kin and Border', pp 135, 159; Harry Evison, 'Historical Report on the Ngai Tahu Takiwa, Particularly as Regards the Northern Ngai Tahu Boundary Question', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q3(a)), pp 11, 139; McAloon, p 138

145. Mitchell and Mitchell, 'Boundary Issues', pp 14–15

146. Walzl, 'Ngati Rarua and the West Coast', pp 18, 20

147. 'Two Letters from Ngaati-Toa to Sir George Grey', pp 263–276

declare, however, that their non-exclusive customary rights on the West Coast have never been displaced, except through Government purchase.¹⁴⁸ It is not claimed that these rights were based on any Ngati Toa participation in the western taua, or on subsequent occupation, but simply on the tribe's overriding mana and overall leadership of the South Island raupatu.

Ngati Toa's claims to a paramount role in the invasion of the South Island have a long history, and we take them seriously. With regard to the West Coast, we have taken note of the relevant studies by Ngati Toa's historians Boast and Gilling.¹⁴⁹ We have already discussed Ngati Toa's claims, which were made with respect not just to the West Coast takiwa but to the whole western side of Te Tau Ihu, in our first preliminary report. We looked at the divergent perceptions of Ngati Toa's allies, who rejected the idea that the mana of Te Rauparaha and his iwi extended to territories that had been acquired through an offensive in which Ngati Toa had taken little or no direct part, and which were subsequently settled by allied tribes but not by Ngati Toa. Our view was that Ngati Toa's special role in the overall raupatu did give that tribe a kind of notional or potential right, but that in the case of the western side of the northern South Island it was not followed up by occupation and settlement and therefore did not result in the development of any ongoing rights there. We were of the view that occupation need not be based on permanent residence to have effect but that it did need to be of a more tangible character than a strategic control exercised from a stronghold in the North Island. In the present context, we reiterate our conclusion that Ngati Toa's failure to occupy lands on the western side of the island meant that their 'paramountcy' in the raupatu did not lead, in the long term, to any continuing customary right there.¹⁵⁰ The Maori Appellate Court came to a similar conclusion in 1990.¹⁵¹ We believe that Ngati Toa's claims had an even more insubstantial basis on the West Coast than in western Te Tau Ihu generally, although the evidence that Te Rauparaha received the homage of Tuhuru should not be ignored. Insofar as the claims of their allies were not demonstrably extinct in 1840, the latent claim of Ngati Toa also still existed. Whether their potential interest was recognised in the short term, when the Crown purchases were made in the 1850s, will be considered in the next chapter.

148. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), pp10, 44–45, 49–50, 55–58

149. Boast, vol 1, p 27; Gilling, 'We Say that We Have the Authority', pp 5–20, 61–67, 84–90; Bryan Gilling, brief of evidence, 18 July 2003 (doc Q7), pp 2–3, 15–16, 20–23

150. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), pp 28, 48–51, 79–81

151. *In the Matter of a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board* unreported, 12 November 1990, Maori Appellate Court, Rotorua, 1/89 (doc A4), p 20

2.5 DEVELOPING CUSTOMARY RIGHTS IN THE STATUTORY TAKIWA, 1840–60

The coming of the Treaty and British annexation of New Zealand in 1840 meant that Maori could no longer settle their differences by warfare or acquire land through conquest. Otherwise, Maori custom continued to operate and iwi or hapu could peacefully transfer customary land, or occupy it by agreement. Takawaenga and tuku could still operate.

Also, with the beginning of British administration and the onset of systematic colonisation, particularly in Nelson, there was a great increase in the documentation of events and opinions. But most of this focused on the new settlements and their immediate environs, not on the remote corners of the East and West Coasts. There should also have been a similar increase in the documentation of Maori customary rights to land, particularly as Crown officials and settlers sought new land for settlement. Though such sources remain our most important archive, we must note that they were often deficient because the writers accidentally or deliberately omitted material, or misinterpreted what they saw. As we shall demonstrate from time to time below, there was a tendency to exaggerate the effects of warfare in general and the conquests of Ngati Toa in particular – and the extent to which Kurahaupo people were annihilated or enslaved. Kurahaupo people had an opportunity to re-emerge and revive their customary rights after 1840, but the documentary record does not always give them full credit for doing so. Nevertheless, we have to work out, as best we can, what customary rights they had in the takiwa by 1860 (the year of the last Crown purchase in the South Island), as compared with those of Ngati Toa and their northern allies, and of Ngai Tahu.

2.5.1 The east coast

At 1840, the extent of Ngati Toa's control down the east coast was unclear. As we have already noted, neither Ngati Toa nor Ngai Tahu were in effective occupation of the coast. Though Ngai Tahu had regained the initiative with their raids into Te Tau Ihu in the 1830s, they had not gained sufficient control to resettle the area. Indeed, they had been slow to reoccupy territory north of Kaiapoi and would not resume occupation of their old sites at the mouth of the Kaikoura River and northwards to Waipapa until the late 1850s.¹⁵² According to Gilling, the Ngai Tahu group headed by Kaikoura Whakatau settled at Mikonui, two miles north of Amuri Bluff, but still south of Kaikoura.¹⁵³ As we note in chapter 3, when James Mackay went to negotiate the Kaikoura purchase in 1859, several groups of Ngai Tahu were living as far north as Waipapa and went to Kaikoura to meet him.

152. Phillipson, *The Northern South Island*, p 34

153. Gilling, 'We Say that We Have the Authority', pp 36–37

Likewise, there is little evidence that Rangitane occupied or used the resources of the east coast down to Waiau-toa. Ernst Dieffenbach, the naturalist with Colonel Wakefield's land buying expedition, noted that many changes had taken place amongst the inhabitants of Cook Strait in the previous 30 years and that several tribes had either disappeared or migrated to distant places as a result of the wars. He added the intriguing comment: 'The tribes of the Rangitane and Nga-hei-tao [Ngai Tahu] in Queen Charlotte's Sound, have gone to the eastern coast of the Middle Island: some are held in slavery by the Nga-te-awa.'¹⁵⁴ Unfortunately, Dieffenbach did not say where on the eastern coast either group had gone, and he did not go there to find out. Rangitane were by then fairly numerous around Wairau, Kaituna, and Te Hoiere. Armstrong cites a census in 1845 that recorded Rangitane as about 10 per cent of the Maori population of Te Tau Ihu.¹⁵⁵ But there is no record of how many of them were living in the eastern part of the takiwa, though there were plenty of reports, and perhaps more rumours, of their presence in the interior. In the early 1840s, there was much interest from Nelson settlers in the Wairau plain and valley, and several expeditions inspected it, coming across small parties of Rangitane who were deemed to be fugitives from Ngati Toa. The New Zealand Company surveyor John Cotterell led an expedition from Nelson to the headwaters of the Wairau, down that river to the coast, along Cloudy Bay to Parinui o Whiti, across the Awatere Valley to the east coast and down that coast to Waiau-toa, before returning to Nelson. He did not once report any contact with Maori, though he had plenty to say about the splendid natural pastures he came across.¹⁵⁶ Soon afterwards, pastoralists began to take up this land, though they dealt with Ngati Toa, not Rangitane.

Charles Ligar, the Surveyor-General, who inspected the Wairau plain for Grey in March 1847, came across what he called a 'fugitive' party of Rangitane, and concluded that no one had resided permanently there since Te Rauparaha had conquered Rangitane and taken them into captivity – apart from the fugitive band.¹⁵⁷ Ligar consulted the Rangitane chief Ihaia Kaikoura (who was no fugitive but rather the leading chief of the mainly Ngati Toa community at Port Underwood), and persuaded him to draw a map of the boundaries of the Wairau district. Though Kaikoura was reluctant to outline the interior, he did sketch in the coast from Port Underwood south to Tumutumu and Karaka. According to Armstrong, who reproduces the map, Karaka is very near Waiau-toa. The map drew the coastal limits of the Wairau district, 'the territory once controlled by his people,' as Armstrong puts it.¹⁵⁸ But when he was asked for the owners of the district, Kaikoura listed only Ngati Toa rangatira, as if to say that Rangitane accepted a Ngati Toa paramountcy.

154. Armstrong, 'The Right of Deciding', p 35

155. Ibid, p 36

156. John Sylvanus Cotterell, 'Diary of an Excursion Overland from Nelson to the East Coast, 1842', *Nelson Examiner and New Zealand Chronicle*, vol 1, 17 December 1842, p 163

157. Armstrong, 'The Right of Deciding', pp 44–45

158. Ibid, p 46

By the later 1840s, pastoralists from Nelson were occupying the east coast, though only one transaction was completed before the Crown acquired the area as part of the Wairau purchase. This was the 'lease' organised by Clifford and Weld in August 1847 with the Ngati Toa chief Rawiri Te Puaha. The block is said to have consisted of 'all the land from the White Bluff [Parinui o Whiti] down the east coast, round Cape Campbell to Kekerenga [sic].'¹⁵⁹ Kekerengu is on the east coast, some 20 kilometres north of Waiau-toa. Obviously, Clifford and Weld, like Grey and his officials, who were soon to conclude the Wairau purchase, thought that Ngati Toa had an exclusive title to the district. In 1848, soon after he took up residence on the Flaxbourne or Waiharakeke River, Weld said that he did not have a neighbour, Maori or European, within 40 miles.¹⁶⁰

Although Frederick Weld tried to find a route along the coast to Canterbury in 1850, it was found to be impassable for sheep. So he and others explored the inland valleys and passes. This meant that there were few further reports of journeys along the coast and little possibility of information on any Maori settlements. But there was one such report from WJM Hamilton, who was on the *Acheron* surveying expedition in 1849. He noticed four Maori women and two blacks, one Australian and one African, at Waipapa. Gilling argues that the women were Ngati Toa.¹⁶¹ The two black men were probably from Guard's whaling station that operated at Waipapa until 1846. Hamilton also called at Kaikoura and reported that the only Maori to use that district, the Ngati Kuri group headed by Kaikoura Whatatau, lived mainly at Amuri (Haumuri Bluffs), some 20 kilometres south of Kaikoura. On his journey up the coast in 1850, Weld came into contact with Kaikoura Whatatau at Amuri but did not report further contacts with Maori before he arrived back at his Flaxbourne station.¹⁶²

Over the next two years, several other expeditions tried to find passes between the Awatere and Waiau-toa valleys, and behind the Inland Kaikoura range to the Hanmer Plains. They sometimes had Maori guides or porters, but their tribal affiliations were not noted, though they were probably not Rangitane, who were more likely to have known the routes. Lieutenant Impey's expedition up the Awatere Valley in June 1850 came across a footpath and an old 'wari' (whare) and later 'tracks of wild dogs and Maories'. Two nights later, when they were disturbed by barking dogs, they thought it advisable to load their guns.¹⁶³ In an expedition the previous month, Captain Mitchell's party came across some collected firewood and the remains of another 'warri' in the Acheron Valley.¹⁶⁴ In 1852, an

159. Gilling, 'We Say that We Have the Authority', p 37

160. Jeanine Williams, *Frederick Weld* (Auckland: Auckland University Press, 1983), p 23

161. Gilling, 'We Say that We Have the Authority', pp 36–37

162. Frederick Weld, 'Mr Weld's Journey by the Awatere Valley to the Canterbury Plains', *Nelson Examiner and New Zealand Chronicle*, vol 10, 15 March 1851, pp 13–14

163. A Impey, 'Notes of a Trip to Discover a Pass from the Wairau to the Port Cooper Plains', *Nelson Examiner and New Zealand Chronicle*, vol 9, 29 June 1850, p 71

164. W M Mitchell, 'Memorandum of an Expedition into the Interior of the Southern Island of New Zealand', *Nelson Examiner and New Zealand Chronicle*, vol 9, 3 August 1850, pp 91–92

expedition led by EJ Lee found the remains of three old huts. Lee speculated that they had belonged to ‘some of those unfortunates who used to inhabit the Wairau, and who were all but massacred in days gone by’. Armstrong says he was probably referring to Rangitane who had escaped from the Ngati Toa attacks and who survived in the interior between the Awatere and Waiau-toa valleys until the 1850s.¹⁶⁵ But we have seen no reports of expeditions along the coast after Weld’s 1850 journey, through to 1860, so it is uncertain whether any Rangitane or Ngati Toa who survived the Ngai Tahu raids in the 1830s still remained on the coast.

By this time, there was little to keep Maori on the coast. As Anderson points out, the sand and gravel beaches north of Waipapa to Cape Campbell provided few attractions, as evidenced by the few archaeological remains of settlement.¹⁶⁶ There was little new economic activity to attract them to any part of the coast north of Kaikoura and Waipapa, where there were whaling stations, though the one belonging to John Guard at Waipapa was abandoned in 1846. There were no other stations around the coast south of Port Underwood. In any case, shore-based whaling had been declining since about 1835. The new pastoral industry provided little employment for Maori. Apart from Weld and Clifford’s run, which ran down to Kekerengu, the coast to the south was only slowly occupied by pastoralists. Like Weld, they preferred the richer pastures south and inland of Kaikoura. Gilling points out that some Maori worked for Europeans who had established runs by the 1850s, but their tribal affiliations were not identified.¹⁶⁷ Though the coming of peace and the beginning of British rule allowed Rangitane to escape the tutelage of Ngati Toa and resume occupation of their land, it seems that most chose to remain in, or move to, the Wairau and Kaituna valleys. Ngati Toa also congregated at Wairau and Cloudy Bay, particularly at the whaling station at Port Underwood. But with the Crown’s Wairau purchase from Ngati Toa in 1846 and the addition of that to the Nelson Crown grant in 1848, the east coast to Kaiapoi became Crown land and none of that was reserved for Ngati Toa, let alone Rangitane. With the land rapidly being taken up and granted to pastoralists, there was no land left for Ngati Toa, Rangitane, or Ngai Tahu, had they been inclined to reoccupy it (though, as we note in chapter 3, small reserves were granted to Ngai Tahu south of Waipapa as part of the Kaikoura purchase). If there were any Rangitane, Ngati Toa, or Ngai Tahu occupants of the coast, Crown officials were not disposed to notice or consult them when they came to purchase the land in 1846. As we shall point out in our next chapter, that transaction was negotiated with but three Ngati Toa chiefs, behind closed doors at Government House in Wellington.

165. Armstrong, ‘The Right of Deciding’, pp 48–50

166. Anderson, ‘Kin and Border’, p 94

167. Gilling, ‘We Say that We Have the Authority’, p 38

2.5.2 The West Coast

We turn now to what can be known about the exercise of customary rights on the West Coast in the two decades after 1840. There is, in fact, very little evidence for what was happening there in this period. No Pakeha lived in the region, and only a few sealers had visited. We must rely mainly on a handful of references. For a period of some years after 1837, no evidence at all has been located. There is a snippet of information from 1842: in that year the surveyor Tuckett heard of two 'principal men' (probably Ngati Rarua) who had moved, apparently recently, from Raukawa in Te Tai Tapu to the Arahura district.¹⁶⁸ We get more detailed information from the journals of the earliest Pakeha explorers, Charles Heaphy and Thomas Brunner, who made two overland journeys from Nelson in the mid-1840s, though it should be remembered that they were not specifically reporting on Maori rights and the information they give on that matter is incidental and not necessarily accurate. On the other hand, as the Mitchells point out, the explorers were accompanied by Maori guides. These were identified as Kehu of Ngati Tumatakokiri and Ngati Apa (who had been captured by Ngai Tahu when a boy, and later taken over by Ngati Rarua and transferred to Motueka),¹⁶⁹ and a Ngai Tahu man who had been a slave of Te Atiawa in Golden Bay. The two guides possessed varied experience of all the tribes involved, which would probably have made them knowledgeable and impartial informants. Furthermore, the language barriers within the expeditionary group were probably less serious than has been alleged by some commentators.¹⁷⁰

Heaphy and Brunner, accompanied by their guides, set off down the West Coast from the Whanganui Inlet in 1846. The two explorers knew very little about their destination, but had heard in Nelson that some Ngati Rarua were living at Arahura and occasionally travelled up the coast to Whanganui.¹⁷¹ The party met Niho at his residence in the southern part of the Whanganui Inlet, and were told that they had no right to visit Kawatiri without his permission, since he was the chief of 'Wanganui and the whole of the coast beyond'. Threatening to keep the two Maori guides as slaves, the 'old fellow' demanded payment before he would allow them to proceed. This declaration of authority was treated with scepticism at the time by Heaphy, who regarded Niho's 'bluster' as merely an attempt at extortion.¹⁷² Three years later, however, in another account, Heaphy did give some credence to Niho's claim, when he wrote that the chief continued to demand tribute from the people at Arahura even after he no longer resided there:

168. 'Report of an Examination . . . by Mr Tuckett', *Nelson Examiner and New Zealand Chronicle*, 16 April 1842, p 24 (as cited in Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 270)

169. Mitchell and Mitchell, 'A History of Maori of Nelson and Marlborough', vol 1, ch 3, p 52

170. Mitchell and Mitchell, statement of response, pp 29–31

171. Taylor, *Early Travellers in New Zealand*, p 204

172. *Ibid*, p 208

Te Niho retired after a time from the greenstone country to his own settlements at Wanganui and Massacre Bay, leaving several of his people behind, who became identified with the Ngahitau [*sic*]. Frequently, however, the Kawhia chief sent his slaves, and occasionally went himself to the Ara Hura for the presents of Poinamu [*sic*] which he claimed as tribute.¹⁷³

After their encounter with Niho, Heaphy and his party managed to proceed on down the coast. They did not mention meeting anyone on their journey, at Paturau or Raukawa or anywhere along the Te Tai Tapu coast. Their understanding was that the inhabitants had moved south to the pounamu districts.¹⁷⁴ Since it was winter they did not expect to meet any travellers, but just north of Kawatiri they encountered Aperahama and his family travelling from Arahura to Nelson for baptism, and they later met a group of 15 people also travelling with this intention.¹⁷⁵ Aperahama has been identified by the Mitchells as Ngati Tama and Ngati Rarua, and they quote a contemporary statement that he had earlier been ‘on a visit in the [Golden Bay] district – up from the neighbourhood of the Green Stone.’¹⁷⁶ There was no one at Kawatiri itself, although they saw plantations. Soon afterwards, they met Kahu’s brother Mahuika (the son of Kahu’s mother Mata Nohinohi by her second husband), who was travelling north. Heaphy recorded that Mahuika and other people living at Arahura were establishing gardens at Kawatiri and intending to live there. He understood that their object was ‘to obtain a title to Kawatiri by *occupation*’ and then to sell it for Pakeha settlement (emphasis in original).¹⁷⁷ The explorers reached Kararoa, the northernmost Arahura settlement, and then other small settlements at the Mawhera, Taramakau, and Arahura Rivers.

Heaphy recorded what he heard about the history of the area – that Niho had invaded the West Coast and killed many Ngai Tahu at Karamea, before leaving some of his party at Arahura to obtain pounamu. He gathered that the northern arrivals had become ‘amalgamated’ with the ‘subject natives’ there, and that the total population was about 70.¹⁷⁸

At the end of 1847, Heaphy’s companion Brunner again travelled to the West Coast, accompanied and assisted by Kahu and Pikiwati (he too was identified as Ngati Tumatakokiri) and the wives of the two Maori. On arrival at Kawatiri (by an inland route this time), he saw a small potato garden, and recorded that it was the first year that Mahuika and the few other residents had lived there after moving north through ‘most difficult country’ from

173. Charles Heaphy, ‘Some Account of the Greenstone Country of the Middle Island,’ *The Maori Messenger*, vol 1, no 21, 11 October 1849 (as quoted in Hilary Mitchell and Maui John Mitchell, ‘West Coast of the South Island,’ pp 28–29)

174. Taylor, *Early Travellers in New Zealand*, p 210

175. Ibid, pp 223, 230

176. Hilary Mitchell and Maui John Mitchell, ‘Southern Issues; Supplementary Material,’ unpublished notes, undated (doc Q9(a)), pp 1–3

177. Taylor, *Early Travellers in New Zealand*, pp 226, 229

178. Ibid, p 237

Mawhera.¹⁷⁹ He was told (he does not say by whom) that the land from Whanganui to Kawatiri belonged to Niho by conquest, and from Kawatiri southward belonged to Poutini Ngai Tahu.¹⁸⁰ At Kararoa, the travellers found only a few people, the others having moved to Golden Bay. Brunner visited the Arahura settlements, and noted that at Hokitika there was formerly a large pa occupied by Niho and other people who were now living at Whanganui.¹⁸¹ He learned that Okarito was where Niho captured and killed many Ngai Tahu and took Tuhuru prisoner, afterwards releasing him to return to Arahura and work pounamu for Ngati Rarua.¹⁸² He stated that the population of the West Coast north of latitude 44 degrees south (the Arawhata area in present-day South Westland) was 97, including children.¹⁸³

This evidence indicates that, in the observation of the explorers at least, in the mid-1840s the northern part of the West Coast was an empty land until the Kawatiri settlement was initiated. There appeared to be no permanent settlement (of Ngati Apa, Ngati Rarua, or Ngai Tahu) between the northernmost Arahura village (Kararoa) and the Whanganui Inlet. It is also clear that the main area of settlement (the middle coast, or 'Arahura') was only thinly populated, with Brunner giving a figure of fewer than 100 people for the whole region from Kararoa down to the Arawhata River.

The evidence also shows that there were still some members of the northern tribes resident in the Arahura area, and that there had been intermarriage with Ngai Tahu. It is not shown whether any of these people had lived there continuously since the invasion, but it seems that some at least had moved there in the early 1840s. From these accounts, it is also apparent that Niho continued to claim rights on the West Coast after moving back to Whanganui. At first, Heaphy was inclined to doubt the seriousness of Niho's claim, but he and Brunner later recorded details of the historical and continuing connection of the northerners with the pounamu districts. Brunner heard that Niho's claim was accepted for the area as far south as Kawatiri, but not for the districts beyond that. This part of the evidence is problematic for the Ngai Tahu witnesses: Anderson is doubtful of its accuracy, while McAloon, describing Brunner as 'apparently somewhat confused' here, corrects him with the suggestion that he meant Kahurangi rather than Kawatiri.¹⁸⁴ If Brunner's information is correct, it would also mean that Kawatiri was the northernmost limit of Ngai Tahu's rohe and that, even if Ngai Tahu had recovered after Te Puoho's defeat, their occupation did not extend far north of Mawhera by the mid-1840s.

The evidence of Heaphy and Brunner is also valuable for its information about what was happening at Kawatiri, where people of unstated tribal affiliation but coming from Mawhera

179. Ibid, p 280

180. Ibid

181. Ibid, pp 283, 286

182. Ibid, p 289

183. Ibid, p 291

184. Anderson, 'Kin and Border', p 125; McAloon, p 37

were in the process of establishing a new settlement. One of these settlers was identified as Mahuika, later shown to be the son of a Ngati Apa father and a mother with strong Ngai Tahu connections. Some of the people of this settlement, we will see, identified themselves as Ngati Apa in 1860.

Two other pieces of evidence from the 1840s and 1850s throw light on the matters we are considering here.

The first comes from the events surrounding the Canterbury purchase of 1848. During the purchase discussions at Akaroa (on the east coast) between the Government agent HT Kemp and Ngai Tahu, certain chiefs of that tribe, including Tuhuru's son Wereta Tainui, appear to have identified Kawatiri as Ngai Tahu's northern boundary on the West Coast.¹⁸⁵ In the *Ngai Tahu Report 1991*, the Tribunal understood that Kawatiri was chosen for the northern boundary of the proposed purchase 'as a result of discussion with Wereta Tainui and possibly other Ngai Tahu who were familiar with the extent of reoccupation by Poutini Ngai Tahu of their lands on the west coast'.¹⁸⁶ Nearly 30 years after the Canterbury purchase, Wereta recounted that in 1849 he had told Walter Mantell that there were about 80 Ngai Tahu adult males on the West Coast, as well as 'another Maori settlement at Kawatiri inhabited mostly by members of the Ngatiapa hapu', numbering about 20 persons, including women and children.¹⁸⁷ We note that McAloon interprets Wereta's statement as nothing more than a list of settlements, and certainly not a description of tribal rights. He supports this conclusion with additional evidence in the form of complaints by Wereta in 1852 that payments had been made for localities on the West Coast up to Kawatiri only, and not for other places up to Toropuhi (about 20 kilometres south of Kahurangi).¹⁸⁸

We agree with McAloon that Wereta was probably listing settlements rather than identifying all places where Ngai Tahu claimed associations and interests. We do not interpret this evidence as a recognition by Ngai Tahu that their rights on the West Coast did not extend beyond Kawatiri. On the other hand, we do see Wereta's statement in 1849 as a clear acknowledgement of the existence at Kawatiri of a community whose Ngati Apa composition made it distinct from other West Coast settlements further south.

There is also the census information given to Mantell by Ngai Tahu (including Wereta as mentioned above) and submitted to the Government in 1852. Of the 70 Maori listed for the West Coast between Mahitahi and Kararoa, a number were identified as Ngati Rarua or Ngati Koata, or as the children of people of those tribes. None was listed as Ngati Apa, but the census did not include Kawatiri.¹⁸⁹ This is further evidence that long after Niho's

185. Armstrong, 'Ngati Apa ki te Ra To', p 66

186. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), p 434

187. Petition of Wereta Tainui and others, 21 June 1878 (as quoted in Armstrong, 'Ngati Apa ki te Ra To', p 67)

188. McAloon, pp 41–43, 93

189. Walzl, 'Ngati Rarua and the West Coast', pp 28–29

purported 'withdrawal' a proportion of the West Coast population was still identified by Ngai Tahu as being members of the northern tribes. It could also suggest that Ngai Tahu did not regard the Kawatiri settlement as being a Ngai Tahu one.

We are left with the question of whether the evidence from the 1840s and 1850s is enough to show that Ngati Rarua and the other northern tribes still occupied and had a continuing interest in the area south of Kahurangi Point. We need also to ascertain the significance of the new settlement at Kawatiri and the identity of the inhabitants: were they Ngati Apa reoccupying the area on the basis of traditional rights, or refugees living there only on the sufferance of Ngai Tahu (the 'real owners')?

At the end of this period, the Arahura purchase (of land extending north to Kahurangi Point) was carried out by James Mackay, whose transaction was with Ngai Tahu alone, albeit with some recognition of Ngati Apa at Kawatiri. For our understanding of which tribe or tribes had customary rights in the area by 1860, we must weigh the historical sources. On the one hand are the explorers' tentative but disinterested observations from 1846 to 1849, along with a few other pieces of relevant evidence from the 1840s and 1850s. On the other hand, there is Mackay's later and more assured exposition – a view that resulted from discussions with Ngai Tahu and saw the northerners' rights south of Te Tai Tapu as having come to an end with the 'withdrawal' of Niho and Takerei in 1837. An important element in the situation by 1860, however, was the earlier extinguishment of the interests of Ngati Toa, Ngati Rarua, and their allies in 'Arahura' as part of the Waipounamu purchases, which we discuss in the next chapter.

Ultimately, the question of customary rights is one that must be judged from within the Maori domain, and is more complex than is suggested by a simple picture of 'total conquest' or, on the other hand, 'complete withdrawal'. What factors would be weighed in the customary world in an assessment of the rights of Ngati Rarua and their allies south of Kahurangi Point, which was the southern limit of their core settlements in Golden Bay, west Whanganui, and Te Tai Tapu? They would include the seasons of Niho's presence at Mawhera and the marriage into Tuhuru's whanau; the northerners who were left in the area and how they were regarded by Poutini Ngai Tahu; Niho's protection of the Mawhera community against Te Puoho's taua; the failure of the northern tribes to avenge Te Puoho's death; the subsequent years of Niho's absence; the nature of the relationship after 1837 (whether tribute or ongoing trade exchange); and the assertions by Niho that his authority still extended to Arahura. Some of these factors we cannot now evaluate with any certainty. Undoubtedly, at its height, Niho's influence extended over Mawhera, but there was a rebalancing of mana and power in the late 1830s, as we showed in the previous section. It may be that Niho continued to return, on occasion, but he never re-established a permanent presence. On the other hand, some of his people were still in the area in the 1840s and beyond, and, as we will see, were included in the arrangement for reserves after 1860. Was this a recognition, by all

the parties involved, of their customary standing, or part of a Crown-imposed agreement that had no significance in the customary world? We will discuss this latter aspect further in the next chapter, but here we focus on customary tribal rights.

The Mitchells argue that the rights of the northern chiefs did not depend on continuous residence. They explain that Niho and Takerei, 'like most other chiefs, were not permanent residents of any one place, but were overlords of several, all of which had to be visited occasionally'. They did make such visits in the 1840s, and other northern chiefs were still visiting their West Coast interests in the 1850s. For example, James Mackay was accompanied in 1857 by Poharama Hotu of Golden Bay and Kararoa and by Te Koihua of Pakawau, who were travelling south to obtain pounamu, and in 1860 he was escorted by the northern chiefs Pirimona and Te Karamu, who were witnesses to the Arahura deed. Even in the 1860s, there were many northerners who travelled south when the gold rush started, which the Mitchells say illustrates 'the ease with which the northern tribes traversed their territory whenever it suited them'. In their view, the journeys made by the northerners since the 1820s to get pounamu were considered a right gained by the conquests led by Niho and Takerei. They find no evidence that this pattern was ever broken, or was ever challenged by Ngai Tahu.¹⁹⁰ The Mitchells have also done considerable research into the 'large number' of northerners who remained on the West Coast as residents even after Niho and Takerei moved back to Te Tai Tapu. There were still many such residents in the 1840s (although from the 1850s some drifted north to rejoin their relatives, or participate in the Aorere gold rush, or take part in Taranaki affairs), and their descendents remained there.¹⁹¹ The Mitchells point to the senior Ngati Tama chief Hori Te Karamu, who was buried at Kawatiri, and argue that it is 'inconceivable' that his whanau would have permitted burial there and not in Golden Bay or Wakapuaka, 'given his high lineage and standing as the eldest son of the paramount chief of Ngati Tama, Te Puoho o te Rangi, had he not had enormous mana/manawhenua in the district'.¹⁹² For Te Atiawa, Alan Riwaka similarly argues that the tribe exercised rights on the West Coast, and that some members lived there. He describes the frequent journeys of the Atiawa chief Te Koihua to obtain pounamu as an exercise of customary rights.¹⁹³

Ngai Tahu have a different view. McAloon says the explorers' evidence offers no support for the northerners' claim that they still enjoyed rights on the West Coast in the 1840s. He comments that Heaphy shows no awareness of Te Puoho's raid and what happened after it.¹⁹⁴ In response to this, however, Walzl (for Ngati Rarua) notes that Heaphy's evidence, which does not mention Te Puoho, predates the narrative presented by Mackay. It is in Mackay's account – which derived from information given to him by Ngai Tahu in the late 1850s when

190. Mitchell and Mitchell, 'Boundary Issues', pp 14–18

191. Ibid, pp 18–19

192. Ibid, p 54

193. Riwaka, p 239

194. McAloon, pp 6, 26, 34, 138

they were negotiating with the Crown for their West Coast interests – that Niho withdraws for fear of Ngai Tahu, and other accounts have been based on this. Walzl argues that the Heaphy narrative thus offers an earlier and alternative understanding of Ngati Rarua's history on the West Coast.¹⁹⁵ We might also ask, as Gilling does, why the settlement of Kawatiri from Mawhera in the mid-1840s occurred so long after Ngati Rarua's 'withdrawal', if not because the people at Mawhera were deterred by the continuing influence of the northern tribes in the region.¹⁹⁶ Indeed, there is no evidence at all for a Ngai Tahu reconquest or (re)occupation of the northern West Coast before the mixed Kawatiri settlement far to the south of Kahurangi began in 1846.

Ballara agrees that there is nothing unusual about Niho's patterns of residence, since Maori often moved around their broader territory.¹⁹⁷ Her view at the time of writing her report, however, was that Ngati Rarua could not conclusively demonstrate that they had achieved a sustained occupation of the West Coast, or that Niho was still exercising authority over the Arahura area at 1840. The northerners could have all left with Niho and Takerei in the late 1830s, abandoning the opportunity to develop their rights; their later presence in the district could have arisen from a return to the area in 1842. A gap of a few years might be thought insignificant, but if this is what occurred, Ngati Rarua and their allies would have had no standing under British law, at least unless their rights were accepted by those deemed to be the 'real owners'. In this case, the 'owners' in 1840, the critical time (under British law but not Maori law) for determining such rights, were Ngai Tahu. While it is possible that some Ngati Rarua remained at Taramakau throughout the 'difficult years' after Te Puoho's death, Ballara suggests that they were 'almost certainly absent' from Arahura in 1840.¹⁹⁸ As we have seen, the explorers' evidence does not directly address this question, but it does add weight to the argument that Ngati Rarua and their allies had maintained an association with the area in this crucial period. There is no conclusive evidence that they did all withdraw from the district. Under cross-examination, Ballara modified her position, admitting the possibility of ongoing settlement.¹⁹⁹

We are less concerned with the question of whether Ngati Rarua and their allies can demonstrate a physical presence at 1840 than with evidence of their ongoing assertion of rights. In our view, Ngati Rarua, Ngati Tama, and Te Atiawa still had an interest in the district and their case has more merit than has been generally afforded to it by earlier inquiries. The circumstances in which their interests were discussed around the time of the Arahura purchase were of such a nature as to obscure the existence of those interests, because the issue at the time was not to sort out who held authority over this stretch of the coast, but to

195. Tony Walzl, statement of response to evidence of James McAloon, 22 September 2003 (doc Q18), p 3

196. Gilling, brief of evidence (25 September), pp19, 20

197. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 152

198. Ibid, p 277–278. We note that Phillipson, in his response to the Ngai Tahu evidence (doc Q19), did not have the opportunity to include a review of the evidence relevant to this issue.

199. Angela Ballara, cross-examination, eighth hearing, 17–19 February 2003 (transcript, pp 35–36)

extinguish Ngai Tahu rights. We have attached more significance to the inclusion of Ngati Rarua and other northern individuals in the Arahura purchase reserve arrangements than did the Maori Appellate Court, which found in 1990 that Ngai Tahu had 'sole rights' to the lands acquired under the Arahura deed. The court considered the northern allies to have left no one there and Niho to have abandoned his interests.²⁰⁰ The court was aware that some non-Ngai Tahu had been included in the original reserve arrangements, but assessed the implications of this point only for Ngati Apa. We, however, see the reserve inclusions, and such significant customary arrangements as the marriage of Tuhuru's daughter to Niho, as well as the northern allies' ongoing contacts with the West Coast, including the long-term residence of some of their members and the periodic visits for obtaining pounamu, as sufficient support for maintenance of their claim there.

This brings us to the question of Ngati Apa. As noted earlier, Heaphy and Brunner encountered people who were involved in a Kawatiri settlement. They were subsequently (during the Crown's purchase negotiations with Ngai Tahu) identified as Ngati Apa. According to Armstrong, the people establishing the Kawatiri settlement in the 1840s were Ngati Apa who had previously taken shelter with Ngai Tahu at Mawhera and were now intent on reoccupying an old tribal area, since Niho's control no longer ran that far south in an area that may have been a kind of 'border region' between the territories of Ngati Rarua and Ngai Tahu.²⁰¹ Ballara says that Mahuika and his people were Ngati Apa who may have either taken refuge in the south at the time of the conquest or moved south from Te Tai Tapu with Ngati Rarua in the early 1840s.²⁰²

The significance of Ngai Tahu's historical recognition in 1860 of the Kawatiri people as Ngati Apa is now questioned by their descendants, and Ngai Tahu witnesses offered differing and ultimately irreconcilable views on the matter. Anderson argues that the Ngati Apa involved in starting the new settlement could not have been reasserting an ancestral claim, since such a right had never existed. In his view, they had been living in Mawhera in dependence on Ngai Tahu, as captives, refugees, or spouses. As to why the settlement was being established, he sees no reason to question the explanation given to Heaphy at the time by the people moving north from Mawhera: 'here was a group, which included former refugees, that was taking steps to secure its future'. The new settlement, which was essentially an expansion of the Mawhera community, 'appears to represent the traditional process of a whanau or other small group making a claim to particular rights in the "common" land of the hapu'. Presumably, the action was made with the acquiescence of Ngai Tahu. Furthermore, Mahuika, who appears to have been the leader of the group, had both Ngati Apa and Ngai Tahu ancestry, and the majority of the Kawatiri people later given reserves

200. *In the Matter of a Claim to the Waitangi Tribunal*, pp 22, 24

201. Armstrong, 'Ngati Apa ki te Ra To', pp 52, 56

202. Ballara, 'Customary Maori Land Tenure in Te Tau Ihu', p 276

there were of at least part Ngai Tahu descent. Anderson says that it was not unusual for small groups of one iwi to live in territory regarded as belonging to others, having originally been captives, refugees, or marriage connections. In this case, however, the settlement was by no means essentially 'Ngati Apa'.²⁰³

Tau argues that Ngai Tahu was the only group that could show Ngati Wairangi ancestry and that it was for that genealogical descent alone, not any whakapapa to Ngati Apa, who never occupied the region, that the rights of the 'Ngati Apa' Mahuika whanau were recognised in 1860. Tau refers, as we do also, to the testimony of the son of the Mahuika who helped found the Kawatiri settlement: he told the Native Land Court in 1926 that his West Coast claims went through his grandmother Mata Nohinohi, who was of Ngai Tahu and ultimately of Ngati Wairangi descent.²⁰⁴

McAloon offers a further line of explanation: he suggests that the Ngati Apa came to Kawatiri not in accordance with any ancestral rights there but as the result of a recent *tuku* from Poutini Ngai Tahu at Mawhera. They thus had 'residence rights' only, not 'mana-whenua', in the land allocated to them by Ngai Tahu. He then shifts his line of argument to emphasise their part descent from Ngai Tahu and thus their move into another part of Ngai Tahu territory. He questions 'why these people called themselves Ngati Apa at all'.²⁰⁵ We comment here that people are often able to draw on various lines in their whakapapa, and make decisions that seem to them appropriate in the circumstances. We are mindful of what Armstrong calls 'the subtleties and adaptability of genealogy'.²⁰⁶ But even when Henare Mahuika, a member of the Mahuika whanau of Kawatiri, was allocated land at Kaiapoi at about the same time as the Arahura purchase, he was still described as 'Ngatiapa' and was among the very few awardees not designated as Ngai Tahu.²⁰⁷

We note Phillipson's response to the Ngai Tahu evidence. He does not accept that it satisfactorily explains the presence of the Ngati Apa people at Kawatiri and their rights there, partly because it has 'inherent contradictions'. He points out that Tau's argument that the rights of the Mahuika family on the West Coast were through Ngai Tahu conflicts with McAloon's view of a group living there without rights. Anderson's explanation of the rights of the Kawatiri community of the 1840s is similarly contradictory: they were there with the permission of Ngai Tahu and were without rights, yet they were themselves essentially Ngai Tahu. Phillipson also throws doubt on McAloon's idea that there had been a *tuku*. He argues that *tuku* always conveyed rights of some kind, and that Ngai Tahu had not identified the rights that operated in this case. He regards McAloon's evidence for a *tuku* to persons named in reserve ownership lists as inadequate – most likely a misinterpretation

203. Anderson, 'Kin and Border', pp 138–141

204. Tau, pp 78, 147, 149

205. McAloon, pp 33, 37, 80–83

206. Armstrong, 'Ngati Apa ki te Ra To', p 133

207. W L Buller, 'Report on the Kaiapoi Reserve', *Compendium*, vol 2, p 98

of evidence relating to Ngati Rarua, not to Ngati Apa. Phillipson's conclusion is that Ngati Apa's residence at Kawatiri was on a basis of customary rights.²⁰⁸

In conclusion, we do not accept that the Ngati Apa occupying the Kawatiri district in 1860 were there on sufferance only. It will be seen in chapter 3 that their status as Ngati Apa was recognised by Ngai Tahu leaders in the mid nineteenth century, and that, in particular, their right to participate in the Arahura negotiations was respected. There is strong documentary evidence for this point, which does not permit of any other conclusion than that they were a community identified as Ngati Apa, connected with but distinct from Ngai Tahu, who acknowledged their rights as legitimate. Nor do we accept McAloon's argument that there had been a *tuku*. Not only is the evidence of the *tuku* slight, but we do not accept his view that such a basis of claim provided a lesser kind of interest that existed only on the sufferance of Ngai Tahu. While *tuku* took many different forms, there is extensive evidence available to show that under Maori custom it always conveyed rights and imposed obligations on both sides that continued unless deliberately abandoned. We have seen no evidence about the circumstances of the *tuku* or to suggest that any such *tuku* at Kawatiri involved rights that did not permit a say in how land was disposed of by recipients who remained resident.

We do not accept that Ngati Apa were at Kawatiri without a basis of customary rights. We give considerable weight to such evidence as Wereta's in 1849 and 1878 and the documents relating to the 1860 purchase. We see the Kawatiri community not as a group enjoying rights only through their part-Ngai Tahu ancestry, but as a group based on Ngati Apa who had been refugees under Ngai Tahu protection and recognised as having a customary right to the land. The key question is how the people at Kawatiri identified themselves at the time. In 1860, their spokesman, Puaha Te Rangi, identified himself and his people as Ngati Apa, and this was recognised by Ngai Tahu. Although the stance of Ngai Tahu has now changed, the standing of Ngati Apa as a separate community exercising autonomous rights was acknowledged by Ngai Tahu in the early years of the colony.

The Maori Appellate Court found in 1990, however, that in the case of Ngati Apa there was no 'customary take to support something more than a mere right of residence'. In the court's view such occupation had been by permission of Ngai Tahu only, unsupported by an independent take, and thus did not alter Ngai Tahu's claim to sole ownership.²⁰⁹ Our view is different. We do not accept that Ngati Apa could not demonstrate ancestral association with the area, or that such rights had been extinguished by their defeat at the hands of the northern allies (as the Maori Appellate Court was to argue). We also place weight on evidence that points to Ngai Tahu's historical recognition of the existence of Ngati Apa rights at Kawatiri but that was not available to the court in 1990. We discuss this further in chapter 4.

208. Phillipson, statement of response, pp 19–23

209. *In the Matter of a Claim to the Waitangi Tribunal*, p 24

2.6 CLAIMANT AND CROWN SUBMISSIONS

As we have indicated, not all iwi who have lodged claims in relation to Te Tau Ihu also claimed rights within the takiwa. Ngati Koata made no claim and Ngati Kuia, who did lodge a claim, abandoned it in their closing submissions, though still maintaining that they had whakapapa links to places in the takiwa.²¹⁰ Six of the iwi did make claims in this regard, however. In dealing with their submissions, together with those of Ngai Tahu and the Crown, we once again divide our analysis into sections relating to the East and West Coasts.

2.6.1 Submissions on the east coast**(1) Claimant submissions**

Only two of the claimant groups made submissions on the east coast portion of the takiwa: Rangitane and Ngati Toa. We discuss these in turn.

(a) Rangitane: Rangitane said in their amended statement of claim that their rohe extended northwards from the Waiau-toa towards Wairau and inland all the way across the mountains through Maruia to Kawatiri, though they did not continue to assert a claim to the West Coast.²¹¹ Their closing submissions:

- ▶ listed the evidence they had presented from Armstrong, Norton, Bradley, and Judith Macdonald;
- ▶ referred to the Tribunal's site visit and the inspection of various Rangitane sites, including Matariki Pa; and
- ▶ specified their places named by signatories to Rangitane's Waipounamu deed.

The submissions also referred to evidence presented by Tuiti Macdonald to a 1926 Native Land Court case, which asserted that Rangitane had conquered the territory from Tory Channel to the Waiau-toa. The submissions even drew material from the Ngai Tahu evidence, including various manuscripts from Dr Tau's supporting documents. One of these, the Waruwarutu manuscript, described the Ngai Tahu attack on Rangitane at Waiharakeke that we listed above, though Tau did not refer to that incident in his evidence. Finally, we note that Rangitane's closing submissions referred to the boundary issue. They argued that Ngai Tahu had begun to claim a boundary as far north as Parinui o Whiti only in 1848. This was in retaliation for Ngati Toa's claim to Kaiapoi during the negotiation of the Wairau purchase. Counsel quoted a statement from Anderson (derived from Ballara) that it was only as a result of Crown negotiations that boundaries had become 'clearly defined and exclusive . . . where no such definition had occurred before Pakeha intervention.'²¹² Rangitane also

210. Ngati Kuia, second amended statement of claim, 4 March 2003 (claim 1.11(b)); counsel for Ngati Kuia, closing submissions, 17 February 2004 (doc T14), p 7

211. Rangitane, fifth amended statement of claim, 31 January 2003 (claim 1.1(f)), p 8

212. Counsel for Rangitane, closing submissions, p 18

made submissions on their treatment by the Crown during the Maori Appellate Court hearing and subsequent settlement with Ngai Tahu. We discuss these in chapter 4.

(b) Ngati Toa: Ngati Toa argued in their statement of claim that, ‘as first conquerors’, they had an ‘overriding mana and authority’ over all other descent groups in Te Tau Ihu. That authority, they said, extended ‘at least to Kaikoura on the eastern coast’ and Arahura on the west. However, Ngati Toa did not claim an exclusive title, having always recognised that their conquest was achieved in combination with ‘allies and relations’. They also claimed that they had the right to ‘control alienation’. Their conquest of Rangitane gave them rights ‘at least to Waipapa or Waiau-toa’ and their conquest of Ngai Tahu gave them some customary rights at least as far as Kaikoura and extending to Kaiapoi. They referred to Servantes’ correspondence with Grey in 1850 (which we discuss in chapter 3) for explanation of the extension of their claim ‘to a certain extent as far as Kaiapoi’.²¹³ Ngati Toa described their southern boundary as running from ‘Kaikoura and west to Arahura’,²¹⁴ though not from Kaiapoi to Arahura. The submissions also referred to the evidence of Matiu Rei, Bryan Gilling, and Richard Boast in support of Ngati Toa’s customary rights on the eastern coast ‘well to the south of the Wairau Valley’.²¹⁵

The closing submissions argued that it was sufficient for Ngati Toa to ‘take control of, and to hold an area whether by occupation *or* under the influence or mana of the conquering group [to] claim a valid raupatu’ (emphasis in original). Occupation was not essential to maintain ahi ka; it was also about ‘the maintenance of a political entity of a community’.²¹⁶ Ngati Toa’s mana was demonstrated by the respect shown to their chiefs and the deference of allied and tributary tribes. Furthermore, Ngati Toa was ‘able to hold and defend the lands that it had acquired in Te Tau Ihu, against all comers but the Crown’.²¹⁷ In their closing submissions, Ngati Toa backed up their raupatu claim by referring to their takawaenga marriages with Ngai Tahu, based on evidence from Nicholson and Rei. The authority in such marriages, the ‘tahakaha’, was with the conqueror. Otherwise, Ngati Toa did not claim that they had remained in occupation of land on the east coast. The east coast was not mentioned in the list of ‘key areas’ occupied by Ngati Toa at 1840, nor in the list of other places where Ngati Toa chiefs resided.²¹⁸ Accordingly, the submissions stressed that it was not necessary to occupy land to maintain ahi ka because ‘all descent groups of the Cook Strait region were

213. Ngati Toa Rangatira, fourth amended statement of claim, 21 May 2003 (claim 1.7(d)), pp 14–15; counsel for Ngati Toa Rangatira, closing submissions, p 49

214. Counsel for Ngati Toa Rangatira, closing submissions, p 7

215. Ibid, p 50

216. Ibid, pp 45–46

217. Ibid, p 45

218. Ibid, p 49

subject to the overriding mana and authority of Ngati Toa,' though they did not assert an exclusive title outside the 'key areas'.²¹⁹

Ngati Toa accepted that Ngai Tahu had rights within their takiwa, but argued that those rights also were not exclusive.²²⁰ The Ngati Toa submissions described the Ngai Tahu counter-attacks in Te Tau Ihu, but argued that they were indecisive. The submissions argued that Ngai Tahu had not gained control of the area north of Kaikoura, much less 'exclusive' authority up to Cloudy Bay.²²¹ Ngati Toa counsel, like Rangitane counsel, argued that the Ngai Tahu assertion of a boundary at Parinui o Whiti was a response to the Crown's acceptance of a Ngati Toa boundary at Kaiapoi.²²² The Ngati Toa submissions then discussed the effects of Crown intervention on Ngati Toa, including the Crown purchases beginning with Wairau. We discuss these in our next chapter. Ngati Toa also made submissions on their treatment by the Crown during the Maori Appellate Court hearing and the subsequent settlement with Ngai Tahu. We discuss these in chapter 4.

(2) Ngai Tahu submissions

Ngai Tahu are not a party to this inquiry but were permitted to submit evidence in response to that of Te Tau Ihu iwi on their claims in the takiwa. Ngai Tahu's position was that the Maori Appellate Court decision of 1990 should be binding on this Tribunal, but if this was not accepted by us, then Ngai Tahu submitted that the court's decision is 'highly persuasive' and that its conclusions should be accepted as correct.²²³ In their view, the Te Tau Ihu claimants had presented very little evidence to the Tribunal that had not already been presented to the Maori Appellate Court.²²⁴

Ngai Tahu's closing submissions expounded Anderson's theory on boundaries, though they also noted, as we did above, some of the qualifications he made on the applicability of his Pacific model to New Zealand Maori. Counsel argued that the model was not as rigid as Phillipson maintained. Rights in land and resources, in Anderson's view, were 'exclusive at the level at which they were held' and some groups, sometimes, maintained boundaries' (emphasis in original).²²⁵ On the east coast, Ngai Tahu's boundaries were said to extend to Parinui o Whiti on the basis of 'a full matrix of customary title', including take taunaha, take tipuna, take tuku, and ahi ka. These boundaries were defended 'up to and during the wars with Ngati Toa'.

219. Ibid, p 50

220. Ibid, pp 57–59

221. Ibid, p 60

222. Ibid, p 61

223. Counsel for Ngai Tahu, closing submissions, p 33

224. Ibid, pp 37–38

225. Ibid, p 51

2.6.1(3)

Ngai Tahu acknowledged Rangitane participation in the battle at Matariki but dismissed the notion that Rangitane defeated Ngai Tahu and then occupied Matariki. Ngai Tahu also rejected the view that the tradition of Te Huataki indicates that Rangitane had rights to lands south of Parinui o Whiti.²²⁶

With respect to Ngati Toa, Ngai Tahu argued that the Ngati Toa attacks on Kaiapoi and Banks Peninsula did not constitute a take raupatu ‘because they were not consolidated by occupation or by any other form of military or political suzerainty.’²²⁷ Ngai Tahu’s counter-attacks against Ngati Toa and its allies in Te Tau Ihu saw Ngai Tahu ‘actively re-establishing their tribal boundaries and the military and political equilibrium that had existed before the Ngai Tahu–Ngati Toa wars’. The submissions argued that ‘Ngati Toa did not manage to penetrate south of Te Parinui o Whiti following the battle.’²²⁸ Finally, for the east coast, the submissions referred to the peace settlements between Ngai Tahu and Ngati Toa in the late 1830s and argued that these declared Parinui o Whiti as the Ngai Tahu tribal boundary.²²⁹

(3) Crown submissions

The Crown discussed the issue of claims in the Ngai Tahu takiwa in its closing submissions. We appreciate their headline quotation. It is from a ‘Johnson’, presumably the celebrated English lexicographer, Dr Samuel Johnson:

To embarrass justice by a multiplicity of laws, or to hazard it by confidence in judges, are the opposite rocks on which all civil institutions have been wrecked, and between which legislative wisdom has never yet found an open passage.²³⁰

That is a timely warning for us, as indeed it is for the Crown. The Crown’s introductory paragraph spelled out the two important issues that had arisen:

The first is the Crown’s interest in the integrity and durability of a settlement with Ngai Tahu. The second is the Crown’s interest in seeing that the well-founded Treaty grievances of all Maori are inquired into and in due course settled.²³¹

The Crown submissions noted that there was a paucity of evidence on ‘the critical historical moments’ for the northern portions of the takiwa on both coasts.²³² On the east coast, the submissions pointed out, evidence of Rangitane and Ngati Toa exercising rights appeared to be ‘indeterminate’ and the coast from Parinui o Whiti to Waiau-toa ‘generally remained vacated’. It had ‘few permanent occupations’ but there were occasional excursions

226. Counsel for Ngai Tahu, closing submissions, p 54

227. Ibid, p 56

228. Ibid, pp 56–57

229. Ibid, p 57

230. Crown counsel, closing submissions, p 121

231. Ibid, p 122

232. Ibid, p 124

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from the north and south for seasonal gathering. Nevertheless, the Crown argued, if subsequent Crown actions were to be deemed to impinge on the interests of Te Tau Ihu iwi in the takiwa, the existence of those interests had to be established.²³³ The Crown did not go on to discuss whether any such interests were infringed by the subsequent Crown purchases. We shall return to the Crown's position in our discussion of the purchases in chapter 3. However, we note that the Crown did not take a position, one way or the other, in relation to the dispute between Te Tau Ihu iwi and Ngai Tahu over whether the former had rights in the latter's takiwa. As the submissions put it, 'The Crown does not usually participate in intra Maori disputes about contested customary rights.'²³⁴ Nor did it assume expertise in such matters. The Crown had taken the decision to 'abide' the decision of the Maori Appellate Court on Ngai Tahu's northern boundaries.

2.6.2 Submissions on the West Coast

Five of the claimant groups made submissions on the West Coast portion of the takiwa: the Kurahaupo iwi Ngati Apa, and four of the northern iwi who entered the region in the early nineteenth century: Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa. We discuss each of these in turn, followed by the submissions of Ngai Tahu and finally those of the Crown.

(1) Claimant submissions

(a) Ngati Apa: Ngati Apa said in their amended statement of claim that the areas where they were living in 1840, and where they had customary rights, included 'the whole block of country from the southern bank lands of the Kawatiri (including Tauranga Bay) north to Kahurangi Point and inland of that coastline in an easterly direction to the Nelson Lakes area.'²³⁵ They pointed out that the invasion of the northern tribes was relatively recent, and that in 1840 the customary process of conquest was 'incomplete and in a state of flux', with Ngati Apa rights subsisting in a latent form in coastal areas where Ngati Apa and the newcomers lived together. In the hinterland the northern tribes had not established rights of conquest or occupation at all.²³⁶

In their closing submissions, Ngati Apa repeated the claim that their customary interests included the area 'down to and including the Kawatiri Valley'. They asserted that the evidence proved 'beyond question' that before the conquest Ngati Apa had dominated coastal and inland areas of western Te Tau Ihu and the northern West Coast down to Kawatiri,

233. Ibid, pp 126–127

234. Ibid, p 133

235. Ngati Apa, amended statement of claim, p 5

236. Ibid, p 3

and had intermarried with the previous occupiers Ngati Tumatakokiri.²³⁷ In respect of the northern conquest, they again asserted that it was incomplete, leaving an ‘inchoate state of affairs’ in which Ngati Apa rights were not totally annihilated. The conquest was limited to coastal districts, where Ngati Apa tributary communities continued to live, and did not include interior districts, where survivors lived in freedom and retained their rangatira-tanga. In support of their claims in respect of coastal areas, Ngati Apa quoted the findings of the *Rekohu* report to the effect that in certain circumstances ancestral rights might survive conquest and eventually fully revive. They relied also on the arguments of Ballara in this regard.²³⁸ Evidence was quoted to show that the conquest took place only a very short time before the Treaty was signed and that there had therefore not been enough time for the conquerors’ rights to be converted into an absolute right, even in coastal areas and certainly in the hinterland. This was understandable in view of the huge areas involved, especially on the West Coast. The idea of an absolute conquest that stripped the Kurahaupo tribes of all rights was described as a ‘myth.’²³⁹

Counsel also rejected the claims of Ngai Tahu that Ngati Apa had no rights south of Kahurangi. The statements of Wereta Tainui in 1849 and 1878 were quoted in support: this senior Ngai Tahu chief had spoken on both occasions of Ngai Tahu settlements from Mawhera southwards and a Ngati Apa one at Kawatiri. He had not claimed Kawatiri as a Ngai Tahu settlement, ‘let alone Kahurangi as a northern boundary line’. The northernmost Ngai Tahu settlement he had mentioned was Mawhera. Counsel said that this was not disposed of by Ngai Tahu historians, except for a ‘flippant suggestion’ that Wereta was old and confused – it was nonsense to say he would have invented a separate Ngati Apa presence at Kawatiri, and the statement ‘should be treated with the disdain it deserves’. The evidence of Heaphy and Brunner was put forward in support of Ngati Apa’s independent presence. It was also argued that the recognition of Ngati Apa in the Arahura purchase of 1860 was a vindication of the tribe’s claims in respect of their customary rights in Kawatiri. The evidence presented by Ngai Tahu to counter this interpretation was rejected as ‘weak efforts to rewrite Maori customary history, ignoring whakapapa linkages from Ngati Apa and seeking to elevate Ngai Tahu linkages to a level which their forebears did not seek to do.’²⁴⁰

Specifically, Ngati Apa rejected Ngai Tahu’s argument ‘that somehow Puaha Te Rangi was Ngai Tahu, not Ngati Apa, despite the extraordinary fact that he personally asserted his own rights at the time as Ngati Apa’, with the justice of his demand being agreed to by the contemporary Ngai Tahu present at the time.²⁴¹ Ngati Apa’s submissions on what happened in the Arahura purchase will be discussed further in chapter 3. All in all, it was submitted

237. Counsel for Ngati Apa, closing submissions, pp 3, 7–8

238. Ibid, pp 5–6, 8–9, 27

239. Ibid, pp 10–11, 16–17

240. Ibid, pp 30–31

241. Ibid, pp 37–38

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that there was ‘clear, objective evidence’ to support the case put forward by Ngati Apa, ‘that there was and is a separate Ngati Apa community at Kawatiri, enjoying the resources in and around the Kawatiri area and coastline’. The point was made that there were low numbers of people residing in the area between Mawhera and Kahurangi, and that the resources were shared by the northern iwi, Ngati Apa, and Ngai Tahu.²⁴² It was also pointed out that Ngai Tahu continued to recognise Ngati Apa interests until the 1920s.²⁴³ The submissions laid emphasis on the geographical realities, including the difficulties of travel between Kararoa and Kahurangi, which made it unlikely that Ngai Tahu had an ongoing exclusive occupational presence in areas so far away from their nearest support in the Arahura district. Kahurangi, on the other hand, had easy coastal access from the north, where Ngati Rarua and the other northern iwi and the Ngati Apa tributaries resided. It thus ‘defies logic in a Maori customary usage sense’, especially in war conditions and in view of ‘who had the force on the ground and where it was located’, that Ngai Tahu exclusively ‘owned’ all the land south of Kahurangi.²⁴⁴ Finally, counsel drew attention to Ngai Tahu’s failure to call any witnesses who could claim descent from long-time occupants of the northern part of the takiwa. The idea that Ngai Tahu traditionally and exclusively occupied the region south of Kahurangi was described as another ‘myth’, but unfortunately one that was accepted by the Maori Appellate Court, in ‘a travesty of justice’, in 1990.²⁴⁵

(b) Ngati Toa: Ngati Toa asserted in their amended statement of claim that after the conquest ‘all descent groups of the Cook Strait region and the Northern South Island extending at least to Kaikoura on the eastern coast and to Arahura on the West Coast were subject to the overriding mana and authority of Ngati Toa as first conquerors’.²⁴⁶ They explained further, in their closing submissions, that tino rangatiratanga was exerted by Ngati Toa in this rohe in accordance with ‘classic Maori law and custom’, but acknowledged that in some areas other groups had rights too. ‘In these cases, several layers of rights applied to the land and other resources of the area’, varying in nature, depth and scope. There were ‘core areas of interest’ but Ngati Toa had ‘overriding mana and authority’ over the whole region, including ‘non-exclusive alienation rights’.²⁴⁷ Counsel asserted that the tribe acquired its rights in Te Tau Ihu by raupatu, ‘in conjunction with its allies and relations’, and by 1840 ‘controlled a powerful domain based on both sides of Cook Strait and was the predominant iwi in Te Tau Ihu’. These customary rights had never been displaced by anyone in Te Tau Ihu other than the Crown.²⁴⁸ The interests claimed were not exclusive, having been acquired

242. Ibid, p 32

243. Ibid

244. Ibid, pp 33–34

245. Ibid, p 35

246. Ngati Toa Rangatira, fourth amended statement of claim, p 15

247. Counsel for Ngati Toa Rangatira, closing submissions, pp 49–50

248. Ibid, p 10

2.6.2(1)(c)

in combination with others, but Ngati Toa do maintain that their allies and relations had an obligation to acknowledge Ngati Toa's mana in Te Tau Ihu and the ultimate right to control alienation of the land.²⁴⁹ It was submitted that the rights claimed by the tribe were not dependent on occupation.²⁵⁰ In respect of the Ngai Tahu takiwa specifically, counsel submitted that Ngai Tahu had not proved that its rights there were exclusive; Ngati Toa itself did not claim exclusive rights there, but 'an original and ongoing interest'. The Ngati Toa claim to interests in this area was presented as a very longstanding one, 'based on traditional customary take, especially aspects of take raupatu'.²⁵¹ In general, the submissions did not give details of Ngati Toa's history on the West Coast, including its relations with Ngati Apa and Ngai Tahu; nor did it refer specifically to its claims there, except for a brief mention of some of the evidence that such claims had historically been made.²⁵²

(c) Ngati Rarua: Ngati Rarua said in their amended statement of claim that their interests on the West Coast derived from conquest and occupation as far south as Mawhera, Hokitika, and Okarito. They stated that they remained on the West Coast after Te Puoho's raid, maintaining their relationship with Poutini Ngai Tahu up to and beyond 1840.²⁵³ All this was expanded in their closing submissions, which recounted the history of the invasion, the capture of Tuhuru, the marriage of his daughter to Niho, and Ngati Rarua's protection of Ngai Tahu against Te Puoho. The evidence for these events was reviewed. The submissions rejected the assertion that Ngati Rarua acted on the West Coast under the mana of Ngati Toa rather than independently. It was emphasised that Te Puoho's defeat did not result in the withdrawal of Ngati Rarua from the area, and that people of that tribe remained in the area, as evidenced later by the allocation of reserves to them.²⁵⁴ Ngati Rarua itself did not assert exclusive authority on the West Coast, 'although there were clearly places where Ngati Rarua communities were strong both numerically and in an occupying/activity sense'.²⁵⁵ It was argued that, for part of the conquest period (up to 1837), the tribe's mana and authority was indeed exclusive and that thereafter, up to 1840 and beyond, it persisted to a large degree even though Niho was not in continuous occupation. Ngai Tahu's case for its possession of exclusive authority in the western takiwa by 1840, as argued by Anderson and McAloon, was rejected. Criticism of the latter's report was based on Walzl's statement of response to it, and counsel argued that McAloon's case did not withstand scrutiny. Attention was drawn in particular to his low regard for the evidence of Heaphy and Brunner, which

249. Counsel for Ngati Toa Rangatira, closing submissions, pp 44–45

250. Ibid, pp 46–47; see also counsel for Ngati Rangatira, submissions in response to closing submissions of Crown counsel, 19 April 2004 (paper 2.785), pp 6–7

251. Counsel for Ngati Toa Rangatira, closing submissions, p 58

252. Ibid, p 47

253. Ngati Rarua, second amended statement of claim, 21 May 2003 (claim 1.13(b)), pp 13, 29–30

254. Counsel for Ngati Rarua, closing submissions, pp 118–125, 149–50

255. Ibid, p 131

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counsel described as ‘the most valuable contemporary independent accounts of who held the mana and exercised authority and enjoyed occupation up and down the West Coast for the period say 1831 through to 1846’. To reject this source in favour of James Mackay’s much later evidence, gathered moreover in the context of negotiations for a land sale by Ngai Tahu, was ‘illogical’.²⁵⁶

Ngati Rarua also made a submission in response to the closing submissions of the Crown. The view of the Crown that Ngati Toa acted ‘in stewardship’ of the other northern iwi was not accepted. Ngati Rarua maintained, and had always maintained, that they acted under their own mana in the raupatu, and had thereby acquired their own rights in Te Tau Ihu and on the West Coast.²⁵⁷ The Crown’s ‘dismissive’ portrayal of the northern tribes’ rights on the West Coast as ‘a possible overlay’ contradicted the evidence, which indicated strongly that Ngati Rarua’s rights there were ‘prevailing and continuous’. Counsel rejected the Crown’s submission that evidence of Ngati Rarua’s interests on the West Coast was ‘inconclusive’, and referred to the considerable evidence that the tribe’s customary rights persisted through to 1840 and beyond. It was emphasised that Ngati Rarua had no desire to deny the mana of Ngai Tahu in the takiwa, but only to assert Ngati Rarua’s own mana there.²⁵⁸ Ngati Rarua regretted that during the inquiry the Crown had deliberately not undertaken a full investigation into customary rights.²⁵⁹

(d) Ngati Tama: Ngati Tama stated in their amended statement of claim that they secured an interest in parts of the West Coast through conquest followed by settlement. This interest ‘overlapped and was shared with Ngati Rarua, Te Atiawa, Ngati Apa and Ngai Tahu’.²⁶⁰ In their closing submissions, Ngati Tama said that, while their interests and authority in some parts of the South Island were complete, in other places, such as the West Coast south of Kahurangi Point, they were shared with other iwi.²⁶¹ There was discussion of contested rights and overlapping claims, and the Tribunal was advised to give consideration to these in districts, such as the West Coast, where they existed.²⁶² Ngati Tama recognised that Ngati Apa have rights and interests on the West Coast, although since the conquest those rights no longer existed in other parts of western Te Tau Ihu.²⁶³ They acknowledged the strong links with Ngati Rarua and Te Atiawa in western Te Tau Ihu, but did not accept any claim of Ngati Rarua to primacy in terms of either their role in the raupatu or their consequent

²⁵⁶. Ibid, pp 129–138

²⁵⁷. Counsel for Ngati Rarua, submissions in response to closing submissions of Crown counsel, 12 August 2004 (paper 2.796), p 5

²⁵⁸. Ibid, pp 6, 9, 15–17

²⁵⁹. Ibid, p 17

²⁶⁰. Ngati Tama, amended statement of claim, 26 February 2003 (claim 1.16(a)), supplement, pp 4–5

²⁶¹. Counsel for Ngati Tama, closing submissions, pp 8, 16, 103

²⁶². Ibid, pp 14–16

²⁶³. Ibid, p 17

2.6.2(1)(e)

interests.²⁶⁴ They also rejected Ngati Toa's claims to paramountcy of interest, and did not accept that Ngati Toa was actively involved in the conquest of western Te Tau Ihu or maintained any direct rights or interests there.²⁶⁵ They did not accept that Ngai Tahu maintained exclusive rights on the West Coast after 1840.²⁶⁶

(e) Te Atiawa: Te Atiawa made only a brief statement of their interests on the West Coast in their closing submissions. They admitted that they had not had an opportunity to fully develop their case, but said that the research of the Mitchells and Riwaka did establish a prima facie case for their customary rights in the region.²⁶⁷ These rights were based on raupatu, a conquest in which they at various times in various combinations with Ngati Rarua and Ngati Tama had invaded the region and obtained land there. The history of the raupatu was summarised in the submissions, followed by an assertion that Te Atiawa's mana was distinct from and independent of Ngati Rarua's. The rights thus gained were 'con-joint' with those of Ngati Rarua and Ngati Tama, and they had 'over time matured into take tupuna'.²⁶⁸ Regarding Ngati Toa's claim to hegemony or 'overlordship' over Te Atiawa in the northern South Island, it was submitted that 'the weight of evidence demonstrates that there is no customary or historical justification' for such claims.²⁶⁹ Ngai Tahu's claim that there was a border between their territories and those of the northern tribes was rejected, but the submissions did not go beyond declaring that 'Ngai Tahu could not, and did not, prevent Te Atiawa and other Te Tau Ihu iwi from travelling into the West Coast and obtaining rights there'.²⁷⁰

(2) Ngai Tahu submissions

As noted earlier, Ngai Tahu were not a party to this inquiry but were permitted to submit evidence and make submissions in response to the evidence of Te Tau Ihu iwi on their claims in the takiwa. Their closing submissions denied that there was any reason to question the 1990 decision of the Maori Appellate Court that the Ngai Tahu takiwa extended as far north as Kahurangi Point, since no new evidence had been presented (except for the Wereta Tainui petition of 1878, but it was submitted that McAloon had shown that this evidence did not prove that the people of Ngati Apa descent at Kawatiri had anything other than residence rights there).²⁷¹ The submissions then went on to make a response to the claims of each of the Te Tau Ihu tribes concerning the West Coast takiwa.

264. Counsel for Ngati Tama, closing submissions, p 19

265. Ibid, pp 19–20

266. Ibid, p 19

267. Counsel for Te Atiawa, closing submissions, pp 42–43

268. Ibid, pp 11–19, 44

269. Ibid, pp 24–41

270. Ibid, p 43

271. Counsel for Ngai Tahu, closing submissions, pp 4, 5, 37–38

Concerning Ngati Apa, it was not accepted that they could demonstrate customary title before 1840, there being no traditional evidence for any claim based on conquest, discovery, or ancestral rights. The evidence (in particular, Tau's evidence for Ngai Tahu's descent from Ngati Tumatakokiri, Ngati Wairangi, and invading Ngai Tahu hapu) showed rather that it was Ngai Tahu who had rights based 'on the full matrix of customary claims.'²⁷² Ngati Apa's contention that it would have been difficult for Ngai Tahu to maintain an ongoing occupational presence as far north from Arahura as Kahurangi was dismissed as 'mere conjecture'²⁷³ – there were many other South Island examples of occupancy in very isolated places. The submissions denied that there was any traditional evidence for the arrival or presence of an independent Ngati Apa community (ie, Ngati Apa who were not also of Ngai Tahu ancestry) on the West Coast before 1840. Because there was no evidence of ancestral rights, the Ngati Apa claim was regarded by Ngai Tahu as that of a whanau, not of an iwi.²⁷⁴ Ngati Apa rights in Kawatiri were merely those of refugee groups who shifted south and were later allowed to settle there. That community included persons of Ngati Apa ancestry, who had a right of some kind to cultivate and live on the land.²⁷⁵ In their earlier response to the statements of claim made by the iwi of Te Tau Ihu, Ngai Tahu had said that their concurrence with such occupation was the 'continuation of a tuku they had already entered into' with the refugees, and as we have seen, this was the explanation offered by McAlloon. In their closing submissions, however, Ngai Tahu said that the Kawatiri people were not living there with rights conferred by tuku, but 'for reasons of close kinship and manaakitanga.'²⁷⁶ To some extent they were 'a Ngai Tahu whanau/hapu living there with rights through Ngai Tahu's claim to the land,'²⁷⁷ although some chose to identify as Ngati Apa. Overall, the rights of people with whakapapa connections to Ngati Apa or any other iwi were stated to be based on residence and relationship to Ngai Tahu, not on any tribal customary rights or manawhenua.²⁷⁸

Concerning the claims of the northern allied tribes to rights by conquest, Ngai Tahu submitted that it was clear that Ngati Rarua was forced to retreat from the West Coast after the defeat of Te Puoho at Tutarau in 1837.²⁷⁹ They denied that there was any evidence that Niho or Takerei ever returned to the West Coast after 1837, or left any other chiefs as figures of authority in their stead. Importance was placed on James Mackay's report in 1859 that Ngati Rarua had abandoned the coast after Tutarau and had never resumed occupation south of Kahurangi. Ngai Tahu's position was that Ngati Rarua were forced to withdraw because Ngai Tahu had managed to re-establish themselves after the defeat of Te Puoho and Ngati

272. Ibid, p 54

273. Ibid, p 65

274. Ibid, p 63

275. Ibid, pp 63–64

276. Ibid, p 55

277. Ibid, p 63

278. Counsel for Ngai Tahu, statement of response to Te Tau Ihu iwi claims concerning the Ngai Tahu takiwa, 14 July 2003 (paper 2.634), p 13; counsel for Ngai Tahu, closing submissions, pp 54–55, 62–65, 68

279. Counsel for Ngai Tahu, closing submissions, p 58

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Tama.²⁸⁰ Ngati Rarua's claim was therefore based only on a limited period of occupation before their withdrawal prior to 1840. Furthermore, members of the three northern tribes who remained in the area did not constitute a separate community or hold any power over Ngai Tahu. It was argued that most of those who remained and married into Ngai Tahu would have been too young in 1837 and of insufficient mana to have been deputed to uphold northern claims of manawhenua. No political or community presence was maintained, as 'a few people left behind as marriage partners does not constitute such a presence.'²⁸¹ There was therefore no tribal mana of these iwi (or of Ngati Toa) on the West Coast by 1840.²⁸²

(3) Crown submissions

As we have seen, the Crown noted in its closing submissions that there was a shortage of evidence for what was happening in the northern portions of the takiwa on both coasts at 'the critical historical moments', thus making it difficult to arrive at definitive conclusions about the customary rights of the various tribes.²⁸³ The Crown was not convinced that there was 'a sufficient evidential base from which contested views could now be adequately adjudicated', though there had been 'a genuine attempt on the part of the Crown to understand the complex overlapping claim issues in this inquiry.'²⁸⁴ The reminder was made that, in the period 1840 to 1860, 'customary rights as between different groups of Maori in Te Tau Ihu were not fixed and were in an evolving state of flux.'²⁸⁵

It was nevertheless possible to identify, 'in approximate terms', the location of the various iwi in the Treaty period and, in 'tentative' and imprecise terms, the customary rights of those iwi.²⁸⁶ The Crown's present understanding of the relevant evidence was briefly set out. It was noted that the northern conquest was incomplete, in that the Kurahaupo iwi were in varying degrees subjugated but retained a tributary or independent status. It was also understood that the northern iwi acquired and held land interests, especially in the early post-conquest phase, in a 'confederate' manner 'under the stewardship of Ngati Toa.'²⁸⁷ With regard to the West Coast, it was stated that there were Ngati Apa interests there, with a 'possible overlay' of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa interests.²⁸⁸ The Crown's submissions briefly reviewed the evidence for Ngati Apa's rights on the West Coast, and identified the main issue as the nature of the interests of the Kawatiri community of the 1840s and 1850s. Whether there had been Ngati Apa occupation of the area before 1840

280. Counsel for Ngai Tahu, closing submissions, p 59

281. Ibid, p 73

282. Ibid, pp 58–60, 72–73, 76; counsel for Ngai Tahu, submissions in response to various submissions, 14 May 2004 (paper 2.794), pp 3–4

283. Crown counsel, closing submissions, p 124

284. Ibid, pp 9–10

285. Ibid, p 16

286. Ibid, p 24

287. Ibid, pp 24–25

288. Ibid, p 27

is difficult to know, but Ngai Tahu's acceptance of Ngati Apa's participation in the Arahura purchase in 1860 'lends weight to the possibility that there was a distinct Ngati Apa community there at that time'.²⁸⁹ As for the customary rights of the northern iwi, the Crown noted that there had been much dispute over the extent of their interests after 1837, and that the evidence relating to it was limited. The only comment that the Crown made on the situation of the northern tribes vis-à-vis Ngai Tahu in this period was that it was 'something of an impasse'.²⁹⁰ In the Crown's view, there was a similar lack of evidence for the rights of Ngati Toa. It was thus very difficult to establish how far beyond Te Tai Tapu any rights and interests of the northern allied groups may have extended. The evidence was described as 'indeterminate' and 'inconclusive'.²⁹¹ As we will discuss in chapter 4, the Crown argued further that it was entitled to rely on the Maori Appellate Court's decision that established the Ngai Tahu takiwa.²⁹²

2.7 TRIBUNAL CONCLUSIONS ON THE CUSTOMARY RIGHTS OF TE TAU IHU IWI IN THE TAKIWA

In this section, we set out our conclusions on the rights of the Kurahaupo tribes and the northern allied tribes in the statutory takiwa, but make no findings on Treaty breaches. We make such findings in our next chapter when we consider how the Crown dealt with the customary rights of various iwi while negotiating purchases.

We have reached some conclusions already, as we considered evidence and submissions. Some of these are of a general nature and can be re-stated here.

- As we stated in section 2.2, we do not accept the submissions advanced by Ngai Tahu, and particularly Anderson, to the effect that hapu and iwi were divided by rigid boundaries and had exclusive rights to land and resources within their respective territories. However, we noted in our discussion that Anderson had considerably qualified his model and that Ngai Tahu, in their final submissions, had quoted him to the effect that rights were 'exclusive *at the level at which they were held* and some groups, sometimes, maintained boundaries' (emphasis in original).²⁹³ That did not prevent Ngai Tahu from continuing to claim exclusive rights to northern boundaries at Parinui o Whiti and Kahurangi Point. We opted for an alternative arrangement, already supported in previous Tribunal reports such as the *Ngati Awa Raupatu Report*, to the effect that hapu and iwi had recognised 'core' territories but that the fringes of those territories were

289. Ibid, p 125

290. Ibid, p 126

291. Ibid, pp 129, 130

292. Ibid, p 135

293. Counsel for Ngai Tahu, closing submissions, p 51

essentially zones of overlapping rights where resources were shared with neighbours. Although boundaries were sometimes mentioned, we believe that Ngai Tahu and various Te Tau Ihu iwi had overlapping rights in the statutory takiwa, though to different degrees on the East and West Coasts. Rights did not depend on one factor alone, such as conquest or occupation, and could vary over time. We think it is more appropriate to think in terms of ‘bundles’ and ‘layers’ of rights. Rights recently established by conquest could be strengthened by continuing acts of use and occupation. Those who lost their rights by conquest and enslavement, could regain them later, though only by peaceful arrangements after 1840.

- Since there is no documentary evidence of occupation and use of resources by the various hapu and iwi before about 1820, and not a great deal that is relevant after that even as late as 1860, we have had to rely considerably on oral tradition, including much that was recorded from the mid nineteenth century. Both Anderson and Tau are conscious of the limitations of oral traditions as history, and they are careful to list the various checks and balances that need to be applied in interpreting them. Those who recount oral traditions select the whakapapa and retell the historical incidents that suit their particular purposes; they own them and use them to tell their history. There is nothing particularly wrong with this kind of history so long as we appreciate its origin and purpose. It is not very different from the ‘nationalist’ histories that have been written the world over. It is only when an exclusive right to the history is asserted, when there are clearly two or more parties to it, that there is danger. So far as our inquiry was concerned, we need to remember that the survival and collection of oral traditions was uneven. They were recorded mainly from the winners, with few being recorded from those who were defeated. Some historians of an earlier generation, such as Elvy, did collect oral traditions from Rangitane, as he did from Ngai Tahu kaumatua and kuia. However, we do not accept Tau’s assertion that all the traditions that Elvy took from Rangitane derive ultimately from Ngai Tahu sources. As we have said, there is no exclusive right to the Kupe stories, which are shared by numerous iwi. Nor is there an exclusive right to the stories relating to Tapuae-o-Uenuku. As Tipene O’Regan acknowledged, two parties can gaze on the two sides of that mountain. Likewise, we think that two or more parties can view great events, and great battles of the past, such as Matariki, from their different perspectives, and use oral traditions from their side to describe them. We accept that Rangitane can use their oral traditions to assert historical rights as far south as Waiau-toa; just as Ngai Tahu can use their traditions to contradict the Rangitane version. The versions are so numerous and the alignments on one side or another so varied, that it is impossible, in our time, to be sure that one version is superior to the other or even that there was only one battle. Likewise, we can accept that when land is under negotiation for sale to the Crown, the vendors will use

a selection of historical facts and take that are most supportive of their claim. They will pick the most expansive boundaries, as we explain in our next chapter. In our view, all oral traditions are based on a selection of historical facts; their 'truths' are in the eyes of the beholders. At this distance in time we cannot select or privilege one version of oral tradition at the expense of others. Nevertheless, there were some differences between the ways in which rights were asserted and justified on the two coasts, so we discuss these separately.

We now outline our conclusions on more particular issues, coast by coast, following the chronological framework used above.

2.7.1 The east coast

We begin with the period up to 1820. As we noted, much of the oral tradition used by both sides related to a claimed historical boundary between Rangitane and Ngai Tahu at Waiau-toa. Historians who supported that Rangitane claim, such as the Mitchells and Armstrong, relied considerably on the work of Elvy, who, as we noted, used Rangitane as well Ngai Tahu traditions. The historians for Rangitane say that they defeated Ngati Kuri, a hapu of Ngai Tahu, in the battle of Matariki, thereby establishing their claim to the Waiau-toa boundary. As we have noted, Tau, for Ngai Tahu, using Ngai Tahu sources alone, argues that Rangitane were not even involved in the battle of Matariki. We do not think he has sustained this argument; indeed, some of the Ngai Tahu sources he used actually admit that Rangitane were involved, though not in the way that Elvy said they were. We think that Rangitane were sufficiently involved, in one way or another, to have established the basis for a claim. However, Matariki was so long ago (no one seems to be able to say more than that it was mid to late eighteenth century) and the accounts so contradictory, that a claim by Rangitane based on Matariki alone would not be sufficient to validate their claim. A successful battle, and a take raupatu based on it, has to be followed up by occupation or other kinds of use if it is to be effective against others. There is very little evidence on what happened after Matariki in the 20 to 50 years that elapsed before the Ngati Toa-led invasion. Since there are no accounts of continuing warfare between Rangitane and Ngai Tahu after Matariki, it seems that there was a peaceful accommodation between them. Certainly, there are archaeological signs of occupation on the north bank of the Waiau-toa. Rangitane told us during our field trip there that these were their sites. They may well have been, but we must remember Anderson's caution that archaeological remains do not usually lend themselves to identification of the iwi responsible. Also, it is likely that the sites were occupied successively by several different iwi, probably including Rangitane. Though we believe that Rangitane have a historical claim to customary rights as far as Waiau-toa, we do not think they had an exclusive claim. Others, including Ngai Tahu, could also have had rights north of the Waiau-toa. Indeed, we regard

Waiau-toa as not so much a boundary between Rangitane and Ngai Tahu as a buffer, or contestable zone in which both had rights. We need to look at the period after 1820 for further signs of the various iwi rights.

Following the Ngati Toa invasions from 1820, neither Ngati Toa nor Ngai Tahu showed any interest in establishing permanent communities in the east coast takiwa north of Waiau-toa, though some Ngati Toa individuals with Ngai Tahu spouses appear to have remained as far south as Kaikoura. As we have noted above, Rangitane living at Wairau and in the sounds were attacked by Ngati Toa and their allies. Some Rangitane escaped to the interior, and some of these went to the Awatere Valley.²⁹⁴ Others remained as dependants of Ngati Toa. As we also noted, some of those Rangitane carried supplies overland for Ngati Toa to use when they attacked Ngai Tahu at Kaiapohia, and some of them assisted Ngati Toa in that battle, as if to say that they were partners, albeit unequal partners, in the event. Whatever the nature of Rangitane's participation, Ngai Tahu saw it as cause to attack Rangitane when they came north to retaliate against Ngati Toa. We listed several places along the east coast, from Waipapa northwards, where Ngai Tahu attacked Rangitane kainga – a sure indication that Rangitane were then in occupation of parts of the coast. It is unlikely that all of the Rangitane occupants were killed and possible that some survivors resumed their occupation of the settlements and remained there until after 1840, thereby preserving their ahi ka. We do not accept the proposition that all Rangitane territorial rights, either in the Wairau and Pelorus Sound (where they were ultimately recognised) or on the east coast (where they were not), were extinguished by defeat at the hands of Ngati Toa or Ngai Tahu. In later years, and at our hearing of their claims, Rangitane could still demonstrate whakapapa links and memory of battle sites and other places of traditional significance in the east coast takiwa as far south as Waiau-toa. We conclude that ancestral associations can continue and must be respected as long as such memories are held. This conclusion applies equally to Ngati Toa and Ngai Tahu as well as to Rangitane.

We need to consider now whether the situation in the takiwa around 1840 was changed over the next 20 years. It was during this time that the Crown effected the Wairau and Kaikoura purchases. As we noted above, documentation increased as Europeans became more involved with the district, but there is very little, if any, comment in this material on Maori occupation of the Kaikoura coast. European settlement at Nelson and Canterbury altered the direction of economic development and Maori tended to gravitate towards those centres. It seems likely that Rangitane who survived the Ngai Tahu attacks along the coast in the 1830s gradually declined in number and perhaps disappeared by the 1850s. Although some Maori were employed on pastoral runs, their iwi identity was not recorded. But even if the east coast north of Waiau-toa was now vacant, Rangitane (and Ngati Toa and Ngai

294. Armstrong, 'The Right of Deciding', p 17

Tahu) had not necessarily lost their rights in it. In Maori custom there was no land without right-holders and land that was temporarily vacant belonged to those who previously had rights in it.

In the 1840s, it was assumed by New Zealand Company and Crown officials that Rangitane, as a ‘conquered’ people who either were ‘enslaved’ by Ngati Toa or became fugitive bands in the interior, were without rights. Their status in Te Tau Ihu was carefully examined in our first preliminary report, where we concluded that the result of ‘conquest’ for Rangitane and other Kurahaupo people was ‘more nuanced than is often allowed.’²⁹⁵ The preliminary report noted that the Tribunal’s *Rekohu* report had argued that ‘the rights of those who had been defeated might survive conquest and even in a very harsh environment.’²⁹⁶ Applying that to Te Tau Ihu, the preliminary report stated that ‘The Kurahaupo tribes remained with the land and . . . where that . . . land continued to be occupied by an identifiable community, even on the “sufferance” of new, more militarily powerful arrivals – ancestral rights survived.’ Although the northern tribes controlled a wide region, this could not encompass ‘the whole of Te Tau Ihu with its multiple bays and rugged interior.’ The free Kurahaupo groups who survived in the interior and later rejoined the settled, tributary communities no longer had exclusive rights but ‘valid customary rights nonetheless.’²⁹⁷ Their ancestral rights could not be sundered in the short time between the northern conquests and the coming of British rule. Under customary arrangements, captured chiefs who proved their worth could regain mana, and this continued after 1840, when some such as Ihaia Kaikoura at Port Underwood were accepted as leaders of mixed communities that included Ngati Toa. Inter-marriage with Ngati Toa chiefs also cemented relations and enhanced status (for instance, Te Kanae at Wairau had a Rangitane wife). Such customary arrangements were further encouraged by British rule, when slavery was no longer permissible. By 1853, when the first Waipounamu deed was executed with Ngati Toa, Rangitane had so recovered their status that they were described, with others, as ‘co-equal claimants’ with Ngati Toa. In 1856, Rangitane signed one of the Waipounamu deeds on their own, and another with Ngati Kuia. By the 1850s, Rangitane and other Kurahaupo groups ‘were largely free of any effective overlordship.’²⁹⁸ What has been said in our first preliminary report for Rangitane in Te Tau Ihu applies equally to their rights in the statutory takiwa, and in relation to Ngai Tahu as well as Ngati Toa.

We conclude that Rangitane, Ngati Toa, and Ngai Tahu all had rights in the east coast takiwa, though those rights were based on different take. As we understand it, their rights were as follows.

295. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, p 62

296. Ibid, p 82

297. Ibid, pp 82–83

298. Ibid, p 68

(1) Rangitane's rights

Rangitane had rights that had been initiated by campaigns originally against Waitaha and subsequently against Ngati Kuri of Ngai Tahu. Those rights were developed by subsequent occupation and use of resources as far as Waiau-toa and Waipapa which persisted until the time of the Ngai Tahu attacks on them in the 1830s. Since Ngai Tahu did not follow those attacks by settlement in the area, Rangitane were free to resume their occupation or use of the coast north of Waiau-toa. Even though Rangitane may not have been in occupation in any great number, or at all, by the time the Wairau and Kaikoura purchases were negotiated, they retained ancestral associations. The Crown was obliged to consult Rangitane who were still living at Wairau and Pelorus (as they were eventually consulted for the Waipounamu purchase). But we make no findings on the issue here, since we do that in the next chapter.

(2) Ngati Toa's rights

Ngati Toa had rights based on their successful invasion from the 1820s. So far as the east coast was concerned, Ngati Toa defeated Ngai Tahu, as we noted, in the campaigns to Kaikoura, Kaiapohia, and Akaroa, though their victories were not consolidated by occupation so far south. There was some hesitancy in expressing Ngati Toa's claim to the east coast takiwa, in that their counsel asserted a title as far as Kaikoura rather than to the south. This contrasts with the assertiveness of their original claim while negotiating the Wairau purchase, when they asserted a claim as far as Kaiapohia, the site of their earlier defeat of Ngai Tahu. As we detail in chapter 3, it was that latter boundary that the Crown recognised in the Wairau purchase. Ngati Toa defeated Rangitane at Wairau, the sounds, and Cloudy Bay to Cape Campbell but did not, so far as we know, attack any Rangitane residing on the east coast. We presume it was Rangitane from Wairau who were used by Ngati Toa to assist in the final attack on Kaiapohia. It was the Ngati Toa defeat of Ngai Tahu, not of Rangitane, that gave them the opportunity to develop rights to the east coast. Ngati Toa partially consolidated their defeat of Ngai Tahu by temporary occupation along the coast to Kaikoura in the later 1830s and more lastingly by takawaenga marriages with Ngai Tahu at Kaikoura. Nevertheless, Ngati Toa could still have more fully exercised their rights, based on their victories against Ngai Tahu, by sustained residence or further acts of occupation or both. The fact that Ngati Toa did not choose to exercise that right was due largely to their engagements elsewhere on both sides of Cook Strait, not, in our view, to a fear of attack by Ngai Tahu, who had withdrawn to Kaiapoi. In the late 1830s and early 1840s, Ngati Toa and Ngai Tahu negotiated a peace settlement that could have been implemented by further occupation, but their attention was directed elsewhere. However, the Crown awarded Ngati Toa an exclusive right to the east coast as far as Kaiapoi with the Wairau purchase, though it later over-rode that exclusivity when it purchased much of the east coast a second time from Ngai Tahu with the Kaikoura purchase. We make findings on these issues in our next chapter.

(3) Ngai Tahu's rights

In our view, Ngai Tahu also had rights in the east coast takiwa, based on their pre-1820 rights of occupation. Even though Ngai Tahu had withdrawn south, such rights survived the invasions from the north, as demonstrated by their campaigns against Ngati Toa in the 1830s. However, those fights against Ngati Toa and their allies in Te Tau Ihu were inconclusive. The subsequent peace arrangements left neither side in ascendancy, with neither asserting an exclusive title to the east coast north of Waiau-toa. That was to come later – in negotiation with the Crown in the Wairau and Kaikoura purchases. It could be said that Ngai Tahu exercised a partial conquest of Rangitane in their attacks on them as they advanced up the coast, but this was also incomplete since Ngai Tahu did not occupy the coast north of Waiau-toa and did not prevent Rangitane from reoccupying it. Nevertheless, we consider that Ngai Tahu, like Ngati Toa, had a right to occupy that part of the coast, had they chosen to do so. But we do not consider that they had an exclusive right, since they did not occupy any land north of Waiau-toa and did not completely obliterate Rangitane, let alone Ngati Toa.

We are thus dealing with a situation in which all three iwi had rights in a district where none of them was in occupation in any force as a community, though it is probable that all three iwi were making seasonal use of resources in different parts of the takiwa. According to Weld, Kaikoura Whakatau of Ngai Tahu was familiar with hunting kakapo in the headwaters of the Awatere River.²⁹⁹ Armstrong cites evidence that we detailed above of Rangitane living in the same area. And it is likely Ngati Toa continued to hunt ducks seasonally at Kaparatahau after Te Rauparaha's narrow escape. The Tribunal, in its Whanganui a Tara inquiry, examined similar instances of seasonal use of otherwise unoccupied land at Ohariu (on the south-west fringes of the infant Wellington settlement) and in Heretaunga (the Hutt Valley). These were typical over-lapping zones between the Taranaki iwi, who occupied Wellington and the lower Hutt Valley, and Ngati Toa at Kapiti and Porirua. Neither side permanently occupied and cultivated the overlapping zones but both occasionally used the resources of the bush and the sea. In similar fashion to their claims in Te Tau Ihu, Ngati Toa claimed the land by virtue of their raupatu of the whole Wellington–Kapiti Coast district, and their leadership, through Te Rauparaha, of that conquest. They still occasionally exercised food-gathering rights at Ohariu and Heretaunga. The Tribunal accepted that both sides had ahi ka in these districts. It specifically concluded that by 1840 'Ngati Toa had ahi ka in the Porirua basin, parts of Ohariu (other parts of which were used or occupied by Ngati Tama), and parts of Heretaunga'. The Tribunal added that 'ahi ka rights were not confined to the area of day-to-day living . . . but extended to other areas of association or influence'.³⁰⁰ We consider that this latter situation applied to the east coast takiwa and that it reinforces our conclusion that all three iwi had rights in the takiwa north of Waiau-toa.

299. John Sherrard, *Kaikoura: A History of the District* (Kaikoura: Kaikoura County Council, 1966), pp 47–48

300. Waitangi Tribunal, *Te Whanganui a Tara me ona Takiwa: Report on the Wellington District* (Wellington: Legislation Direct, 2003), p 41

Our overall conclusion is that all three peoples – Rangitane, Ngati Toa, and Ngai Tahu – had legitimate overlapping customary rights in the area between Parinui o Whiti and Waiau-toa and that none of these rights had been effectively extinguished before the Wairau purchase of 1847. But we make no findings on Treaty breach here. That has to be considered as we examine the Crown purchases from 1847 in our next chapter.

2.7.2 The West Coast

The period up to about 1820 is obscure. It appears to us that the key reality is the limited value of this part of the West Coast, from Kahurangi Point down to the Kawatiri district, to the various tribes occupying more favoured districts to the north and south. It was an inhospitable area in which there were few resources and travel was extremely difficult. The few people who occupied it were migratory and used the resources on a seasonal basis. It is not surprising, therefore, that the evidence for customary rights in the northern part of the takiwa at this time is fragmentary and ambiguous. It appears that Ngati Wairangi had associations with the area before they were displaced southwards by Ngati Tumatakokiri and eventually absorbed by Ngai Tahu when that tribe came to Te Tai Poutini. It is a matter of dispute how far south the power of Ngati Tumatakokiri extended – as far as Mawhera (according to the Mitchells) or to Karamea or even just to Kahurangi (depending on how Alexander Mackay's brief statement is interpreted). In the wider Te Tau Ihu region, Ngati Tumatakokiri were later attacked by Ngati Apa in forays from the north, and on the West Coast they were assailed from the south by Ngai Tahu, so that by the second decade of the nineteenth century they had ceased to exist as an independent iwi. Individuals continued to identify themselves as Ngati Tumatakokiri, however, and some whakapapa of both Ngati Apa and Ngai Tahu included forebears from this defeated tribe. Again, it is disputed how far south Ngati Apa held sway on the West Coast after this – further south than Kawatiri (according to the Mitchells) or no further than Kahurangi (according to Anderson). It is significant that Anderson, who argues against the presence of Ngati Apa south of Kahurangi, admits that Ngai Tahu were 'invisible' there too. He says that the area was probably a borderland, and we agree. This helps to explain why the claims of different iwi to the area are so much in conflict. It is also important that the victories over Ngati Tumatakokiri won by Ngati Apa and Ngai Tahu were very recent. The result was that in 1820 the rights of both these tribes in the area between Kahurangi and Kawatiri were still fluid and unsettled, with neither of them able to show that they had exclusive control.

The invasion of Te Tau Ihu by allied tribes from the North Island took place not long before the Treaty, in the 1820s and 1830s. It altered the situation considerably, though its comparatively recent occurrence meant that tribal rights were probably still not altogether settled in 1840. On the West Coast the incursions of the northerners, led by Ngati Rarua, culminated in the resounding victories of Niho and Takerei down the coast as far south as

Okarito. Whether Ngati Toa's special role as the initiator and overall sponsor of the South Island raupatu gave them rights in the West Coast districts conquered by their allies is disputed among the northern tribes. All of them, except Ngati Toa themselves, deny that the rights claimed in this way were valid. As far as the interests of the defeated tribes are concerned, Ngati Apa's influence in western Te Tau Ihu, including any on the West Coast, was severely affected by the northern invasion. The iwi was not completely wiped out, however, and some of its members emerged in the West Coast districts later. For Poutini Ngai Tahu, the invasion carried with it such indignities as the capture of the principal chief of the area, Tuhuru. The nature of the occupying presence of Ngati Rarua and their allies in the 1830s is not altogether clear, but it included settlement, intermarriage with Ngai Tahu, and control of the pounamu trade. The defeat of Ngai Tahu was thus fairly comprehensive, but the extent of the victors' control became somewhat more uncertain after 1837 when one of their important chiefs, Te Puoho, was himself defeated far to the south in Murihiku. Niho and Takerei had protected the Ngai Tahu community on the central coast as Te Puoho passed through on his way south, but now they reduced their presence on the West Coast south of Te Tai Tapu. It is disputed whether this amounted to a complete withdrawal, meaning that the northerners' interests were abandoned, or was merely a scaled down but continuing pattern of residence, visits, and influence that kept their rights alive. Whatever the case after 1837, it is clear that some members of the northern tribes were still living on the West Coast in the 1840s. Whether they had been there in 1840 or whether residence and other aspects of the northern presence had been resumed after that date is obscure, but we see no reason to doubt that the presence was continuous.

In many other parts of New Zealand, events moved fast in the two decades after the Treaty was signed in 1840, but until 1860 the West Coast remained a region largely unknown and unvisited by Pakeha. Consequently, it was still the case that there is comparatively little contemporary evidence about tribal rights there. The main documentary evidence available to us is the fairly insubstantial references contained in the journals of two explorers who visited the area in the mid-1840s. This evidence includes mention of the claims still being made by Niho in 1846, and indications that the residence and other activities of the northern tribes in the area had not ceased altogether. It is clear also that the region was still sparsely inhabited, especially between Kahurangi and the northernmost 'Arahura' settlement at Kararoa, and that there were no signs of any reassertion of Ngai Tahu influence north of that place. The evidence does include, however, a record of the establishment of a new settlement at Kawatiri and testimony that those involved had some kind of Ngati Apa identity. The significance of this identity is disputed, with Ngati Apa alleging that it pointed to a reoccupation of ancestral territory and Ngai Tahu arguing that the 'Ngati Apa' members of the Kawatiri community settled there with the permission of Ngai Tahu and were essentially Ngai Tahu people in any case. It is clear that the interests of the tribes had continued to evolve since 1840.

Our conclusion is that the various tribes with a historical presence in the West Coast part of the takiwa all had rights, although as on the east coast they varied considerably in character. Our understanding of their rights is as follows.

(1) *Ngati Apa's rights*

Ngati Apa had rights deriving from their defeat of Ngati Tumatakokiri, who practically disappeared as an iwi, partly by absorption into the victorious tribe. For a comparatively short period after their displacement of the previous occupiers, Ngati Apa frequented the area south of Te Tai Tapu towards Te Tai Poutini, where a branch of Ngai Tahu was based who also successfully attacked Ngati Tumatakokiri. Both of the victorious iwi used the resources of the remote borderland area between Te Tai Tapu and Kawatiri, probably on a purely seasonal basis only. In the 1820s and 1830s, these shared and probably competing rights were dramatically brought to an end by the invasions of Ngati Rarua and their allies, though not permanently. We repeat the point we made in relation to Rangitane on the east coast (and which we discussed more fully in our first preliminary report) that the conquest of the Kurahaupo tribes in the South Island was less complete than Pakeha in the post-Treaty period assumed. In the case of Ngati Apa, members of the tribe survived and there was potential for their ancestral rights to be revived more fully. This becomes particularly relevant in a large and sparsely settled region like the northern West Coast below Kahurangi Point. When the hand of the northern invaders lightened not long before 1840, the rights of Ngati Apa, who had formerly used the area along with their southern neighbours Ngai Tahu, could revive somewhat, though there is no evidence that either tribe had resumed their former use of the area by the mid-1840s. This was the context, however, in which Ngati Apa could emerge very soon after that as part of a resettlement of the vacant Kawatiri area. The recognition by both Ngai Tahu and the Government land purchasers of their right to be there will be covered in our next chapter.

(2) *Ngati Toa's rights*

Ngati Toa did not participate directly in the invasion and settlement of the West Coast, but claimed rights there as the overriding authority in the South Island raupatu as a whole. If what Mackay called Tuhuru's 'act of submission' to Te Rauparaha occurred, it was presumably made in this context. Ngati Toa's claim did not deny the rights of their allies, but the expectation was that they would defer to Ngati Toa when it came to decisions about sale. This was a claim rejected by all three of the allied conquerors. We accept, however, that Ngati Toa's role in the wider raupatu did give them a notional or potential right on the West Coast, which had not lapsed by 1840, but it had not been followed up by occupation and settlement and never was, and so did not result in the development of any continuing customary rights in the area. Whether the Crown recognised any interest of Ngati Toa in this area during the purchase period will be considered in the next chapter.

(3) Ngati Rarua's rights

Ngati Rarua initially acquired rights through raupatu. In the western parts of the South Island down to Arahura and beyond, they were the unquestioned victors (or at least the leaders of the victorious allies) over Ngati Apa and Ngai Tahu in the 1820s and 1830s. For some years, this achievement was plainly manifested in their dominance in the relationship with Ngai Tahu in Te Tai Poutini, but after Te Puoho's defeat in Murihiku in 1837 there was a lessening of Ngati Rarua's presence in the area. It did not cease altogether, however, and was maintained in several important ways, including the obtaining of pounamu and the residence of chiefs and others, into the 1840s and 1850s. Probably, it was slowly declining as iwi members moved away and the tribe increasingly focused its concerns elsewhere, but the right to occupy land (or at least the freedom to take up and exercise such a right) had not terminated by 1840 as Ngai Tahu claimed. Some Ngati Rarua remained in the area and were awarded interests in the reserves established under the Arahura purchase arrangements.

(4) Ngati Tama's rights

Ngati Tama derived their rights through their participation in the invasion and occupation led by Ngati Rarua (although they do not concede that Ngati Rarua had any primacy as far as rights are concerned). We believe that Ngati Tama's rights continued in the same way as Ngati Rarua's, as outlined above.

(5) Te Atiawa's rights

Te Atiawa similarly acquired and retained rights through participation in the invasion and occupation, although on a smaller scale.

(6) Ngai Tahu's rights

Ngai Tahu also had rights in the whole region up to Kahurangi Point. In the remote districts north of Kawatiri, they were based on a history of insubstantial seasonal resource use in a borderland formerly controlled by Ngati Tumatakokiri and subsequently used by Ngati Apa as well as Ngai Tahu. This area was temporarily lost to the northern invaders in the 1820s and 1830s, and Ngai Tahu's West Coast heartland of Te Tai Poutini had to be shared with them, but Ngai Tahu survived as a community there. With the slowly declining presence of Ngati Rarua and their allies after 1840, Ngai Tahu were in a position, along with Ngati Apa, to reclaim the rights that they had previously enjoyed in the northern districts. By 1860, there was little or no evidence that they had begun to do so, apart from their participation in the Kawatiri settlement, which they acknowledged in that year to be one in which a Ngati Apa interest existed.

Again, therefore, we are dealing not with exclusive rights, but with a situation in which all the tribes involved had rights to varying degrees. We are not concerned with the main part of Ngai Tahu's West Coast takiwa, Te Tai Poutini, but with the less settled, not well defined,

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and contested northern districts, especially Kawatiri and the long stretch of coastal land between there and Kahurangi Point. We conclude that all six tribes – Ngati Apa and Ngai Tahu from earlier times and Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa after the northern allies' invasion – had legitimate overlapping rights in the area between Kahurangi and Kawatiri and that none of these rights had been effectively extinguished before Crown purchasing began in the 1850s. The extent to which the Crown recognised or failed to recognise these interests during the purchase period will be considered in the next chapter.

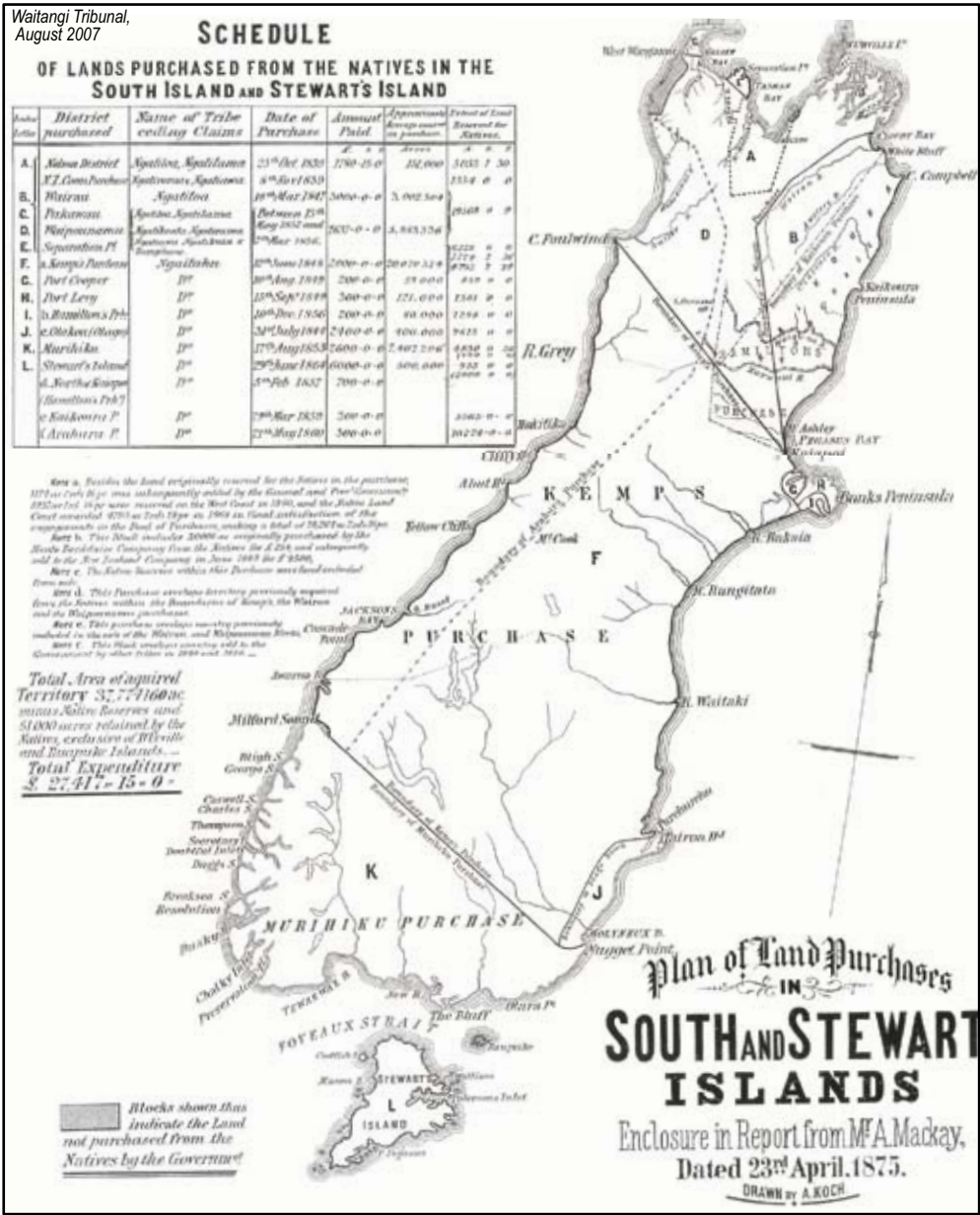
CHAPTER 3

THE CROWN'S TREATMENT OF TE TAU IHU CUSTOMARY RIGHTS IN THE STATUTORY TAKIWA DURING THE MID NINETEENTH CENTURY PURCHASES

3.1 INTRODUCTION

In our previous chapter, we concluded that Te Tau Ihu iwi did have customary interests in what has been defined as Ngai Tahu's statutory takiwa, though their rights overlapped and did not displace the acknowledged rights of Ngai Tahu. In this chapter, we consider claims by Te Tau Ihu iwi that their rights were not recognised or not fully recognised by the Crown in a succession of purchases in the mid-nineteenth century, beginning with the Wairau purchase of 1847, and in the Crown's actions in respect of the West Coast reserves extending into the twentieth century. We also examine the Crown's response to those claims.

Our previous chapter also discussed the related issue of boundaries in Maori custom. We concluded that rigid boundaries between iwi were uncommon. Though iwi had 'core territories', these were usually separated by broad zones in which they had overlapping rights. In this chapter, we consider how the Crown, in dealing with respective iwi claims to territory, 'ossified' boundaries in the process of extinguishing them and, if necessary, bought out rival overlapping claims. This, it was hoped, would enable the Crown to secure a quiet title and, in turn, to grant titles to colonists who would not be disturbed by disgruntled Maori claimants. Thus, to note the first instance, the Crown accepted Ngati Toa's request for a southern boundary of the Wairau purchase of 1847 at Kaiapohia Pa – the place where Te Pahi was killed in 1829 or 1830. The east coast portion of Wairau was purchased again, this time from Ngai Tahu, in two more transactions: first to Waiau-ua with the North Canterbury purchase in 1856, and then as far as Parinui o Whiti in the Kaikoura purchase in 1859. On the West Coast, the Crown, having fixed Ngai Tahu's northern boundary at the Kawatiri River in association with the Canterbury purchase, then agreed to extend that boundary to Kahurangi Point in the Arahura purchase in 1860. In all of these 'blanket' purchases, the Crown was accepting the sellers' word on their boundaries (or places that were important to them) simply to extinguish their customary rights, wherever they may have been said to exist. The very fact that there were multiple purchases on both coasts from several iwi meant that none of the iwi involved could be regarded as having had an exclusive title to the



Map 4: The South Island purchases

Source: A Koch, 'Plan of Land Purchases in South and Stewart Islands', 23 April 1875, AJHR, 1875, G-3, facing p 2

land. Despite that, as we noted earlier, the Maori Appellate Court decided in its 1990 judgment that Ngai Tahu, as the last sellers in the Kaikoura and Arahura purchases of 1859 and 1860, did have an exclusive title to the lands described in those deeds.

That decision is a major issue in this and the next chapter. In this chapter, we examine the foundation for it – by looking at all of the Crown purchases that covered the statutory takiwa, beginning with Wairau and ending with Arahura. With each, we examine the extent

to which the Crown considered the customary rights of all iwi in the territory involved. Once again, we begin with the east coast, before discussing the West Coast.

3.2 THE EAST COAST

3.2.1 The Wairau purchase, 1847

The Crown's purchase of the Wairau block was discussed at some length in our first preliminary report. Here, we are concerned with the factors that led to the extension of the purchase from Wairau Valley and plain to embrace the Awatere Valley and the north and east coasts from Parinui o Whiti around Cape Campbell and as far south as Kaiapohia. The main issue that we examine is whether the Crown, in extending the boundaries of Wairau, dealt fully and fairly with all of those who had customary rights in the area. The two claimants who had concerns with the extension, Ngati Toa and Rangitane, were critical of the Crown, though from different perspectives. We also discuss the Crown's position. Our preliminary report recorded a general admission from the Crown that 'it failed to inquire properly during its major land purchases.'¹ We have to examine whether that failure also applied to the extension of the Wairau purchase to the east coast.

(1) Governor Grey and the purchase of Wairau

In our previous chapter, we referred to Ngati Toa's insistence on Kaiapohia as the southern boundary of the Wairau purchase – to gain utu for the loss there of Te Pehi and other chiefs in 1829 or 1830. In this section, we examine that arrangement in more detail. Governor Grey willingly conceded the Ngati Toa demand, since it allowed the Crown to acquire a huge additional territory. There was now some urgency for the Crown to intervene on such a large scale as Europeans were already negotiating with Maori for leases of pastoral land in eastern Te Tau Ihu.² Grey needed to move quickly to enforce the pre-emptive clause of the Treaty and acquire the land for the Crown.

In February 1846, Grey sent his Surveyor-General, Charles Ligar, to Wairau to identify the extent of land available, estimate the Maori population and the area of their cultivations, and find out whether they were willing to sell. Ligar made little contact with Maori beyond the mixed Ngati Toa, Ngati Rarua, and Rangitane settlement at Port Underwood. He listed the names of 13 'Ngati Toa' chiefs whose consent, he said, was needed to acquire the land. Though Ligar did not say so, one of the chiefs, Ihaia Kaikoura, was Rangitane and two others,

1. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2007), p187

2. David Armstrong, "'The Right of Deciding': Rangitane ki Wairau and the Crown, 1840–1900", report commissioned by Te Runanga o Rangitane o Wairau in association with the Crown Forestry Rental Trust, 2000 (doc A80), pp57–58

Pukekohatu and Pikiwau, were Ngati Rarua.³ Ligar told Grey that there were 80,000 acres suitable for cropping in the Wairau district, plus 288,000 acres suitable for pastoral farming. This was more than enough land to satisfy the needs of the New Zealand Company settlers who had been unable to get sufficient rural land at Nelson and Golden Bay. But Grey was not satisfied with this area, and looked beyond to the east coast at least as far as Kaikoura. Nor was he content to accept Ligar's advice to consult the 13 leading right-holders (and any 'others' he admitted had claims as well). He had already decided to deal with but three of the chiefs – Tamihana Te Rauparaha, Matene Te Whiwhi, and Rawiri Puaha – and to rely on Spain's earlier conclusion that Ngati Toa had sole possession of the Wairau.⁴ Indeed, he assumed that Ngati Toa had sole rights all the way to Kaikoura since their claim there was 'identical with their claim to the valley of the Wairau'.⁵ He estimated that this added some 3,000,000 acres to the Wairau block.

In March 1847, Grey completed the purchase of the extended block for £3000 from the three younger Ngati Toa chiefs, whose signatures to the deed were arranged behind closed doors at Government House in Wellington. The transaction was completed while Tamihana's father, Te Rauparaha, and other senior chiefs were held in detention or, like Te Rangihaeata, had been driven into exile.⁶ There was no consultation with Rangitane or Ngai Tahu at all.

(2) *The east coast extension*

In 1850, W F G Servantes, the army officer who acted as Grey's interpreter when the Wairau deed was signed in Wellington, wrote an account of the extension of the eastern boundary of the purchase. As Servantes put it, 'The natives were in the first place asked to dispose of the Wairau Valley only; but they themselves proposed to cede all their lands as far as Kaiapoi to which point they stated that the property to which they had a sole title extended.' The 'Kaiapoi' mentioned here was the old Kaiapohia Pa near the mouth of the Ashley River, some eight kilometres north of the present town of Kaiapoi. It was claimed by Ngati Toa because Te Pehi Kupe and other chiefs had been killed there by Ngai Tahu. Though Servantes admitted that there were doubts as to whether the Ngati Toa title extended to 'Kaiapoi', he said that it was:

thought advisable to include the land in question from Kaikoura to Kaiapoi in the deed of sale, in order to extinguish whatever claims the Ngati Toas had to it, for if excluded, and

3. Although generally regarded as a leader of Ngati Rarua, Pukekohatu was also Ngati Toa.

4. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, pp 198–199

5. Grey to Earl Grey, 26 March 1847 (quoted in Grant Phillipson, *The Northern South Island: Part 1*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1995) (doc A24), p 90)

6. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, pp 199–200

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3.2.1(2)

the boundary fixed at Kaikoura, it was quite certain that they would dispute the right of any tribe or persons who might afterwards wish to dispose of it.⁷

As Servantes admitted, the Crown was buying ‘whatever claims’ Ngati Toa had as far as Kaiapoi. He also admitted that Ngai Tahu had a claim to Kaiapoi as well, though he doubted whether, in terms of custom, it was any better than that of Ngati Toa’s.⁸ Wairau was the first of the Crown’s blanket purchases that we described above. Grey at this stage was merely attempting to purchase Ngati Toa’s rights wherever they might be. As he explained to the Smith–Nairn commission in 1879:

My impression was, that I was buying the entire interest of the North Island natives who have conquered the tribes of the Middle Island . . . I purchased all they had a right to . . . There were no regularly defined boundaries. They were laid down merely verbally.⁹

Later, as we shall see with the North Canterbury and Kaikoura purchases, the Crown found it expedient to similarly purchase Ngai Tahu’s claimed rights in the area.

Wairau was negotiated behind closed doors, well away from the block itself, by a few selected chiefs and in a context of war and coercion. As we pointed out in our first preliminary report, this contrasted with some later purchases, such as Pakawau, which were negotiated at large public hui when all who had claims had the opportunity to promote them.¹⁰ With the Wairau purchase, the people on the ground at Port Underwood, Wairau, and elsewhere were not consulted and asked to sign. There was no attempt to walk or survey the boundaries, as had happened with some earlier Crown purchases. Though there was an elaborate description of the boundaries on the lower Wairau river between the purchase area and the Maori reserve to the north, and of the reserve to be cut out for the Crown along the Tuamarina Stream (where the company settlers were killed), the other boundaries of Wairau were described by a few known landmarks around the coast to Kaiapoi, or not at all. There was no description of the remainder of the interior boundary, though later it was presumed to run from the headwaters of the Wairau River to Kaiapoi. And, as we shall explain more fully below, the location of the southern boundary was changed from one ‘Kaiapoi’ to another.

7. WFG Servantes, ‘Memorandum Explaining Why the Nominal Boundary of the Wairau Purchase Was Placed at Kaiapoi,’ memorandum, 4 September 1850 (quoted in Michael Macky, ‘Crown Purchases in te Tau Ihu between 1847 and 1856,’ report commissioned by the Crown Law Office, 2004 (doc s2), p 40)

8. Ibid

9. Bryan Gilling, ‘Supplementary Material to Report “We Say that We Have the Authority”: Ngati Toa’s Right to Customary Rights in Relation to the “Ngai Tahu Takiwa”’, unpublished report, 2003 (doc P29(a)), p 13

10. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, p 202

(3) Claimant submissions

(a) Ngati Toa: Ngati Toa's closing submission made several general complaints about the Wairau purchase. It was purchased from just three Ngati Toa right-holders, in a coercive context, while their leading chiefs were in detention and on the promise that they would be released on the signing of the deed. The submission also argued that Wairau was claimed as utu for the killing of the company settlers, though it made no reference to Ngati Toa's demand for the Kaiapoi boundary as utu for their losses at the hand of Ngai Tahu. However, it noted that Ngati Toa sources did 'emphasise the extent to which Grey played with Maori customary concepts of reciprocity and utu' to secure the purchase. The submission made no reference to the extension of the purchase to the east coast, though it did say that the boundaries of the purchase were not 'clearly defined in the deed'.¹¹

(b) Rangitane: The Rangitane closing submission made no specific reference to their rights in relation to the Wairau purchase, though it did detail their assertion of claims afterwards. Rangitane occupied land that had been sold at Wairau to protest that they had not been paid for their rights. In addition, the submission summarised the evidence presented to demonstrate a Rangitane presence around 1840 in the area later encompassed by the purchase, particularly their interests on the coast from Parinui o Whiti to Waiau-Toa.¹² Though the submission made no reference to Rangitane's claims in this area, it did discuss Ngai Tahu's subsequent assertions of a northern boundary at Parinui o Whiti. These were seen as a response to Ngati Toa's claims to a boundary at Kaiapoi. However, that did not involve Rangitane since they 'had already sold' their rights.¹³ This was a reference to Rangitane's Waipounamu deed of 1856. We discuss that in section 3.2.3.

(4) Ngai Tahu submissions

Although Ngai Tahu are not a party to this inquiry, they were permitted to make submissions on the takiwa issues. Their closing submission made no reference to Rangitane's position in relation to the Wairau purchase, and only one oblique reference to Ngati Toa's. This was selected from Servantes' 1850 letter to Grey, which said that 'doubts were entertained of the Ngati Toa tribe having an undisputed title to land further south than Kaikoura'.¹⁴ We quoted fuller extracts from Servantes' letter above, including his doubts whether Ngai Tahu had a stronger claim to Kaiapoi than Ngati Toa.

11. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), 100–103

12. Counsel for Rangitane, closing submissions, 5 February 2004 (doc T4), pp 12–13, 22

13. Ibid, pp 12–13, 18–20

14. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), p 75

(5) Crown submissions

The Crown's closing submission made several admissions in relation to the Wairau purchase. These are detailed in our first preliminary report and are briefly summarised here. The Crown admitted:

- ▶ that it did not inquire adequately into customary rights, particularly of defeated peoples;
- ▶ that, by the detention of Te Rauparaha and others, Grey had used 'moral pressure' on the three chiefs to sell the land; and
- ▶ that the purchase was 'not without its controversies such as whether all right-holders were identified'.¹⁵

The Crown submission was critical of the Ligar report for failing to identify overlapping interests of Ngati Toa, Ngati Rarua, and Rangitane, and particularly for failing to explain the authority of the rangatira Ihaia Kaikoura at Port Underwood and for identifying Pukekohatu as Ngati Toa alone.¹⁶ But it was even more critical of Grey, since 'Ultimately Grey transacted with only three chiefs for the sale of the Wairau despite Ligar's report of 13 "owners" and the "many who have claims"'.¹⁷

The Crown submission made no reference to the extension of the Wairau purchase down the east coast to Kaiapoi.

(6) Tribunal discussion and findings

As we have noted, the legal submissions made little or no specific reference to Crown consideration of Ngati Toa or Rangitane rights in the takiwa when it purchased the Wairau. However, counsel made general submissions that referred to the Wairau as a whole and we presume that these apply to the east coast portion of the block that became the Ngai Tahu takiwa. The general submissions have been considered by the Tribunal in its first preliminary report and we take them into account in our conclusions and findings. For the most part, we use questions asked in that report and apply them, wherever possible, to the takiwa.

(a) Was there an adequate inquiry into Te Tau Ihu iwi rights in the takiwa prior to completing the Wairau purchase? Our first preliminary report noted two previous official inquiries that referred to Wairau: Commissioner Spain's inquiry into the New Zealand Company's Nelson purchase; and Ligar's inquiry. Though Spain did not visit Wairau, he questioned Ngati Toa chiefs on it at Otaki, accepted their word that they had not sold it to Wakefield, and concluded, without further investigation, that they had a good title to it. Spain dismissed

15. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 99–104

16. Ibid, pp 103–104

17. Ibid, p 104

3.2.1(6)(b)

Rangitane claims on the assumption that they were merely fugitives in the interior. He did not comment on the east coast, though he was inquiring into the validity of the company's Kapiti deed, which had located the southern boundary of its alleged purchase at the 43rd parallel. This was very close to what became the final southern boundary of the Wairau purchase, as we explain below. We have noted that Spain's findings were used by Grey to accord Ngati Toa an exclusive title to the Wairau and the east coast to Kaiapoi.

Ligar's inquiry was a little more thorough. He inspected the mixed settlement at Port Underwood and examined a little of the Wairau Valley, though he did not go to the east coast. He listed 13 chiefs who were said to have had a joint interest in Wairau and whose consent was needed for the purchase, and added that there were 'many [others] who have claims'. The claimants and the Crown were agreed that the Ligar report was incomplete and faulty. Many right-holders and their tribal affinities were not identified. Our first preliminary report accepted those criticisms but considered that they hardly mattered, since Grey ignored Ligar's report and advice and purchased the Wairau from three absentee chiefs.

If Spain and Ligar did not make adequate inquiries into right-holdings in the Wairau, Grey also made no attempt to do so. Grey's policy on Wairau was 'predetermined', as our first preliminary report described it, since he had decided to deal with the three chiefs before he received Ligar's report, which he ignored. But Grey did use Spain's opinions to support his predetermined policy.

(b) Were Te Tau Ihu iwi rights fully considered during the purchase of the takiwa as part of the Wairau? To some extent, the question of whether Te Tau Ihu iwi rights were fully considered during the purchase of the takiwa as part of the Wairau was answered in our previous section. Since there was no adequate inquiry into customary rights, and the incomplete inquiry by Ligar was ignored by Grey anyway, it was evident that Te Tau Ihu rights would not be properly considered in the purchase. Yet, there were differences in the way that the two iwi with rights in the takiwa – Ngati Toa and Rangitane – were treated.

We begin with the question of Ngati Toa rights. In one sense, of course, Grey enhanced their rights, since he assumed that they had an exclusive title, by raupatu, all the way to Kaiapoi. In another sense, however, Grey diminished their rights – and their rangatiratanga – by purchasing the block from but three of their younger chiefs and under duress, while the senior chiefs, who were in detention or exile, were not consulted. Our first preliminary report concluded, on the basis of work by Crown historian Michael Macky, that Grey had 'predetermined' at least three months before the Ligar inquiry to deal with these three chiefs for Wairau.¹⁸ Grey reported to the Secretary of State that the 'Ngatitōa tribe, agreed after considerable discussion, to dispose of the required territory'. But he had in fact concluded the negotiation with a small selection of chiefs – as was explained in the recollections of

18. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, pp 198–199

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HT Kemp, which are quoted at length in our first preliminary report.¹⁹ In concluding the purchase with only three rangatira, Grey had ignored 10 others that Ligar had said needed to be consulted, as well as numerous other right-holders in residence on the block. None of the three signatories lived at Wairau. Our first preliminary report found that ‘the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right-holders . . . in serious breach of article 2 of the Treaty’.²⁰ Those resident right-holders included prominent Ngati Toa chiefs such as Te Kanae, and also Ngati Rarua and Rangitane. We are not concerned with Ngati Rarua here, since they made no claim to rights on the eastern side of the takiwa, but we do need to consider Rangitane.

Our first preliminary report examined the rights of Rangitane and concluded that they, and particularly their chief Kaikoura, should also have been consulted and needed to consent to the sale. Though Rangitane may not have been asserting their rights in 1846 and 1847, they were later to do so under the leadership of Te Kanae. He was one of the leading Ngati Toa chiefs, who was detained with Te Rauparaha but on release lived at Wairau, married a Rangitane woman, and became their spokesman. We concluded in our first preliminary report that, at the time of the Wairau purchase, a ‘layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive’.²¹ Although that statement most obviously applied to Rangitane rights at Wairau, we think it also applied to the east coast portion of the Wairau purchase, at least as far south as Waiau-toa. This applies to Rangitane who lived at Wairau, Kaituna, or Hoiere, as well as to Rangitane who may have been still living in the interior or on the east coast.

(c) To what extent did the Crown exploit Maori custom to expand the Wairau purchase? The passage from Servantes’ 1850 letter that we quoted above suggested that the initiative for extending the boundary to Kaiapoi came from Ngati Toa. On the other hand, Kemp, who was also present at the Wellington signing (and claimed to have drawn up the deed), put the initiative with Grey. As Kemp described it, Grey wanted ‘to throw a halo of peace’ over the Wairau disaster (the deaths of company men in 1843). Kemp said that Grey sent him to Porirua to ‘explain to Rawiri Puaha the Governor’s wishes’ and invite him to an interview at Government House. When Puaha and others arrived, Grey explained to them ‘his desire to wipe out the memory of so sad an event, and in such a way as to make it acceptable to the feelings of both races’. Puaha ‘at once complied, leaving it entirely to His Excellency’s discretion as to the best way of accomplishing the matter’.²²

Kemp’s version of the events is supported by the Te Kanae manuscript, the main documentary source from the Ngati Toa side. This says that Grey asked Puaha to:

19. Ibid, pp 199–200

20. Ibid, p 204

21. Ibid, pp 204–205

22. Henry Tacy Kemp, *Revised Narrative of Incidents and Events in the Early Colonizing History of New Zealand from 1840 to 1880* (Auckland: Wilson and Horton, 1901), p 9

give over Wairau, the place where Wakefield and his comrades died – to the Queen in compensation for her dead. This was the word of Sir George Grey: ‘Give me the land where my dead died.’ Rawiri Puaha and his tribe agreed and so passed Wairau even unto Kaikoura on account of the dead who died in the conflict at Wairau.²³

These two sources suggest to us that it was Grey who took the initiative in seeking utu for the deaths of Captain Wakefield and his men to get the Wairau. A special Crown reserve covering the site of the battle was taken out of the larger adjoining Ngati Toa reserve. In return, Grey was only too willing to allow Ngati Toa utu for their dead at Kaiapohia – and to take all the land in between. Neither Grey nor any of his officials made any attempt to find out whether Ngati Toa occupied any of the land down the coast to Kaiapohia. As we noted above, Grey was content to assume that Ngati Toa had a title based on conquest, in the same way as they were assumed to hold Wairau. We conclude that this reciprocal use of the Maori custom of utu (getting satisfaction, revenge, or a reward for something) was a cynical ploy by Grey to stretch the Wairau purchase to the limit of the New Zealand Company’s original Kapiti deed. In the process, he got hold of far more land than was required to satisfy the company’s obligations to its Nelson colonists, though it was useful for the Crown to have control of the land that pastoralists were occupying.

(d) *To what extent were the boundaries of the takiwa portion of Wairau adequately explained?*

In discussing the location of the extremities of the Wairau block at the killing fields of Tuamarina and Kaiapohia, we need to keep in mind Maori attitudes to boundaries, as discussed in chapter 2. It was common for Maori to define their territory by way of significant tohu (marks or signs) and places. But these were not necessarily connected up in Maori minds by the finite boundary lines that were recorded after survey on European maps or plans and that Crown officials usually had in mind when buying their land. While Maori territory could include significant physical features, such as tribal mountains, these were not always on the perimeter and were sometimes located in the middle of their territories. Valued sites were not confined to physical features and were often places where important historical events had occurred – for example, where battles had been fought and chiefs had been killed – as we have noted for the Ngati Toa claim to Kaiapohia. But, as we also noted, Maori ‘boundaries’ were flexible, and there was often a buffer or contestable zone between tribal territories, with several iwi or hapu having overlapping rights within an area. Maori also had a flexible way of describing places, with a name such as Wairau not necessarily being restricted to the narrow confines of the river and the land on its banks, but extending indefinitely. This notion could easily be misinterpreted by Pakeha officials. For instance,

23. Wiremu Naera Te Kanae, ‘The History of the Tribes Ngati-Toa-Rangatira Ngati-Awa-o-Runga-o-te-Rangi and Ngati-Raukawa, Having Special Reference to the Doings of Te Rauparaha’, translated by George Graham, 20 August 1888 (reprinted 20 April 1928), Alexander Turnbull Library, Wellington, p 19

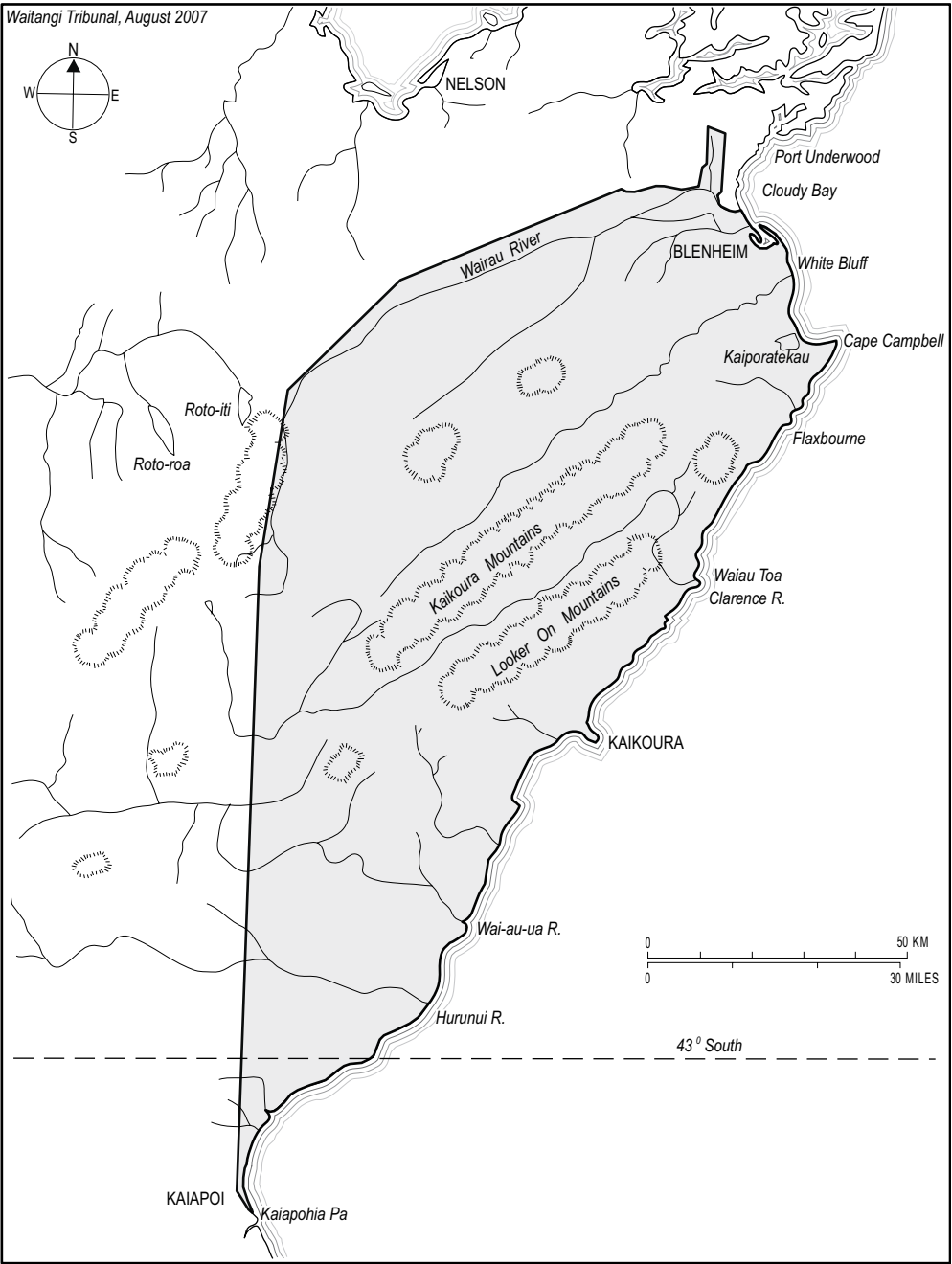
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when the Rangitane chief, Ihaia Kaikoura, drew a map of Rangitane's coastal places but refused to name an interior boundary for the Wairau, Ligar commented that Kaikoura 'seemed never to have given them a thought, and looked upon my inquisitiveness on this point as useless and troublesome'.²⁴ It is more likely that Kaikoura thought Ligar's question was irrelevant. Likewise, when Ngati Toa stretched the meaning of the 'Wairau' all the way to Kaiapoi, they presumed not that there was any physical connection but rather that there was an all-important historical link to the deaths of the Ngati Toa chiefs in 1829 or 1830. But the Crown officials, including the cartographers and surveyors, took those valuable places as marking the extremities of purchases and connected them with finite boundaries.

The description of the boundaries on the Wairau deed of purchase gives some indication of Crown and Ngati Toa priorities. The most detailed description in the deed relates to the one-mile strip of land from the bank of the Wairau to the Tuamarina Stream that was to be cut out of the Ngati Toa reserve to commemorate the company men who were killed, as well as to the northern boundary in general. By contrast, the coastal boundary was vaguely described, though it listed places familiar to Ngati Toa and culminated with 'Kaiapoi'. It was described as follows: 'Beginning at Wairau, running along to Kaiparathau (Te Karaka) or Cape Campbell, running along to Kaikoura until you come to Kaiapoi.' It was this last site, Kaiapohia Pa near the Ashley River, that was important to Ngati Toa. But, unknown to them, that southern extremity of the boundary was not to be final. When the Nelson Crown grant that included Wairau was issued to the company on 1 August 1848, the southern boundary was fixed at another 'Kaiapoi' (or Kaiapoe) at the mouth of the Hurunui River some 70 kilometres north of the Kaiapohia Pa. The matter is fully discussed in the Tribunal's *Ngai Tahu Report 1991*. As that report points out, the boundary used for the Nelson Crown grant was just north of the 43rd parallel, which had been used as the southern boundary in the New Zealand Company's original Kapiti and Queen Charlotte Sound deeds. In stretching the Wairau purchase, and agreeing to Ngati Toa's request for it to be located at Kaiapoi, Grey thought he had located it at the 43rd parallel.²⁵ In the end (if we might regard the 1848 Nelson Crown grant as the end of the Wairau purchase), the Crown did not take all the land to the old Kaiapohia Pa on the Ashley River. The shifting of the Wairau southern boundary to the new 'Kaiapoi' in the Nelson Crown grant, and the recognition of that in the 1848 Canterbury purchase, at least allowed Ngai Tahu to get some utu back on Ngati Toa. The boundary had been shifted well north of the Kaiapohia Pa which, after all, had been the scene of their worst defeat by Ngati Toa. We discuss the boundary change further below when we consider the Canterbury purchase. But we conclude here that the ultimate price of

24. Ligar to Earl Grey, 8 March 1847, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols, compiled by Alexander Mackay (Wellington: Government Printer, 1872–73), vol 1, pp 202–204 (quoted in Mackay, p 50)

25. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 393



Source: Alexander Mackay, 'Plan of the Original Province of Nelson, Shewing the Purchases from the Natives', 1 October 1873, AJHR, 1874, G-6, facing p 2. Mackay's delineation of the boundaries might not be accurate but they are the closest available approximation.

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settling old scores was the signing away of the land to the Crown. As Grey well knew, he was the winner in the utu stakes, and we conclude that he cynically exploited this ancient Maori custom to further the interests of the Crown. In this, as in other instances that we discuss, Crown agents were not so much ignorant of Maori customary law and knew enough about it to turn that knowledge to the Crown's advantage.

One other boundary matter needs to be discussed. Although the deed was fairly detailed in describing the boundary along the lower Wairau River, there was no further description of the inland boundary. By the time the Nelson Crown grant was issued, an inland boundary had been added, connecting (the new) Kaiapoi to the headwaters of the Wairau. It is most unlikely that Ngati Toa were consulted on this or, if they had been, that they would have been able to help. They had not penetrated the interior, though some Rangitane did survive there as independent, if marginal, communities. Rangitane were not consulted over the Wairau purchase, let alone an inland boundary. Spain and Ligar and (presumably) Grey knew about Rangitane's existence but preferred to believe that they were refugees in the bush or slaves to Ngati Toa and were without rights. Slavery was not legal or appropriate under the Treaty after 1840. Once again, we are dealing not so much with ignorance on the part of Crown officials as misapplied assumptions that were convenient to advance the Crown's acquisition of land.

It is unlikely that the internal boundary of the Wairau block was ever surveyed but, as often happened with such early purchases, a line was drawn on a map. In any case, since Ngati Toa had neither conquered nor occupied the interior, it is difficult to see how they had any right to sell it or the Crown had any right to buy it from them. The bands of Rangitane who did remain in the interior, including parts of the interior of the statutory takiwa, were not consulted.

In our view, it was incumbent on the Crown, in purchasing Maori land under the Treaty, to spell out clearly and unambiguously the boundaries of the land involved. They needed to be marked clearly on a map or plan, pointed out to and discussed with the vendors, and preferably, as happened with Otakou and some later Crown purchases, the boundaries needed to be walked with the claimants. Ideally it would have been preferable to survey the boundaries as well. Finally, we say that the purchase should have been discussed openly, at a hui, where all who had claims had the opportunity to promote them against rivals and to the Crown. None of these things happened with the Wairau purchase. It was, as we have said, a deal done in Wellington behind closed doors with three hardly representative chiefs. It is not surprising that the mix-up over the precise locality of Kaiapoi occurred.

(e) Were failures in the Wairau purchase mitigated by inclusion of right-holders in the Waipounamu purchases? The question of whether failures in the Wairau purchase were mitigated by the inclusion of right-holders in the Waipounamu purchases was asked and briefly discussed in our first preliminary report before we went on to consider the Waipounamu

3.2.1(6)(f)

purchases in detail. The report found that, although the Crown paid some right-holders who were excluded from the Wairau purchase with one or another of the Waipounamu purchases, these ‘could not and did not make willing sellers of those whose rights had already been granted to others.’²⁶ In any case, we do not consider that the Waipounamu purchase extinguished the rights of Rangitane on the east coast. We consider these matters in our discussion at section 3.2.3.

(f) Tribunal findings on the Crown’s consideration of Te Tau Ihu iwi rights in the takiwa during the Wairau purchase: Having detailed our conclusions on the five questions posed above, we now make findings of Treaty breaches. We apply the findings of our first preliminary report on the Wairau purchase to the statutory takiwa, with appropriate modifications.

We found, so far as Ngati Toa were concerned, that the Crown’s purchase of Wairau from just three chiefs, without consultation with or the consent of other Ngati Toa right-holders, was ‘an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.’²⁷ These findings apply to the whole of the area purchased, including the statutory takiwa portion. We additionally find that, in the takiwa most particularly, the Crown deliberately and cynically exploited the custom of utu.

In relation to Rangitane, we found that the Crown’s failure to consult and get their approval for the Wairau purchase (including the takiwa portion) was also ‘in serious breach of article 2 of the Treaty, and its principles. This breach was compounded by the Crown’s failure to investigate Rangitane’s post-sale protest or to uncover and satisfy their undoubted rights at that point.’²⁸

We also apply the further finding of the first preliminary report that, ‘Whatever the Wairau purchase may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it.’²⁹ This applies to the majority of Ngati Toa, and to Rangitane and Ngati Rarua resident at Wairau, though in the case of the latter it does not apply to the statutory takiwa portion of Wairau since they claimed no rights there. Likewise, the subsequent attempts to purchase rights by way of one or other of the Waipounamu deeds could not, in the view of our preliminary report, make ‘willing sellers’ of people whose rights had been granted to others. This was ‘in violation of the plain meaning of article 2 of the Treaty and the principles of reciprocity, partnership, and active protection.’³⁰ Our preliminary report noted and agreed with the Crown’s acknowledgement in its closing submission that ‘the ruthless actions of Governor Grey set aside the Treaty promises and put

26. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, p 207

27. *Ibid*, p 202

28. *Ibid*, p 205

29. *Ibid*, p 207

30. *Ibid*

the interests of settlers above those of Maori.³¹ The report also concluded that ‘The action which extinguished their rights at British law was the Crown’s [Nelson] grant of the land to others [ie, settlers] in fee simple.’³² When the company collapsed in 1851 the Crown resumed ownership and could have given some of this land back to Maori, but it did not do so.

We find, in addition to our findings derived from our first preliminary report, that the Wairau deed did not in various respects measure up to the standard required for the Crown to make a valid purchase under the Treaty. The breaches included a failure to properly describe the boundaries of the land, including the inland boundaries, and the shifting of the southern ‘Kaiapoi’ boundary without the consent of the signatories and other right-holders. These Crown actions were in direct breach of article 2 of the Treaty, which provided for the alienation of ‘*such land* as the proprietors thereof may be disposed to alienate’ (emphasis added), and the principle of active protection and partnership.

3.2.2 The Canterbury purchase, 1848

The Crown’s Canterbury purchase of 12 June 1848 is not the subject of claims or submissions to our inquiry, but we discuss it briefly twice in this report in relation to the fixing of its northern boundary – on the East and West Coasts. We do so largely on the basis of the Tribunal’s *Ngai Tahu Report 1991*.³³ With the Canterbury transaction, the Crown purchased Ngai Tahu land in the South Island between the previously purchased Otago block to the south and the Wairau block in the north, and running directly across the island through the Alps to the West Coast. HT Kemp, who conducted the purchase for the Crown, had been present at Government House in Wellington when the Wairau block was purchased from the three Ngati Toa rangatira. He was therefore aware of how the southern boundary for Wairau was established at Kaiapohia. The Canterbury deed described the boundary along the Canterbury coast as including ‘the whole of [the] lands situate on the line of Coast commencing at “Kaiapoi” recently sold by the “Ngatitoo” & the boundary of the Nelson Block continuing from thence until it reaches Otakou’.³⁴ Although it was presumed that the northern boundary went across the island to the West Coast, no locality was named on the coast where it ended. Kettle’s accompanying map did draw a line to the West Coast, however, coming out at Kawatiri – a matter we discuss below. Though the Nelson Crown grant, with its new southern boundary, was not issued until 1 August 1848, the Ngai Tahu Tribunal suggested that Kemp had seen a draft of it in Wellington before he left to negotiate the Canterbury purchase.³⁵ He certainly knew that Grey intended to locate the southern

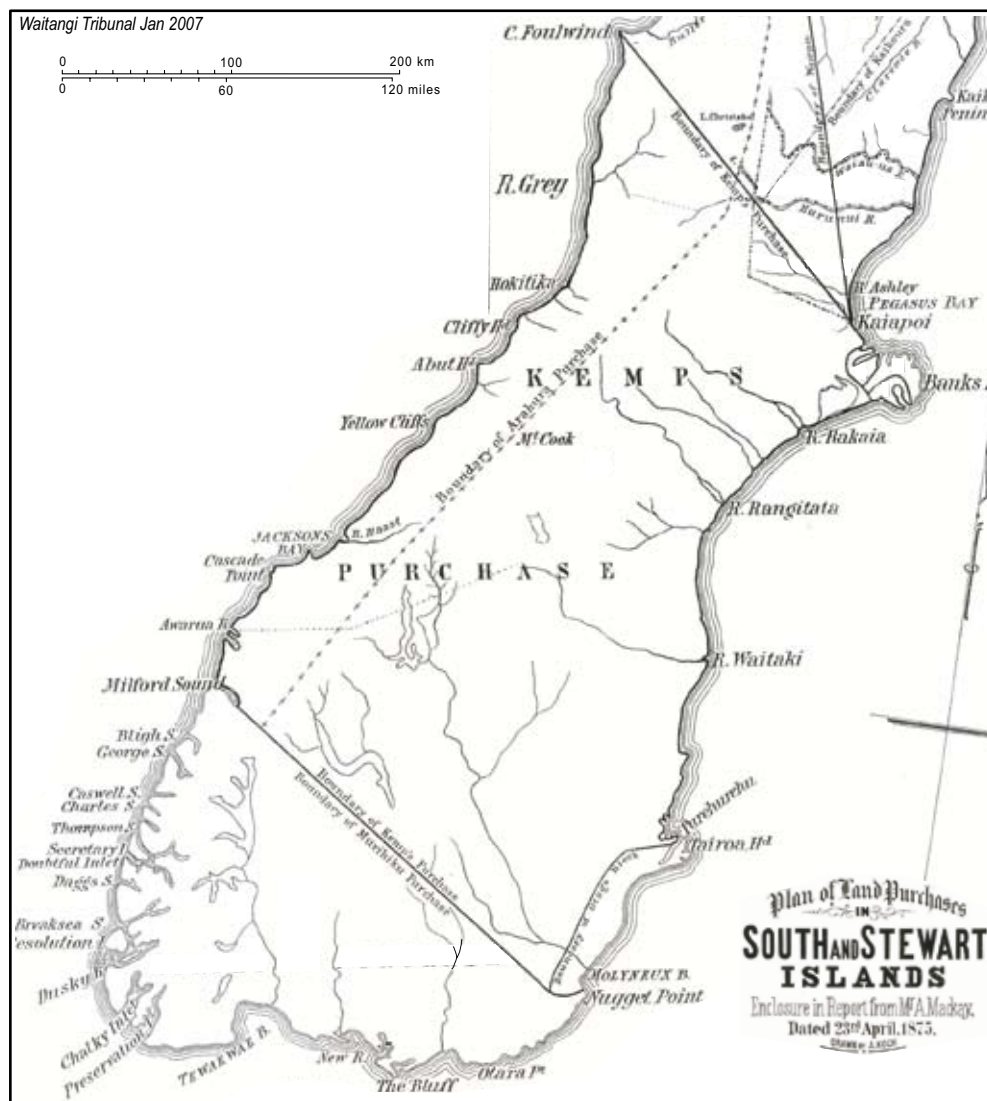
31. Ibid, pp 207–208

32. Ibid, p 207

33. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 387–524

34. As per Kemp’s translation of the Maori text of the deed, reproduced in Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, p 413.

35. Ibid, p 399



Map 6: The Canterbury purchase

Source: A Koch, 'Plan of Land Purchases in South and Stewart Islands', 23 April 1875, AJHR, 1875, G-3, facing p 2

boundary of the Wairau purchase at the 'Kaiapoi' on the Hurunui River near the 43rd parallel boundary of the original company purchase. The Kettle map attached to the Canterbury deed showed the boundary at this Hurunui 'Kaiapoi', although there was dispute as to whether the Ngai Tahu signatories had seen it. The deed was signed by Ngai Tahu on board the *Fly* at Akaroa, not at Kaiapohia, so it is not surprising that there was subsequently confusion over which 'Kaiapoi' was intended as the boundary.³⁶

However, it was Walter Mantell, appointed to set aside the reserves promised to Ngai Tahu in the Canterbury purchase, who was mainly responsible for the confusion that arose.

36. Waitangi Tribunal, *Ngai Tahu Report* 1991, vol 2, pp 410–411

He visited Kaiapohia Pa on 1 September 1848 and pointed to ‘a line in a north-westerly direction’ as marking the southern edge of the rohe of Ngati Toa.³⁷ Ihaia Tainui of Ngai Tahu told the Smith–Nairn commission in 1880 that Mantell had said that the boundary was ‘at the centre of Kaiapoi pa’. Whatever Mantell actually said, he certainly stirred up a hornet’s nest. According to Tainui, people started shouting, and then, after they were asked to sit down, some 35 of them spoke on the issue. One speaker, Paora Tau, even demanded that the Ngai Tahu boundary ‘be put right back to Parinuiowhiti’.³⁸ It is evident that Mantell’s intervention stimulated Ngai Tahu’s demands for payment for their land north of Kaiapohia Pa, initially as far north as the Hurunui Kaiapoi and, after that, gradually to places further north, as we shall see in our discussion of the North Canterbury and Kaikoura purchases of 1856 and 1859.

3.2.3 The Waipounamu purchase, 1853–56

What is known as the Waipounamu purchase was in fact a series of purchases, beginning with a purchase from Ngati Toa on 10 August 1853. The remaining purchases were from others who were named in the original Ngati Toa deed as ‘conjointly’ claiming the land with Ngati Toa. The purchases were a further series of blanket purchases from those who claimed rights over the parts of Te Tau Ihu that had not already been included in the New Zealand Company Crown grant. Since the Crown grant included the Wairau purchase, most of the land included in the Waipounamu purchases was west and north of the Wairau River, and much of that on the West Coast. Accordingly, most of our discussion of the Waipounamu purchase is devoted to that coast. However, there were several matters arising from the Waipounamu transactions that relate to the east coast that are discussed briefly here.

Counsel for Ngati Toa did not raise any issues that related to the east coast takiwa arising from their deed of 10 August 1853. We note, however, that the deed introduced the vague, catch-all phrases that were used in most of the subsequent deeds to eliminate all possible remaining claims in Te Tau Ihu. For instance, in their deed Ngati Toa were to transfer ‘for ever’ their land ‘at the Waipounamu’ to the Queen. ‘Waipounamu’ was not defined, though later the deed said that it was ‘the final sale or transfer of all our lands on this Island’. Since Te Waipounamu is the Maori name for the South Island and Ngati Toa’s deed spoke of the final sale of all their lands on ‘this Island’, it seems that the deed was to include all remaining Ngati Toa lands, wherever they may have been in the South Island, not just in Te Tau Ihu. It was the same for other iwi whose lands were similarly described in the other Waipounamu deeds.

In this section, we are mainly concerned with the position of Rangitane, who were named, with others, as ‘conjointly’ claiming the land with Ngati Toa. This was important

37. Ibid, p 422

38. Ibid, p 425

3.2.3(1)

to Rangitane because it was the first time that they had been recognised as independent of Ngati Toa overlordship. They duly received further recognition when they signed two of the later Waipounamu deeds.

The first deed (or ‘receipt’ as it was called) was signed by Rangitane alone on 1 February 1856. It was signed by 31 Rangitane, including Ihaia Kaikoura, from the Port Underwood–Wairau district. They were to be paid £100 and were promised reserves at Wairau and White’s Bay. The payment was ‘for all our claims on the Island, that is for all the lands of Rangitane from Wairau to Arahura, running inland as far as the claims of the tribe of the Rangitane extend.’³⁹ The very vagueness of this description suggests that McLean, who negotiated the purchase, had no idea just how far Rangitane’s claims extended inland.

The second deed, of 16 February 1856, was signed jointly by ‘the people of Ngatikuia and Rangitane’. They agreed ‘to sell and for ever finally transfer all our lands in this Island, with all the places at the Kaituna, and the Hoiere, and all other places to which we have any right’ to the Queen.⁴⁰ This was one of the most numerous signed Waipounamu deeds – 93 signed, but no distinction was made between Ngati Kuia and Rangitane, even though they appear to have lived in at least three separate communities in the Kaituna Valley and at Hoiere. They may well have recognised that they were selling those places, apart from some reserves, but they were probably unaware of what the Crown meant by such blanket provisions as ‘all our lands in this Island’.

(1) Rangitane’s submissions on the Waipounamu deed, 1 February 1856

Since the Rangitane submissions appear to relate only to the Rangitane deed of 1 February 1856, we confine our discussion to that. In particular, we are concerned with the question as to whether, in that deed, Rangitane sold their rights to land east and south of the Wairau River and more especially on the east coast down to Waiau-toa. Counsel’s closing submissions for Rangitane said that ‘A grievance of Rangitane is that the Crown used different methods of describing land when purchasing from iwi.’ Counsel illustrated this by comparing ‘the Rangitane transaction’ (presumably the Waipounamu deed of 1 February 1856) with its ‘general and wide sweeping rights without reference to any boundaries or any particular map,’ to the ‘Ngai Tahu deed’ (presumably the Kaikoura purchase deed of 29 March 1859) which ‘refers to a map on which boundaries are defined.’⁴¹ Because Rangitane had already sold their rights (in the Waipounamu deed of 1 February 1856), counsel argued, they had ‘no interest in being consulted over the Ngai Tahu transaction.’⁴² This suggests Rangitane accepted that their Waipounamu deed, whereby they had sold all their lands ‘on this Island,’ had included the sale of their interests in the land on the east coast subsequently purchased

39. ‘Receipt for £100 Paid to Rangitane’, 1 February 1856, *Compendium*, vol 1, p 313

40. *Ibid*, pp 315–316

41. Counsel for Rangitane, closing submissions, p 20

42. *Ibid*

by the Crown from Ngai Tahu in the Kaikoura purchase. Moreover, the boundary defined for the Kaikoura purchase that related to the east coast takiwa was used for other purposes when the Crown ‘adopted the European concept of exclusivity’.⁴³

(2) Tribunal discussion and findings on Rangitane’s Waipounamu deed

We do not accept the implication of Rangitane’s counsel that, under their Waipounamu deed of 1 February 1856, they sold their interests in the parts of the east coast subsequently covered by the Kaikoura purchase. In our understanding of the deed, the vague phrase ‘all our claims on the Island’ was qualified by the remainder of the sentence (and we emphasise the first two words): ‘*that is* for all the lands of Rangitane from Wairau to Arahura’. We think that meant Rangitane’s claims ‘on this Island’ were for their lands from the left bank of the Wairau River to Arahura on the West Coast. There was no licence to include land on the right bank of the river and on the east coast. That land had been already included in the Wairau purchase deed without Rangitane’s approval. However, it is possible that James Mackay did indeed believe that Rangitane interests in lands east of the Wairau had been included in their Waipounamu deed when he purchased the Kaikoura block from Ngai Tahu three years later. We discuss that possibility further in section 3.2.5(2)(b).

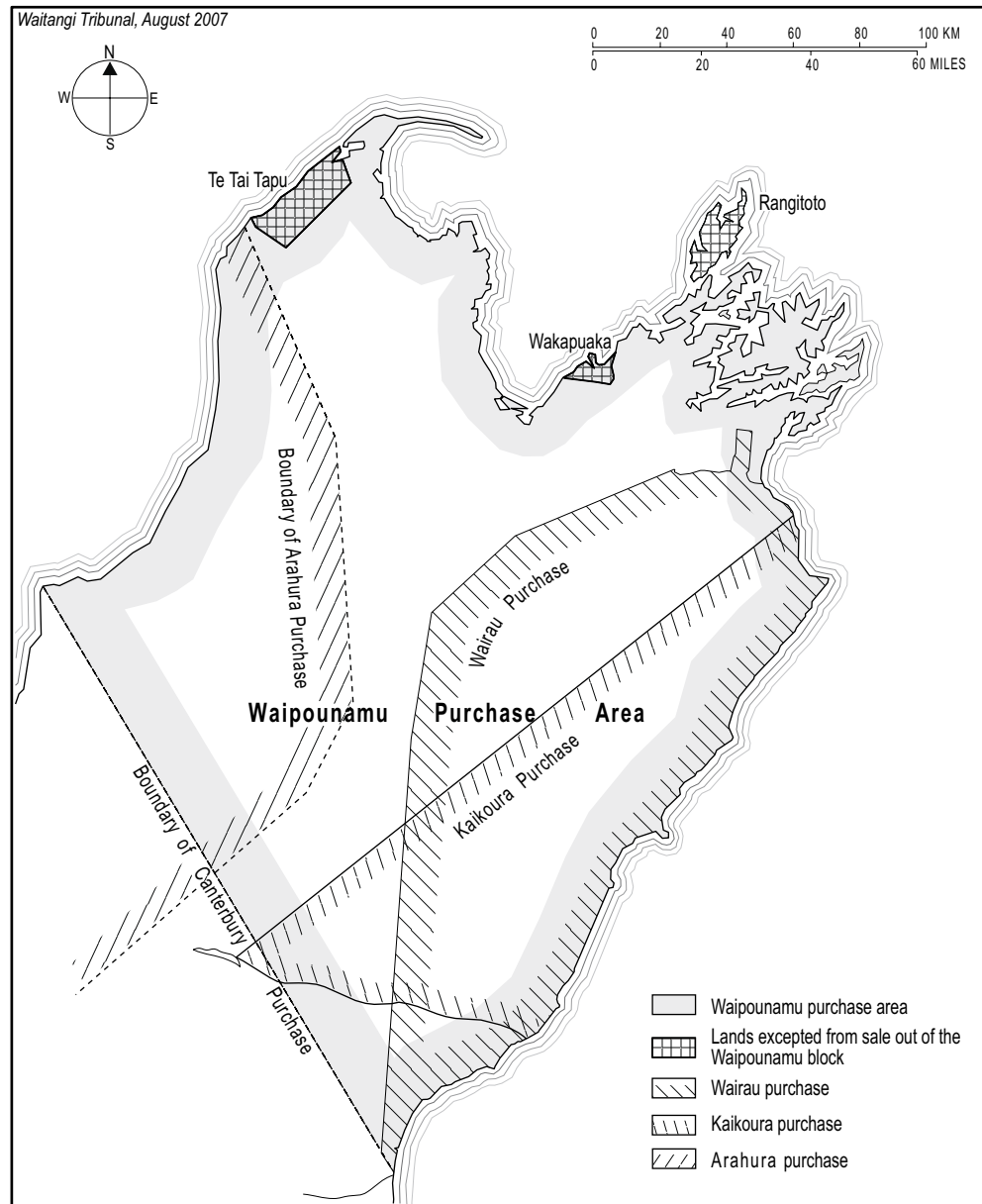
Our first preliminary report was critical of the Crown for its failure to properly investigate rights before proceeding with the Waipounamu purchase, and initiating that purchase, through absentee Ngati Toa, to the disadvantage of the residents in Te Tau Ihu, who had no real opportunity to dissent. The Crown accepted Ngati Toa’s claims at face value, even though it knew them to be contested, in order to put through a purchase of almost the entirety of the northern South Island, including lands in the eastern takiwa. Resident right-holders were pressured into sales because prior dealings had been made with non-residents. We found that this was a deliberate and calculated breach of article 2 and of enormous prejudice to Te Tau Ihu iwi.⁴⁴

There was no suggestion that the subsequent deeds were not properly negotiated with the right leaders and representative owners, and thus in our first preliminary report we made no specific comment on Rangitane other than to note McLean’s concession to them of a separate Waipounamu agreement that ‘acknowledged their legitimacy’.⁴⁵ We have concluded, however, that Rangitane interests in land east and south of the Wairau River were not included in their Waipounamu deed of 1 February 1856. This position was not altered by the second deed signed on 3 March. They had not received any payment when the Wairau block was purchased from Ngati Toa in 1847, nor were they to receive any when the east coast portion of it was purchased again as the Kaikoura block from Ngai Tahu in 1859. We have already made a finding of Treaty breach in relation to Rangitane with the Wairau purchase,

43. Ibid

44. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, pp 266–267

45. Ibid, p 213



and this is not changed or in any degree mitigated by the Waipounamu transaction. In our view, the purchase was seriously flawed and this was a breach of the plain meaning of article 2 of the Treaty and the principles of reciprocity, partnership, and active protection.

Before we leave the Waipounamu transactions, we note that Ngai Tahu were one of the groups who were named as 'conjointly' having rights in Waipounamu with Ngati Toa. But unlike Ngati Toa and the others named, Ngai Tahu did not get a Waipounamu deed. Instead,

they got separate transactions on both coasts that bought out their rights: North Canterbury and Kaikoura on the east coast, and Arahura on the west. We discuss these in turn.

3.2.4 The North Canterbury purchase, 1856

We received no submissions from Te Tau Ihu claimants on the North Canterbury purchase, but we describe it briefly here since it was the first of the Crown's purchases on the east coast north of Kaiapoi that overlapped part of the Wairau purchase. We take our detail from the Tribunal's *Ngai Tahu Report 1991*.

Despite the protests set off by Mantell's attempt to locate the boundary of the Canterbury purchase at Kaiapohia Pa, nothing was done to conciliate Ngai Tahu until 1856, when Governor Browne visited Lyttelton and asked McLean to investigate Ngai Tahu's case. In August, McLean instructed WJW Hamilton to negotiate a purchase with Ngai Tahu. Hamilton concluded what was called the North Canterbury purchase with the Kaiapohia-based Ngai Tahu on 5 February 1857. The deed provided for the sale to the Crown of some 1,140,000 acres running up the coast from the Rakahuri (Ashley) River, just north of the old Kaiapohia Pa, to the Waiau-ua River (north of the Hurunui), and inland to the sources of the Waiau-ua, Hurunui, and Rakahuri Rivers. There was no map or survey of the boundaries, but the approximate location of the purchase is set out in map 8, taken from the Tribunal's *Ngai Tahu Report 1991*. The purchase price was stated at £200, but this was subsequently increased to £500 on Hamilton's recommendation.

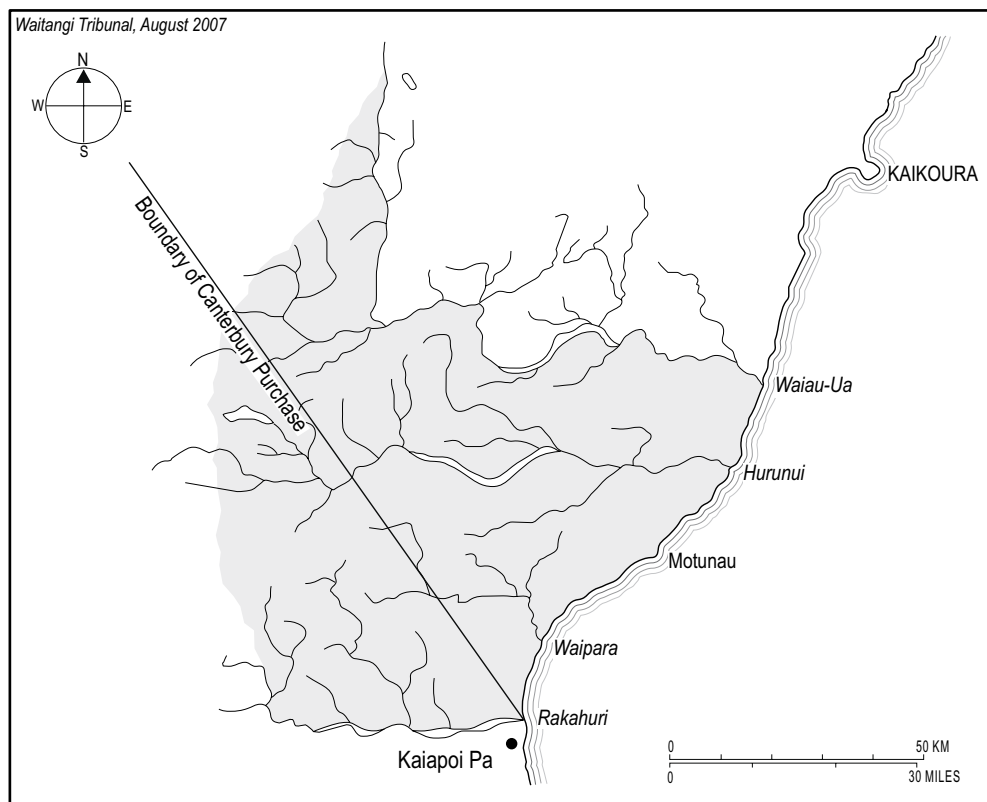
Though Ngai Tahu requested reserves at Hurunui and Motunau, Hamilton refused to allow these, ostensibly because Ngai Tahu had been given sufficient reserves elsewhere, but actually because the land had already been taken up by European pastoralists. The old Kaiapohia Pa (which was technically inside the boundary of the Canterbury purchase) was expressly reserved, however, thus allowing Ngai Tahu to regain their mana over it, despite Ngati Toa's previous sale of it in 1847. During the Tribunal's Ngai Tahu hearing, the Crown conceded that it had breached the Treaty by failing to make reserves for Ngai Tahu in the North Canterbury block.⁴⁶ Ngai Tahu's other grievances were mainly upheld by the Ngai Tahu Tribunal, and its findings⁴⁷ were taken into account in the Crown's final settlement with Ngai Tahu.

3.2.5 The Kaikoura purchase, 1859

The North Canterbury purchase did not extinguish all Ngai Tahu claims to land north of Kaiapoi. As the Ngai Tahu Tribunal pointed out, Ngai Tahu from Kaiapohia and Kaikoura vigorously prosecuted claims north of the Waiau-ua to Kaikoura, and beyond that as far as

46. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 648, 658–661

47. Ibid, pp 661–666



Map 8: The North Canterbury purchase

Source: Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 2, p 649, fig 11

the Wairau Valley.⁴⁸ Like Paora Tau in his confrontation with Mantell, Whakatau Kaikoura wanted to push the Ngai Tahu boundary to Parinui o Whiti, though his people did not live further north than Waipapa. Since pastoralists from Nelson and Canterbury had already taken up most of this land, and Ngai Tahu were threatening to disrupt their occupation, the Governor and McLean decided to investigate Ngai Tahu's further claims. Between 1853 and 1856, McLean had been busy negotiating the blanket Waipounamu purchases in Te Tau Ihu. As we noted, the first of these deeds named Ngai Tahu with other Te Tau Ihu iwi as 'con-jointly' claiming the land with Ngati Toa. But, as we also noted, no Waipounamu deed was ever signed with Ngai Tahu. We can, perhaps, regard the Kaikoura deed and, on the West Coast, the Arahura deed, as replacements. They were further blanket purchases, this time for Ngai Tahu's rights. As Gilling put it, 'Once more the Crown intention was not to investigate ownership, but to "settle claims", which by virtue of their having been made, were presumed to have some degree of legitimacy.'⁴⁹

48. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 669–675

49. Gilling, p 20

The Kaikoura purchase was negotiated with some 80 Ngai Tahu living at and near Kaikoura under the leadership of Whakatau.⁵⁰ They had been ignored when the Crown concluded the Wairau purchase with Ngati Toa. However, Whakatau was paid £60 for his claims to land in the vicinity of Kaikoura (land that was occupied by Fyffe's whaling station) in 1852. Then, in December 1856, when he heard of Hamilton's proposed purchase of North Canterbury, Whakatau offered to sell land as far north as Parinui o Whiti. At this time, Hamilton concentrated on the North Canterbury purchase, though it only came as far north as Waiau-ua, some distance short of Kaikoura.

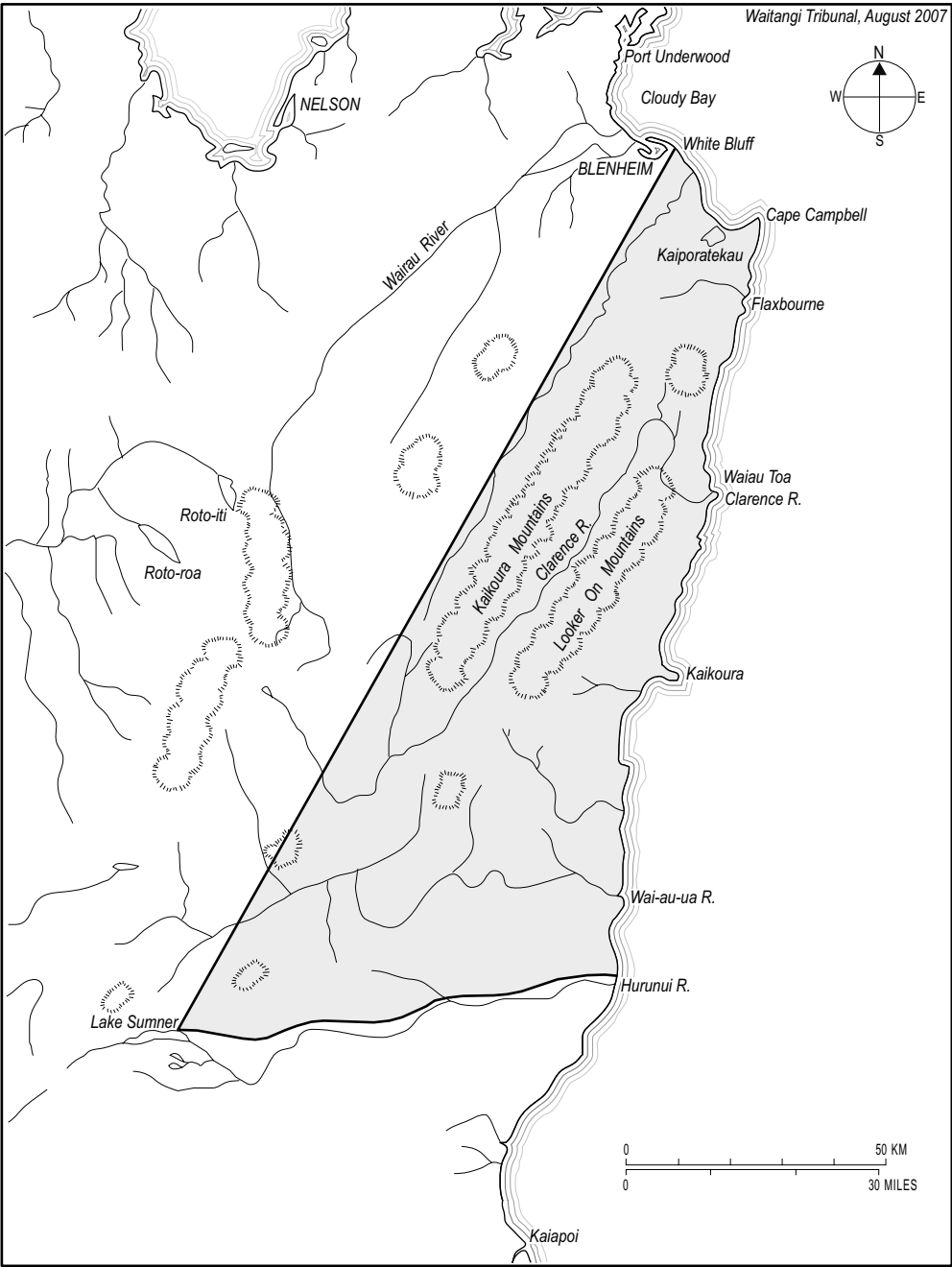
It was not until nearly two years later that McLean instructed James Mackay to purchase Kaikoura. Mackay negotiated the purchase during February and March 1859 with Whakatau and various Ngai Tahu claimants who had come into Kaikoura from settlements north and south of the peninsula, including Waipapa. During that period, Mackay was involved in 'protracted argument', as the Ngai Tahu Tribunal described it, with Kaikoura Ngai Tahu. On one occasion he reminded them that the land had already been purchased from Ngati Toa and Te Atiawa, who would, if necessary, give possession of it to the Government. The negotiations were broken off more than once. Mackay was instructed to pay £150, offered £200, but eventually found it necessary to pay Ngai Tahu £300 for the block. Some of them had been working on pastoral runs in the district and they were well aware that pastoralists were having to pay much higher prices to the Crown for their land. Mackay eventually negotiated a purchase agreement with Ngai Tahu on 29 March.⁵¹ The Kaikoura block covered some 2,500,000 acres running from the Hurunui River up the coast to Cape Campbell, around that to Parinui o Whiti, and in a southerly direction to the source of the Waiau-toa, Lake Sumner, and the Hurunui River. The boundaries are shown in map 9. We note that the southern boundary went beyond the Waiau-ua, the northern boundary of the North Canterbury purchase, to the Hurunui River, thus overlapping that part of the earlier purchase from Ngai Tahu. Mackay explained that he had included the overlapping land because Kaikoura Ngai Tahu had not been paid for their interest in it during the North Canterbury purchase. He did not explain why he had allowed the north-western boundary to go as far as Parinui o Whiti. The Ngai Tahu Tribunal did not comment on this boundary either, since it accepted the Maori Appellate Court's 1990 judgment that Ngai Tahu had an exclusive title as far north as that point.

During the protracted negotiations, Ngai Tahu asked for a reserve of 100,000 acres. Mackay made no provision for reserves in the deed. However, he did arrange a separate agreement that provided for several reserves. These amounted to a mere 5558 acres – from the remnants of land that had not been alienated to Europeans. The largest reserve was at Mangamaunu and Waipapa, and constituted 4800 acres. But even this land was, in Mackay's words, 'of the most useless and worthless description, (especially the block of 4800 acres)'

50. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 675–682

51. Mackay to McLean, 19 April 1859, *Compendium*, vol 2, p 35

3.2.5



Map 9: The Kaikoura purchase

Source: Alexander Mackay, 'Plan of the Original Province of Nelson, Shewing the Purchases from the Natives', 1 October 1873, AJHR, 1874, G-6, facing p 2

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making it necessary for Ngai Tahu to apply to him to purchase some of the land they had just sold.⁵²

Ngai Tahu's grievances over the Kaikoura transaction were submitted to the Ngai Tahu Tribunal and related mainly to the Crown's original Wairau transaction with Ngati Toa, its allowance of European settlement on the block, and the inadequacy of the reserves. The Ngai Tahu Tribunal report was extremely critical of Mackay's behaviour as a Crown purchase agent, comparing it to the actions of another agent who conducted the purchase of Akaroa:

This is the Akaroa purchase situation repeating itself. In the tribunal's view it reveals an appalling attitude on the part of the Crown's agent, who to prove how hard a bargain he has driven, virtually gloats over the fact that to obtain the land they want and need Ngai Tahu are driven to seeking permission to buy back 400 acres of their own land. We cannot condemn too strongly such a cynical disregard by the Crown's agent of the rights of its Treaty partner.⁵³

The Tribunal's findings were taken into account in the final settlement with Ngai Tahu.⁵⁴

(1) Claimant submissions

At our hearing, the Te Tau Ihu iwi did not challenge Ngai Tahu's rights to the Kaikoura block, except on the issue of exclusivity. The only challenge so far as the east coast takiwa was concerned came from Ngati Toa, who complained that the Maori Appellate Court's decision was restricted to ownership as recorded in the Kaikoura deed.⁵⁵ We discuss that decision below.

(2) Tribunal discussion and findings

Before we discuss the Maori Appellate Court decision, we need to discuss the Crown's role in the Kaikoura purchase. We use and adapt the tests we used in relation to the Wairau purchase.

(a) Was there an adequate inquiry into Te Tau Ihu iwi rights before completing the Kaikoura purchase? Here, we are concerned with the rights of Ngati Toa and Rangitane. Since the Crown had already purportedly purchased Ngati Toa rights (and indeed had, through Grey, regarded them as having exclusive rights) with the Wairau deed, it clearly considered that no further compensation was required. We have already made findings on Ngati Toa rights in relation to the Wairau purchase and need make no further comment here, though we do

52. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 669–671, 675–682

53. Ibid, p 682

54. Ibid, pp 682–687

55. Counsel for Ngati Toa Rangatira, closing submissions, 124

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discuss the Maori Appellate Court award in relation to Ngati Toa's submission below, and in chapter 4.

As had been the case with the Wairau purchase, there was no inquiry into Rangitane rights before Mackay negotiated the Kaikoura purchase with Ngai Tahu. However, we note that Hamilton, who purchased North Canterbury for the Crown and was involved in some of the preliminary discussions over the purchase of Kaikoura, thought that Rangitane, though 'now almost extinct', might 'possibly maintain some kind of claim as far south as Waipapa or Waiau Toa (Clarence River)'. Hamilton considered that Ngai Tahu's title south of Waipapa was 'incontrovertible' and admitted that Whakatau's title was 'good, at least as far north as Waipapa, where his people actually now have residence'.⁵⁶ Armstrong has analysed the Hamilton report that we have just quoted. We agree with his conclusion that Ngai Tahu, 'by their own admission, were not permanently occupying land north of the Waiau-toa at this time [1859]'.⁵⁷ Armstrong also argues that the Hamilton report was relied on by the Maori Appellate Court in its 1990 decision that Ngai Tahu had exclusive rights as far north as Parinui o Whiti. But, while Hamilton certainly admitted that Ngai Tahu had told him their rights extended to Parinui o Whiti, he was, as Armstrong points out, 'careful to note that only *south* of the Waiau-toa were Ngai Tahu rights "incontrovertible"' (emphasis in original).⁵⁸ We have examined the Hamilton report and agree with Armstrong's reading of it.

(b) Were the rights of Te Tau Ihu iwi fully considered during the Kaikoura purchase? Since, for different reasons, Ngati Toa and Rangitane rights were not considered at all, we need not pursue very far the question of whether the rights of the Te Tau Ihu iwi were fully considered during the Kaikoura purchase. Mackay's official report on the Kaikoura purchase does not mention Rangitane.⁵⁹ Had he carried out the purchase, Hamilton may well have considered Rangitane's rights. Mackay, on the other hand, seems to have considered that he did not need to do so. As a Nelson resident of some standing, Mackay possibly regarded Rangitane as having no rights – on the assumption that they had been 'slaves' of Ngati Toa and were without rights in land. Nevertheless, he must have been familiar with the Waipounamu deeds and known that in the original Ngati Toa deed Rangitane were recognised as 'conjointly' claiming land with Ngati Toa. But he may also have considered that in their deed of 1 February 1856 Rangitane had ostensibly relinquished 'all' their claims 'on the Island'. Armstrong observes that 'from the Crown's perspective' Rangitane's claims 'in their totality' had been extinguished by the Waipounamu deed and, 'from McLean's point of view

56. Hamilton to McLean, 8 January 1857, *Compendium*, vol 2, p17

57. Armstrong, 'The Right of Deciding', p197

58. Ibid

59. Mackay to McLean, 19 April 1859, *Compendium*, vol 2, pp 35–36; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 676–679

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Rangitane possessed no rights whatsoever outside their reserves and did not require any further consideration in this matter.’⁶⁰ This may well explain the Crown’s failure to examine Rangitane rights in relation to the Kaikoura purchase, but it does not, in our view, excuse that failure. As we said above, we do not believe that Rangitane’s Waipounamu deed did extinguish their rights east of the Wairau River. They continued to exist in 1859 and the Crown should have recognised them in its negotiation for the Kaikoura block.

(c) *The Maori Appellate Court’s 1990 decision to award Ngai Tahu exclusive rights in the statutory takiwa on the basis of the Kaikoura purchase:* The Maori Appellate Court’s 1990 award to Ngai Tahu of exclusive rights in the statutory takiwa on the east coast has become a core issue for this inquiry. The award was made on the ground that, at the time of the Kaikoura purchase, Ngai Tahu was the only iwi that had valid customary ownership of the territory included in the deed of purchase. As the court put it:

the weight of evidence presented to us was in favour of Ngai Tahu holding rangatiratanga over the east coast of Te Waipounamu from Parinui-O-Whiti south to Hurunui including all the land comprised in the Kaikoura Deed immediately prior to the northern invasion.⁶¹

Earlier, the court had admitted that there was ‘a dearth of clear evidence of physical occupation either by the Northern Iwi, Rangitane or Ngai Tahu of the lands between Kaikoura and Parinui-O-Whiti post the northern invasion [from 1820]’.⁶² But then it concluded that:

notwithstanding the conquest of Ngai Tahu by Ngati Toa and their allies, the failure of the northern tribes to remain in occupation post the conquest and the return of Ngai Tahu thus reviving their ahi kaa meant that at the time of the signing of the [Kaikoura] Deed (1859) the right of ownership of the lands comprised in that Deed was according to customary law principles of take and occupation or use vested in Ngai Tahu.⁶³

Our conclusions in chapter 2 on the history of inter-iwi interaction in the statutory takiwa and the consequential development of customary rights differ from those of the Maori Appellate Court. We concluded that all three iwi – Rangitane, Ngati Toa, and Ngai Tahu – had rights in the takiwa by 1859, based on historical claims. However, it seems that none of the three iwi was in occupation at that time, though all three probably made seasonal use of the resources, especially around the fringes of the takiwa. In our view, there had been no ‘return of Ngai Tahu thus reviving their ahi kaa’ at the time of the signing of the Kaikoura deed. If, by the ‘return of Ngai Tahu’, the court meant the retaliatory raids that Ngai Tahu

60. Armstrong, ‘The Right of Deciding’, p197

61. *In the Matter of a Claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board* unreported, 12 November 1990, Maori Appellate Court, Rotorua, 1/89 (doc A4), p19

62. *Ibid*, p14

63. *Ibid*, p19

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did make against Ngati Toa in the 1830s, those did not in our view amount to a conquest, or take raupatu, since the fighting was inconclusive. Ngai Tahu did not remain anywhere in Te Tau Ihu, but went home – to Kaiapohia and places further south. Ngai Tahu did resume occupation of the coast to as far north as Waipapa by the 1850s. The court did not cite any evidence of Ngai Tahu occupation north of there or the Waiau-toa from the late 1830s; nor have we seen any. Though Ngati Toa resumed their occupation of Port Underwood and Wairau, they did not occupy the east coast (other than four, probably Ngati Toa, women living at Waipapa in 1849 and others who, according to Ngati Toa kaumatua evidence, continued to live at Kaikoura). In our view, Ngai Tahu claims to the east coast north of Waiau-toa and as far north as Parinui o Whiti were no stronger than those of Ngati Toa, since neither of them had permanently occupied the land, though after 1840 they had had every opportunity to do so. Instead, they competed against one another to sell it to the Crown.

Ngati Toa's customary title had been extinguished by the Wairau purchase and the inclusion of the block in the 1848 Nelson Crown grant. The purchase of the overlapping Kaikoura block from Ngai Tahu was essentially a form of compensation for their rights in a block that was already Crown land. We consider that it was appropriate for the Crown to compensate them for their historical rights. But we find it difficult to conceive how that 'compensation' could be regarded as confirming Ngai Tahu's exclusive title. It is only possible to accord exclusivity to the last seller if we impugn the title of the first seller, and we see no cause to do that. It is, in our view, preferable to regard the Kaikoura purchase as the last of the Crown's blanket purchases on the east coast, whereby overlapping interests were progressively extinguished. Because the Maori Appellate Court was constrained by the case stated, under which only the last of the Crown's purchases (with Ngai Tahu) were to be considered, it failed to comprehend the significance of the Crown's blanket purchasing policy, whereby, from the Wairau purchase onwards, the overlapping interests of one iwi after another, if not all of them, were extinguished.

But Rangitane rights were extinguished without their consent. They were ignored when the Crown dealt exclusively with Ngati Toa and then Ngai Tahu. We have already discussed the failure to recognise Rangitane with the Wairau purchase. It was no different with the Kaikoura purchase. Mackay was intent on getting a deal with the Kaikoura Ngai Tahu to stop them from interfering with pastoralists who had by that time occupied most of the east coast. As we noted above, Mackay appears not to have considered that Rangitane had rights in the area, or at least considered that they had no rights left after they had been extinguished by Rangitane's Waipounamu deed. As we have said, we do not believe their rights east and south of the Wairau River were extinguished by that deed. Their rights continued to exist and the Crown should have sought their consent to extinguish them before concluding by the Kaikoura deed, or, alternatively, negotiated a separate transaction with Rangitane.

(d) Tribunal findings on the Crown's consideration of Te Tau Ihu iwi rights in the takiwa during the Kaikoura purchase: We find that the Crown's failure to consider and fairly extinguish Rangitane's rights during the Kaikoura purchase was in breach of article 2 of the Treaty and the principles of active protection, partnership, and equal treatment.

We consider and make findings in chapter 4 on the Crown's role during the Maori Appellate Court's hearing and in its subsequent legislation to give effect to the court's award.

3.3 THE WEST COAST

3.3.1 The Canterbury purchase and other early attempts to purchase

A large part of the West Coast was included within the first purchase boundaries affecting the South Island. The New Zealand Company's Kapiti and Queen Charlotte deeds of 1839 purported to cover the whole of the South Island down to the 43rd parallel, which intersects the West Coast about 45 kilometres south of the Hokitika River. The transaction recognised the rights of Ngati Toa and their allies Te Atiawa.⁶⁴ Te Rauparaha himself told Commissioner Spain in 1843 that the rights he claimed on the West Coast extended as far as 'a little Creek called Te Wanganui' (presumably the Wanganui River just south of the 43rd parallel).⁶⁵ Nothing came of this 'purchase', however, at least as far as the West Coast was concerned. The 1845 Crown grant allowed the company only a limited area in Tasman and Golden Bays. Nor did the new Crown grant of 1848 (made after the Wairau purchase) include any part of the West Coast, the Aorere River in Golden Bay being the north-western boundary.

The West Coast rights recognised by the next purchase attempt, the Canterbury transaction of 1848, were those of Ngai Tahu. Grey discussed with the chiefs of that tribe the relinquishment of all their claims to lands lying between the recently purchased Wairau block and the Otago block (purchased in 1844). H T Kemp was sent to organise the transaction. He reported that on 12 June he had purchased the whole of this large district, 'extending over to the West Coast'.⁶⁶ The Canterbury deed does not specify how far north the purchase extended on the West Coast, but the accompanying map shows a boundary between the new Canterbury block and 'the Nelson Block' – a straight line running north-west from 'Kaiapoi' (at the mouth of an unnamed river, evidently the Hurunui, just north of the 43rd parallel) and meeting the West Coast at an unmarked point that appears to be the Kawatiri river mouth (about 30 kilometres north of the 42nd parallel).⁶⁷ In fact, however, neither the

64. *Compendium*, vol 1, pp 64–66

65. Richard Boast, 'Ngati Toa and the Upper South Island: A Report to the Waitangi Tribunal', revised ed, 2 vols, report commissioned by the Crown Forestry Rental Trust, 2000 (doc A56), vol 1, p 69

66. Kemp to Gisborne, 19 June 1848, *Compendium*, vol 1, p 209

67. 'Translation of Kemp's Deed', *Compendium*, vol 1, pp 210–211. The map faces page 308.

Wairau purchase nor the 1848 Crown grant extended as far south in the inland areas as the boundary line on the Canterbury map indicated, and neither included the northern West Coast at all. The significance of Kawatiri as the northernmost point of this first West Coast purchase from Ngai Tahu has been much debated – was this point defined arbitrarily by a north-west compass direction from ‘Kaiapoi’, or did it represent what the Crown’s officers had heard about the northernmost extent of Ngai Tahu’s rohe?⁶⁸ The Ngai Tahu Tribunal noted in its 1991 report that there was no detailed contemporary record of how the northern boundary was discussed or decided upon. The Tribunal found it ‘difficult to accept’ that the officials were acting ‘arbitrarily or capriciously’ when they fixed the boundary at Kawatiri: ‘the most reasonable inference . . . is that this point was chosen as a result of discussion with Werita Tainui and possibly other Ngai Tahu who were familiar with the extent of reoccupation by Poutini Ngai Tahu of their lands on the west coast.’⁶⁹ In evidence presented to our own inquiry, McAloon doubts whether Werita played any part in the fixing of the boundary, but he agrees with the Ngai Tahu Tribunal that, at the time, Ngai Tahu regarded Kawatiri as simply the northern limit of Kemp’s purchase, not as the northern limit of Ngai Tahu mana-whenua on the West Coast.⁷⁰

In any case, the Crown eventually found that the purchase of the West Coast portion of the Canterbury block was not effective, as far as Ngai Tahu were concerned. Poutini Ngai Tahu appear to have been represented at the Akaroa negotiations, but later they said that they had not received their share of the purchase payment and that no reserves had been created for them on the West Coast. In Loveridge’s words, ‘they had every right to think that any agreement to sell their lands was null and void.’⁷¹ The Ngai Tahu Tribunal agreed with this interpretation.⁷² Certainly, the Crown later found it necessary to negotiate a new agreement with Poutini Ngai Tahu, in 1860.

Before dealing with Ngai Tahu again, the Crown had discussions with the northern tribes about the extinguishment of their claims on the West Coast. In Nelson, Superintendent Mathew Richmond heard from Te Keha (Te Atiawa) and others in 1849 that they were willing to sell their interests in ‘Arahura’. No action was taken at this time.⁷³ Wahapiro Paremata of Ngati Tama wrote to Grey in December 1850 with an offer to sell the place in Murihiku where his uncle Te Puoho had died, and, it seems, the West Coast as well. Riwai Turangapeke of Ngati Rarua had apparently already heard about this desire to sell the West Coast claims,

68. Donald Loveridge, ‘The Arahura Purchase of 1860’, report commissioned by the Crown Law Office, 1988 (doc Q1), p 13; Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 429–430, 434; James McAloon, ‘The Position of Ngai Tahu on the West Coast during the 19th Century’, revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q4(a)), p 43

69. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 434

70. Ibid, p 451; McAloon, pp 41, 43

71. Loveridge, pp 12–13

72. Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 2, pp 433–434

73. Loveridge, p 15; Tony Walzl, ‘Ngati Rarua and the West Coast, 1827–1940’, report commissioned by the Ngati Rarua Iwi Trust, 2000 (doc B5), p 32

and had written to Grey six weeks earlier with an offer of Ngati Rarua's interests.⁷⁴ In 1851, Grey instructed Richmond to acquire the western coast from the northern tribes – not just the northern tip from Cape Farewell to the Whanganui Inlet (which was duly bought as the Pakawau purchase in May 1852), but the whole West Coast down to Murihiku. Richmond reported in January 1852 that he was attempting to obtain the West Coast proper but was finding the claimants wanted too high a price.⁷⁵

These discussions with Ngati Rarua and Ngati Tama were the context for expressions of concern from both Ngati Toa and Ngai Tahu. Late in 1851, Grey received a letter from Ngati Toa chiefs indicating that the West Coast offers from Ngati Toa's allies were a defiance of the rights of the principal conqueror. As we explained in the previous chapter, the letter (and another in 1852) set out the history of the West Coast conquest and asserted Ngati Toa's pre-eminence in the northerners' claims there. 'We hold ourselves superior to these people and say that we have the authority', wrote the chiefs. 'The authority was taken by us', they continued, and they were offering the land 'even unto Arahura', though without denying their allies the opportunity to have their rights recognised too.⁷⁶

Indications of anxiety about the Crown's intentions came from a Ngai Tahu quarter also. Information reached the Government that Ngai Tahu in Otago and Murihiku were alarmed by rumours that officials had purchased lands in Murihiku and on the West Coast from Wahapiro and other northerners, and that their own chief Taiaroa had acquiesced in this action.⁷⁷ McLean had indeed heard from Wahapiro and others, at a meeting in Wellington in June 1851, that they wanted to sell their claims on the West Coast and that Taiaroa had consented. Pakaki of Ngai Tahu, who was also present at the meeting, had confirmed that Taiaroa had agreed that Wahapiro should make the sale and that they should share the payments.⁷⁸ In 1852, in response to Ngai Tahu's complaint, McLean confirmed that Wahapiro had told him about Taiaroa's acquiescence in the proposed sale and was asking for a joint arrangement in which he (Wahapiro) would get the first payment and Ngai Tahu the next. McLean said that he had told Wahapiro that any purchase must have the consent of Ngai Tahu, and that he himself had written to Taiaroa to get his view on the matter and had suggested a meeting between the two parties (Ngai Tahu and the northerners). He hoped such a recognition of the northern tribes would 'clear up the difficulties' being experienced in the land purchases in Te Tau Ihu.⁷⁹ Loveridge comments that although the West Coast was

74. McAloon, pp 46–47

75. Richmond to Colonial Secretary, 5 January 1852, *Compendium*, vol 1, p 290

76. Ngati Toa to Grey, 11 December 1851, 'Two Letters from Ngaati-Toa to Sir George Grey', translated by Bruce Biggs, *Journal of the Polynesian Society*, vol 68 (1959), pp 263–276

77. Mantell to Colonial Secretary, 24 February 1852, enclosing letter from Ihaia to other Ngai Tahu, 12 January 1852, *Compendium*, vol 1, p 273

78. McLean, notes of meeting in Wellington, 25 June 1851, McLean papers, Alexander Turnbull Library, Wellington (Loveridge, pp 15–16). We agree with Loveridge that this document has been incorrectly dated as '1857' by the Turnbull Library.

79. McLean, memorandum, undated, *Compendium*, vol 1, p 274

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isolated, little known, and not thought to have many resources, Crown officials did believe it was worth spending money on extinguishing the claims of the northern tribes to this area because those tribes were 'unwilling to sell their rights to land in the Nelson area unless their Arahura claims were recognised as well'.⁸⁰ At the time, Mantell pointed out that Ngai Tahu's title to the West Coast had been extinguished by the Canterbury purchase in 1848, and that even then Taiaroa 'would not have been the party to treat with for that part of the country'.⁸¹ Richmond reported soon afterwards that Ngati Rarua and Ngati Tama in Te Tau Ihu were still wanting too much for their West Coast interests, and had assured him that the resident Ngai Tahu would be compensated for their claims with a share of the asking price.⁸² Perhaps McLean was convinced by now that no further discussion with Ngai Tahu was necessary. There is no indication that the suggested meeting with Ngai Tahu took place, and soon afterwards the Government successfully included the West Coast in the Waipounamu transactions with Ngati Toa and other northern tribes.

3.3.2 The Waipounamu purchase, 1853–56

In our first preliminary report, we discussed and made findings on the series of transactions collectively known as the Waipounamu purchase. Because many of the Waipounamu agreements included claims to the West Coast, we refer to them again here, although more briefly than we did in our earlier report. The Waipounamu purchase was initiated by Grey with Ngati Toa in 1853, and it was in April 1856 that McLean reported the successful conclusion of negotiations entered into by the Crown and Ngati Toa for the cession of the tribe's unextinguished claims in the Nelson and Canterbury provinces.⁸³ In the period since the original agreement with Ngati Toa in 1853, it had been found necessary to have dealings with the other Te Tau Ihu tribes as well (though Ngati Apa was ignored), and many of these transactions included iwi claims to the West Coast.

The foundational deed signed by Ngati Toa chiefs at Porirua on 10 August 1853 represented their 'full and true consent' to the transfer of their 'land at the Waipounamu'. The interests referred to were not otherwise defined, but it was stated that they consisted of 'all our lands on the said Island'. Ngati Toa's recognition that they were not the only claimants was expressed in their undertaking to pay some of the money to certain other tribes, specified in the deed as Te Atiawa, Ngati Koata, Ngati Rarua, Rangitane, and Ngai Tahu, 'who, conjointly with ourselves, claim the land'.⁸⁴ The receipt signed in December 1854 by Ngati Toa chiefs was more specific about the South Island lands covered by the deed of 1853, in

80. Loveridge, pp14–15

81. Mantell to Colonial Secretary, 17 May 1852, *Compendium*, vol1, p 280

82. Richmond to Colonial Secretary, 31 May 1852, *Compendium*, vol1, pp 290–291

83. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol1, p 300

84. 'Ngati Toa Deed of Sale', 10 August 1853, *Compendium*, vol1, p 308

that they were said to comprise ‘all the lands which we have not sold in former times’; the several places and districts mentioned included Arahura.⁸⁵ We note that Taiaroa, the Ngai Tahu chief who had featured in earlier discussions of the West Coast purchase, was apparently present at the Porirua meeting at which the 1854 payment was discussed and agreed.⁸⁶ He was not a signatory to the receipt, however.

The West Coast was also included in the receipt signed in March 1854 in Taranaki by non-resident Te Atiawa, who accepted payment for ‘the whole of the lands to which we lay claim in the Middle Island or Wai Pounamu’. A sequence of place names was included in the document, moving across Te Tau Ihu to Te Tai Tapu ‘and from thence to Arahura.’⁸⁷ Te Atiawa also signed a deed at Queen Charlotte Sound in February 1856, referring particularly to lands in that district but also stating that ‘all our lands on this Island’ were being transferred to the Crown.⁸⁸

The other tribes we are concerned with here, Ngati Tama and Ngati Rarua, signed a deed at Nelson in November 1855. This document similarly transferred ‘all our lands in this Island’, and mentioned a ‘rohe’ extending to Arahura and beyond to ‘the land sold by the Ngaitahu’ (the boundary being at Milford Sound). Some land on the northern part of the coast, south of the Pakawau block purchased in 1852, was ‘excluded from this new sale and reserved for our use’. The southern boundary of the excepted land, which came to be known as Te Tai Tapu, was vaguely defined in the deed, but was clarified in 1862 as being at Kahurangi Point. West Coast place names on the attached map went down as far as Hokitika.⁸⁹

McLean’s report that he had successfully completed the Waipounamu purchase made no mention of Ngati Apa’s rights on the West Coast or anywhere else. Unlike another of the Kurahaupo tribes, Rangitane, Ngati Apa had not been named as one of the ‘conjoint’ owners in the Ngati Toa deed of 1853. Nor were they given the opportunity to sign a Waipounamu deed, although Rangitane signed two such deeds (including one in which the West Coast was specifically mentioned). Ignoring Ngati Apa entirely, McLean noted that he had not been able to visit the only tribe still having claims on the purchase, which he described as ‘a small remnant’ of Ngai Tahu, about 25 in number, who lived at Arahura, ‘a remote and as yet almost inaccessible part of the country’. McLean did not anticipate any difficulty in settling their claims in due course.⁹⁰

The purchase process normally included the creation of reserves for the vendor tribes, but in the Waipounamu purchase no reserves were set aside on the West Coast. Nor is it recorded that the question of reserves arose in the discussions with Ngati Toa, Te Atiawa, Ngati Tama, and Ngati Rarua.

85. ‘Receipt for £2,000 Paid to Ngatitua Tribe’, 13 December 1854, *Compendium*, vol 1, p 311

86. McLean to Colonial Secretary, 15 December 1857, *Compendium*, vol 1, p 303

87. ‘Receipt for £500 Paid to Ngatiawa Tribe’, 10 March 1854, *Compendium*, vol 1, p 309

88. ‘Deed of Sale by the Ngatiawa Tribe’, 9 February 1856, *Compendium*, vol 1, p 314

89. ‘Deed of Sale by the Ngatitama Tribe’, 10 November 1855, *Compendium*, vol 1, pp 312–313

90. McLean to Colonial Secretary, 7 April 1856, *Compendium*, vol 1, p 303

(1) Claimant submissions

The submissions of Ngati Toa and the other three northern tribes involved (Ngati Rarua, Ngati Tama, and Te Atiawa) made little specific reference to the West Coast interests covered by the Waipounamu purchase, although clearly they came within the scope of the allegations of these tribes against the Crown in relation to that series of transactions. We made a detailed presentation of these submissions in our first preliminary report, especially the allegation that the Crown failed to make a proper investigation of customary rights in the South Island before carrying out the Waipounamu purchase. Ngati Toa's submissions raised a special point. As we saw in chapter 2, this tribe acknowledged that on the West Coast other tribes had rights also, but maintained that its allies were obliged, there as elsewhere, to acknowledge the overriding mana and authority of Ngati Toa (as the leaders of the conquest) and their right to control the alienation of land. In respect of the Waipounamu purchase generally, they argue that the Crown was right to deal with them before the others but that their agreement to sell was obtained under pressure and was given with great reluctance.⁹¹ In their submissions, the other three northern tribes rejected Ngati Toa's claims and condemned the Crown's policy of dealing with Ngati Toa first, thus presenting their allies with a *fait accompli* and giving them no choice but to agree to sell their interests.⁹² On the other hand, Ngati Rarua acknowledged that their inclusion in the Waipounamu deeds did represent a recognition by the Crown of their claims to the West Coast.⁹³

Ngati Apa asserted that their claim was unique and that the breaches of the Treaty were worse for them than for other iwi, in that Ngati Apa's customary rights in Te Tau Ihu (including the West Coast down to and including Kawatiri) were 'entirely ignored by the Crown' in all purchases in the 1850s, including the Waipounamu purchase. All of the land in which they had a history of occupation and traditional resource use was included by the Crown in purchase arrangements without any proper separate attempt to ascertain or provide for Ngati Apa rights or even to acknowledge the continued existence of Ngati Apa people.⁹⁴

(2) Crown submissions

The Crown's statements about its treatment of iwi rights on the West Coast resembled the claimant submissions in that its arguments were advanced in relation to Te Tau Ihu generally rather than to the West Coast specifically. At first, in its submissions on generic issues, the Crown denied that it had acted in a state of avoidable ignorance at the time of the major land transactions with Maori in Te Tau Ihu. In fact, it had conducted an inquiry sufficient to properly inform itself of Maori customary rights in the region. It was unrealistic to say

91. Counsel for Ngati Toa Rangatira, closing submissions, pp 44–50, 103

92. See, for example, counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 40, 159; counsel for Ngati Tama, closing submissions, [2004] (doc T11), p 37

93. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 162–163

94. Counsel for Ngati Apa, closing submissions, [February] 2004 (doc T3), pp 2–3, 46

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that the most thorough kind of inquiry, involving much travel and consultation, could have been made, since the region was large, the number of Maori was small, there were only a few Crown officials, and there was a need for practical solutions to urgent issues in the light of settler arrivals and Maori expectations of having settlers among them. Assertions that a full inquiry should have been made were also based on the assumption that the customary basis for the various interests of Maori in Te Tau Ihu was 'readily discoverable', which was not the case. The submission quoted Dr Ballara's statement that, during and after conquest, customary claims were usually fluid or uncertain.⁹⁵ The Crown agreed with Ngati Apa that the region was large and difficult and only partially explored, and that inquiries had been confined to coastal areas, but it argued that almost all Maori lived on the coast and that officials would have found it hard to find anyone to consult with in the almost unpopulated interior.⁹⁶

At a later stage in our hearings, including the closing submissions, counsel no longer claimed that the Crown's inquiries in the 1850s had been sufficient, but still said that customary rights were not settled at the time, and were thus not easily discerned. In accordance with its view that the evidence concerning customary rights on the West Coast was indeterminate and inconclusive, the Crown stated in its closing submissions that it had difficulty in responding in any detail to allegations that it had not recognised the mana and interests of Te Tau Ihu iwi in the takiwa.⁹⁷ It noted that few specific claims had been made that the actions of the Crown had impinged on customary rights in the takiwa.⁹⁸ Its view of the Waipounamu transactions in relation to the West Coast was that they 'could be seen as having concluded the purchase of rights and interests' of the northern iwi there.⁹⁹

(3) Tribunal discussion and findings

(a) Was there an adequate inquiry into Te Tau Ihu iwi rights in the western part of the takiwa prior to completing the Waipounamu purchase? It is clear that, while some inquiry into customary rights was made in parts of Te Tau Ihu during the Waipounamu purchase, no inquiry at all was made on the West Coast. From the Crown's point of view, there was generally no need for such an inquiry, since the Waipounamu purchase was not an acquisition of defined tracts of land of which the owners had been determined, but a blanket cession of all claims to rights in areas of the northern South Island that had not yet been purchased. In respect of the West Coast, the Government simply accepted at face value the claims of Ngati Toa, who were non-resident, and of their northern allies, who had invaded the region and still had a presence in it, and acquired their interests without investigation. This is not

95. Crown counsel, submissions concerning generic issues, 20 September 2002 (paper 2.371), pp 7–8

96. Ibid, p 49

97. Crown counsel, closing submissions, p 130

98. Ibid, p 127

99. Crown counsel, opening submissions, 17 November 2003 (paper 2.748), pp 12–13; Crown counsel, closing submissions, p 129

3.3.2(3)(b)

to say that other right-holders were to be excluded. The Government accepted that the resident Ngai Tahu also had rights, and indeed had already attempted to purchase them (in the Canterbury purchase, which ostensibly included the West Coast but was later found to be ineffective as far as that region was concerned). After completing the Waipounamu purchase in 1856, McLean acknowledged that Ngai Tahu's rights were still unextinguished, and he stated that the Crown intended to deal with that tribe in due course.

The Crown's argument in our inquiry was that customary rights in Te Tau Ihu were still unsettled in the 1850s, and that this justified the 'blanket' policy of extinguishing claims rather than proven rights. It was also argued that the mid-nineteenth century Government lacked resources to conduct exhaustive inquiries into rights. In our first preliminary report, we did not accept that customary rights were so unsettled or so much in flux as to be incapable of definition: they were still evolving, in the customary way, but were ascertainable upon due inquiry.¹⁰⁰ The West Coast was certainly a remote location, but the population was small and even in the 1850s it would not have been impossible to gather them together for a comprehensive inquiry and consultation, as James Mackay showed in 1860.

(b) *Were Te Tau Ihu rights in the western takiwa fully considered in the Waipounamu purchase?*

It is clear that the Government treated the various right-holding iwi differently. The original approach from the northern tribes in 1849 and 1850 had come from Ngati Rarua and Ngati Tama, and the refusal of those tribes in 1852 to sell at a low price was accepted by the Government. Soon, however, the protests of Ngati Toa that their pre-eminent rights on the West Coast were being challenged by their allies were heeded, although the Government was aware that Ngati Toa's claim was contested, and the eventual purchase was initiated with Ngati Toa in 1853. There was no inquiry into the relative strength of the rights of Ngati Toa and the other northern raupatu tribes in the region, or of the resident right-holders Ngai Tahu and Ngati Apa. As elsewhere in the area covered by the Waipounamu purchase, the Crown simply accepted the Ngati Toa claim and used it to elicit sales of the same district by other tribes (in this case Ngati Rarua, Ngati Tama, and Te Atiawa in the first instance). We discussed this aspect of Crown practice in our first preliminary report, where we showed that the Crown exploited its recognition of Ngati Toa paramountcy in order to obtain the interests of other tribes without their full and free consent. Our view was that the Ngati Toa deed of 1853, while not ignoring the rights of other tribes, enabled the Crown to regard the land as sold from that time on. During our inquiry, the Crown conceded that resident right-holders were pressured into sales because prior dealings had been made with non-residents. On the West Coast, although Ngati Toa's allies did make the first approaches to the Government for a possible sale, and in 1852 were able to decline a sale because the price

100. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, p 247

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was too low, the purchase was eventually made from Ngati Toa first and only later from Ngati Rarua, Ngati Tama, and Te Atiawa. Because of this, although their claims were given recognition, the right of the latter tribes to exercise choice in the transaction was restricted.

Priority was given to the claims of the northern tribes, Ngati Toa and their allies. Ngai Tahu, although more clearly a resident tribe on the West Coast and mentioned in 1853 as having 'conjoint' rights, were not dealt with at this stage. There was, however, some Ngai Tahu involvement in the Waipounamu purchase. The Crown had some discussion with Taiaroa, who was an important chief on the eastern coast and apparently acquiesced in the sale of the West Coast. Wahapiro of Ngati Tama agreed to receive the first payment if a sale went through. McLean gave some weight to this Ngai Tahu 'consent', and pointed out that Taiaroa was present at the signing of the Ngati Toa deed in 1853. Taiaroa was not a chief of Poutini Ngai Tahu, however, and did not have rights on the West Coast himself. His involvement in the issue aroused protest from some of his fellow Ngai Tahu.

The possibility that rights were also held by Ngati Apa on the West Coast or anywhere in Te Tau Ihu was not considered in the Waipounamu discussions. They were not listed as a 'conjoint' claimant in the 1853 deed. Our first preliminary report examined the rights of Ngati Apa in the northern South Island and concluded that they should also have been consulted and their consent obtained. In chapter 2 of our present report, in our consideration of customary rights in the West Coast region, we concluded that Ngati Apa rights in the northern part of the West Coast had survived the conquest and still existed in the 1850s. If there had been an on-the-spot inquiry or consultation, these rights might have been asserted. That they were not, at this time anyway, is not surprising in view of the tribe's post-raupatu disarray throughout Te Tau Ihu. On the West Coast, there was no opportunity to make them known, since the Waipounamu transactions were conducted in other places far away. McLean said in 1856 that only Ngai Tahu's rights remained to be extinguished, but in 1852 a group of North Island Ngati Apa chiefs had written him a letter (to which we referred in chapter 2), apparently stating that Ngati Apa had customary rights in the north-western South Island districts formerly controlled by Ngati Tumatakokiri, including places from Te Tai Tapu down to Karamea and Kawatiri.¹⁰¹ Whether McLean dismissed this claim or had forgotten about it by 1856, the fact remains that no consideration whatever was given to Ngati Apa rights in the Waipounamu purchase. Ngati Apa were thus uniquely disadvantaged, since the other Kurahaupo tribes were finally recognised in the Waipounamu deeds – at least to some extent – in the localities where they resided. On the West Coast, the uninvestigated rights of Ngati Apa were extinguished without any consent being given or compensation paid (until 1860, when they were belatedly recognised).

101. Te Kawana Hunia and others to McLean, 15 March 1852 (David Armstrong, 'The Fate of Ngati Apa Reserves and Ancillary Matters', report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 2000 (doc A78), p 2)

(c) To what extent were the boundaries of the western takiwa portion of the Waipounamu purchase adequately explained? The claimants made no submissions on boundary issues. In our view, however, the boundaries were not precisely defined. The West Coast districts in question were usually referred to at the time, by both the tribes and the Government, simply as ‘the Arahura’. Strictly speaking, this label refers only to the district on the central West Coast around the mouth of the Arahura River – a district that had the greatest population and was near the valued pounamu resource. It seems to have been understood, however, that ‘the Arahura’ signified a more extensive West Coast stretching between Te Tai Tapu in the north and the fiord region in the far south.

Mentions of the region in the documents of the time are seldom more precise than this. In view of our earlier comments on the symbolic importance of historic battlegrounds on the east coast, we note that Wahapiro’s offer of the West Coast in 1850 was couched as an invitation to purchase Tukurau in Murihiku, the place where his uncle Te Puoho was killed by Ngai Tahu, and that McLean recognised this as a desire to ‘sell the Arahura district as payment for his uncle’s death.’¹⁰² No more was heard of the inclusion of Murihiku in ‘Arahura’, and from 1854 onwards the designation of Milford Sound as the north-western boundary of the Murihiku purchase served to mark the southern boundary of the West Coast. In the north, the Pakawau purchase of 1852 set the northern boundary of the unpurchased interests of Ngati Toa and their allies at the Wanganui Inlet. With regard to Ngai Tahu, the 1848 Canterbury purchase had used Kawatiri as a northern limit, but, as we have seen, it is uncertain what this signified about Ngai Tahu rights, and in any case the ‘purchase’ had ceased to be recognised as effective. The Waipounamu deeds signed by Ngati Toa and their allies in 1853 and 1854 continued to refer simply to ‘Arahura’, without further definition. In 1855, the Ngati Tama–Ngati Rarua deed mentioned the Murihiku purchase and the boundary it set up at Milford Sound, and also referred to the land excluded from sale at Te Tai Tapu (thus setting Kahurangi Point as the northern limit to ‘Arahura’). While the Milford Sound boundary referred to Ngai Tahu interests, the Kahurangi boundary put a northern limit on the interests being sold by the northern tribes.

There appeared to be no misunderstanding of these boundaries by the Government or by the northern tribes whose claims were being extinguished. Ngai Tahu’s claims were yet to be dealt with, and at this time no thought was given to a consideration of Ngati Apa’s claims. The rights being transferred were understood to be located in coastal areas. The inland boundaries were not defined, but at the time this was apparently of no concern to the northern tribes since they had confined the exercise of their rights on the West Coast to places near the sea. Later, however, in 1873, they claimed that the area acquired under the Waipounamu purchase did not specifically include the mountainous interior of the northern sector (which includes a large part of the statutory takiwa being discussed in this

102. Wahapiro to McLean (translated), 24 December 1850, with marginal note by McLean (McAloon, pp 46–47)

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report). Of course, this area was almost entirely unexplored in the 1850s (as McLean noted at the time), but it is not known whether the interior was discussed with the tribes during the negotiations. It was left largely blank on the sketch map (which lacked an eastern boundary) attached to the 1855 deed. The Government dismissed the 1873 claim, reminding the tribes that according to the deeds they had sold ‘all their lands in the South Island’, and it remains uncertain whether the claim had any validity. Phillipson’s discussion of this matter concludes that it is doubtful that the signatories understood clearly that they were relinquishing all interests including those in the interior.¹⁰³

(d) Tribunal findings on the Crown’s consideration of Te Tau Ihu iwi rights in the takiwa during the Waipounamu purchase: On the basis of our conclusions on the questions posed above, we now make findings of Treaty breaches. Most of them are similar to the findings of our first preliminary report on the Waipounamu purchase, modified to fit the circumstances of the western districts of the statutory takiwa.

We find that the Crown did not inquire properly into customary rights on the West Coast, even though such an inquiry was feasible. The ‘blanket’ purchase of all claimed interests within a wide area was not thought, by its very nature, to require a detailed inquiry, but it was nevertheless a breach of the principles of active protection, partnership, and reciprocity not to inquire into and properly identify the customary rights of the tribes in the area, because it undermined meaningful consent and because some were left out.

As we noted in our first preliminary report, although the Crown recognised Ngati Toa’s interests, it exploited their need to reassert their leadership and rights in the wake of their loss of mana to the Crown in 1846–47. The Crown accepted the claims of Ngati Toa, a non-resident tribe, even in the knowledge that they were contested. On the West Coast, this was an even more doubtful means of proceeding, because rights there were known to be based largely on the occupation undertaken by Ngati Toa’s allies. The subsequent payment of those right-holders, after the event, did not redress the situation. Those iwi were denied their right to decide what places they would sell and for what price. We find that although the interests of Ngati Rarua, Ngati Tama, and Te Atiawa on the West Coast were recognised by the Crown, they were not sold freely and on a basis of informed choice. Ngati Toa’s claims were utilised to pressure the other tribes, who did have a history of residence in the area, into selling their interests. This was a breach of the Treaty principles of partnership, equal treatment, and active protection.

It was acknowledged by the Crown that Ngai Tahu had rights in the area, and there was an intention to deal with them later. This acknowledgement was not made in respect of Ngati Apa rights. We find that Ngati Apa were uniquely disadvantaged in the Waipounamu purchase, in that their rights on the West Coast, as in Te Tau Ihu generally, were not

103. Phillipson, *The Northern South Island*, pp 169–173

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investigated and were thus extinguished without their consent and without any compensation being paid. Although there was a limited recognition of Ngati Apa's West Coast rights in a subsequent deed, they were placed in a position of serious disadvantage by being given no opportunity to dissent from the sale in the Waipounamu transactions. This breached Ngati Apa's article 2 rights and the Treaty principles of reciprocity, partnership, and active protection.

In this differential treatment of the tribes, the Crown breached the principle of equal treatment.

We find also that the Waipounamu deeds, in respect of the West Coast, fell short of the standard required for the Crown to make a valid purchase under the Treaty, especially in their failure to properly describe the boundaries of the land. This omission by the Crown was in direct breach of article 2 of the Treaty and the principles of active protection and partnership.

3.3.3 The Arahura purchase, 1860

The process of extinguishing the remaining rights on the West Coast was given impetus by a report submitted to McLean by James Mackay in 1857, after he had returned to Nelson from a private journey to the region. At Mawhera, he had mentioned the sale of the West Coast by Ngati Toa and Ngati Rarua, but was told by Poutini Ngai Tahu that Ngati Toa had had no right to sell the area.¹⁰⁴ The chief Tarapuhi (the son of the late Tuhuru) and others wrote a letter to McLean to this effect, saying that Ngati Toa were 'thieves, as their feet have never trodden on this ground; they are equal to rats, which when men are sleeping climb up to the storehouses and steal the food'. They told McLean that Ngai Tahu were willing to sell 'the whole of the land along the coast, from West Wanganui to Piopiotai [Piopiotahi, or Milford Sound]'. An inland boundary was described as well, extending north from Piopiotahi along the mountain chain and intersecting the Te Tai Tapu coast at Te Hapu (about 30 kilometres north of Kahurangi).¹⁰⁵

McLean instructed Mackay in November 1858 to go to Arahura and deal with 'Tuhuru and the other Chiefs and people residing on the West Coast' to settle their claims, and to arrange reserves 'for the few Natives residing there'.¹⁰⁶ Mackay's reply, as well as pointing out that Tuhuru had been succeeded by Tarapuhi, asked if the whole of the West Coast was to be purchased, in accordance with Tarapuhi's offer, or just the 'Arahura and Mawhera districts'.¹⁰⁷ His letter made particular mention only of the southernmost districts, and did not

104. Loveridge, p 26

105. Tarapuhi and others to McLean, 15 March 1857 (Loveridge, p 27). It was Kahurangi Point itself that was later mentioned as the northern boundary of the Ngai Tahu offer, and Loveridge says that he can offer no explanation for the change: Loveridge, p 67.

106. McLean to Mackay, 3 November 1858, *Compendium*, vol 2, p 33

107. Mackay to McLean, 19 November 1858, *Compendium*, vol 2, p 34

refer to the northern reaches. McLean's reply similarly confined itself to the south: he left the matter to Mackay's discretion, since he did not know if the Ngai Tahu claims went as far south as Milford Sound. He added that 'the Arahura Natives' were 'the only section of the Natives that we know of in the Middle Island whose claims are as yet unextinguished.'¹⁰⁸

Mackay arrived back on the West Coast in 1859, reaching Mawhera in May. He was now an official Crown negotiator with Poutini Ngai Tahu for the claims they had made in 1857. The mission was unsuccessful, largely because of a dispute over the size of the reserve to be created at the Arahura River and Ngai Tahu's rejection of the payment offer as insufficient. The sensitive fact that the Government had already made a purchase from the northern tribes was mentioned on more than one occasion. Ngai Tahu again rejected the claims of these tribes, and declared that they were not the slaves of Ngati Toa. Mackay insisted that the Waipounamu deeds relating to the West Coast were valid, and even hinted (as he had done during the Kaikoura negotiations) that Ngati Toa could be asked to help gain possession of the land. He advised Ngai Tahu to accept the offer being made, since it was the Crown's wish to act fairly by accepting their claims.¹⁰⁹ It is clear that Mackay regarded the northerners' claim as extinguished by the Waipounamu deeds but was also in no doubt that the Ngai Tahu claim to the West Coast was valid: he accepted that they had been 'partially conquered' by the northern tribes but understood that the latter had withdrawn from the region after the defeat of Te Puoho in 1837. In 1859, he wrote a long account of this history, clearly based on his detailed discussions with Ngai Tahu.¹¹⁰ In this document, and in other records of his discussions on the West Coast, he did not, however, mention any dealings with non-Ngai Tahu informants or give consideration to any Ngati Apa understanding of rights in the region. As far as the northern limits of the Ngai Tahu rohe were concerned, he simply accepted that the proposed purchase of Ngai Tahu rights extended as far north as the tribe claimed, which was the same area as that in which the claims of the northern tribes had already been extinguished.

Mackay's instructions in October 1859 were to visit Arahura again in order to conclude 'negotiations with the Natives for the cession of their title' over the district referred to in the report of his earlier attempt, and to arrange reserves. He was authorised to make a payment to 'the Ngaitahu Natives . . . in full satisfaction of all their claims.'¹¹¹ Mackay eventually reported that his mission had been successfully accomplished. He had been accompanied on his journey, which began from Nelson in January 1860, by three Maori. Two of them were well known Golden Bay chiefs, Tamati Pirimona (Ngati Tama, Ngati Rarua, and Te Atiawa) and Hori Te Karamu (Ngati Tama); the third was Puaha Te Rangi, the Ngati Apa rangatira who was to figure significantly in the Arahura purchase.¹¹²

108. McLean to Mackay, 15 January 1859 (Loveridge, p 42)

109. Loveridge, pp 47–57

110. McAloon, pp 71–78

111. T H Smith (for McLean) to Mackay, 25 October 1859, *Compendium*, vol 2, p 39

112. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, p 40

Mackay's account of the lengthy purchase negotiations was quite detailed, but our concern is mostly with what happened at Poerua on 21 April. During the discussions that day about reserves, Puaha Te Rangi 'demanded compensation for the claims of the Ngatihapa to lands at the Kawatiri or Buller districts'. Mackay reported that:

as Tarapuhi Te Kauhiki, and the majority of the Natives admitted the justice of these claims, and pressed me to award compensation for them, it was deemed expedient to permit Puaha Te Rangi on behalf of himself and a few other Ngatihapa Natives to participate in the payment, and it was arranged that some reserves should be allotted to them in the neighbourhood of the River Buller.

Mackay hoped that the Governor would agree to this, 'on the ground that having thus compensated the Ngatihapa claimants, no after claim or future demand can be made by that tribe'. During the next few weeks, Mackay was busy with arrangements for the reserves, and the deed of sale was eventually signed at Mawhera on 21 May 1860.¹¹³

The Arahura deed recorded a transaction with 'the chiefs and people of the tribe Ngaitahu', and referred to the lands 'named Poutini or Arahura'. The boundaries along the coast from Milford Sound to Kahurangi Point and down the line of alpine peaks were described in the deed and shown on a detailed map drawn in the margin. The 14 signatories included Puaha Te Rangi (who also signed the payment receipt on the same day), and the witnesses included Mackay's northern associates Tamati Pirimona and Hori Te Karamu.¹¹⁴

Mackay stated that he had prepared a schedule of agreed occupation reserves, listing the individuals to whom they were awarded and showing the number of acres to which each individual was entitled. He actually selected and defined the reserves on the ground while he was still in the district, and later submitted maps.¹¹⁵ In the long strip of West Coast land running from the Heaphy River in the north to the Arawhata River in present-day South Westland, there were 58 reserves altogether, identified in two lists attached to the deed. They consisted of 47 schedule A reserves (6724 acres in total), which were occupation reserves for resident Maori, as well as 11 schedule B reserves (3500 acres in total), which were endowment reserves 'for Religious, Social, and Moral purposes' and were conveyed to the Crown and administered under the Native Reserves Act 1856 for the benefit of their owners. Six of the reserves in this latter class were situated in the area from the Kawatiri (Buller) River north towards Kahurangi.¹¹⁶ The occupation reserves (schedule A) were to be allocated to named individuals as owners, and a list of the 14 reserves situated in the Nelson province – that is, from Kararoa north to Karamea – was published in 1862, along with details of

113. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, p 41

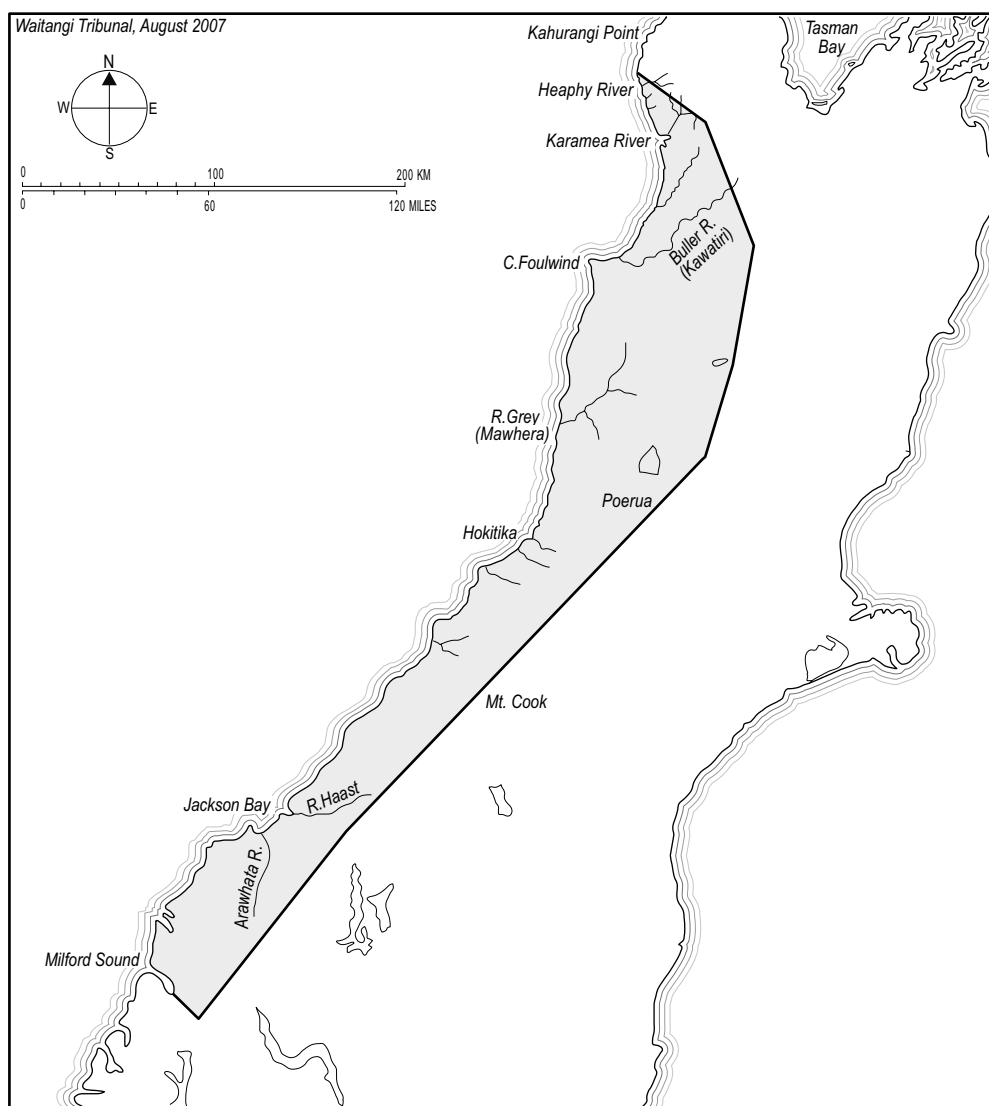
114. 'Deed of Sale [Arahura purchase]'; 21 May 1860, *Compendium*, vol 2, pp 385–386. The map is reproduced in the same volume, facing page 42.

115. Mackay to McLean, 21 September 1861, *Compendium*, vol 2, pp 41–42; Loveridge, pp 70, 78

116. 'Deed of Sale [Arahura purchase]'; p 387

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Map 10: The Arahura purchase

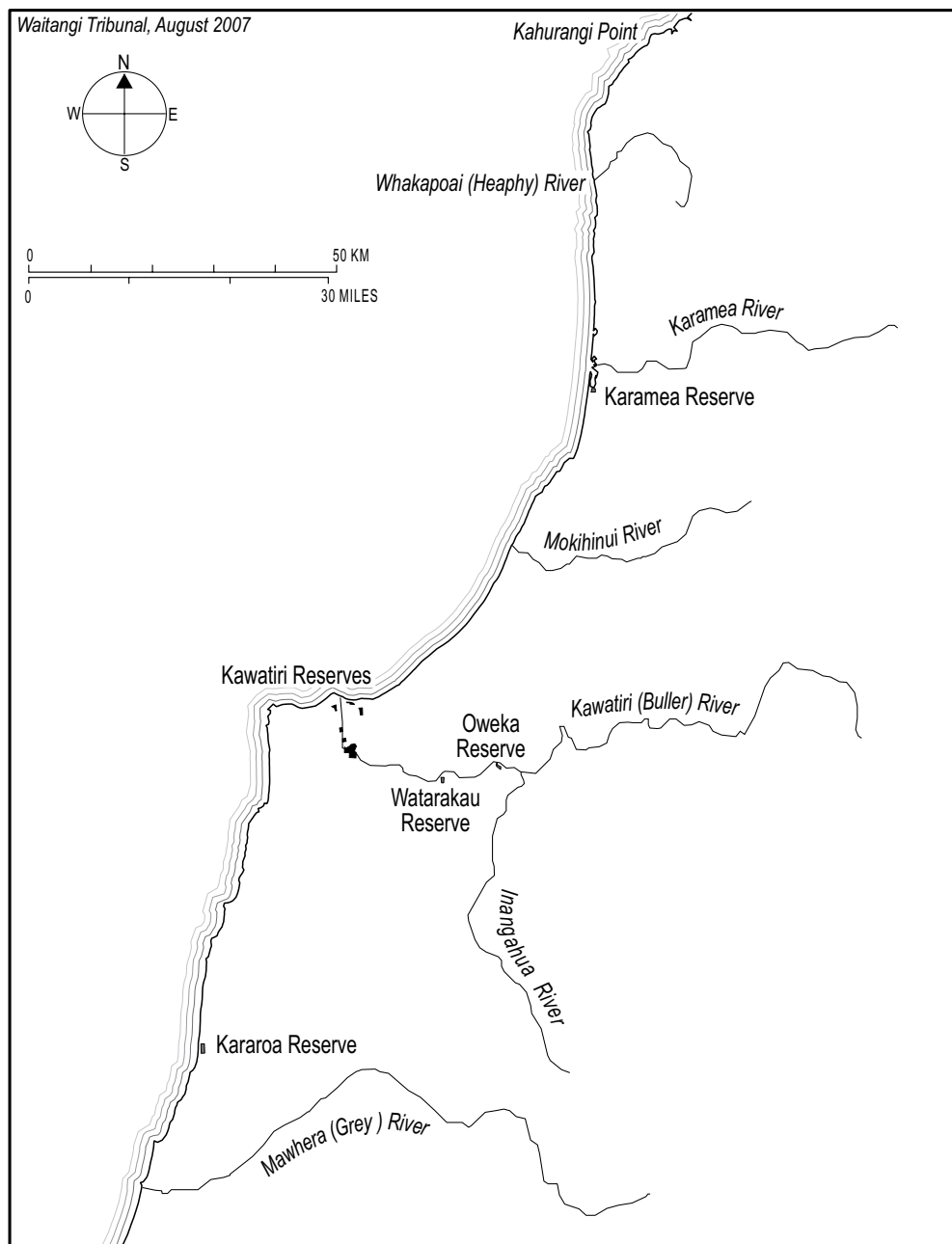
Source: A Koch, 'Plan of Land Purchases in South and Stewart Islands', 23 April 1875, AJHR, 1875, G-3, facing p 2

their location and acreage and the names of the persons to whom they were allocated.¹¹⁷ A later published list covered the whole purchase, again attaching names to the schedule A reserves, and adding 40 town sections with a total area of 10 acres in Westport (Kawatiri) to the endowment lands.¹¹⁸ There were also six town sections in Westport, with a total area of four acres, that were allocated to named individual Maori.¹¹⁹

117. 'Return of General Reserves for Natives which Have Been Made in the Cessions of Territory to the Crown, Province of Nelson', AJHR, 1862, E-10, p 17. The same list (republished in 1865) is in the *Compendium*, vol 2, p 314.

118. 'General Return of Native Reserves in the South Island', undated, *Compendium*, vol 2, pp 337-339

119. David Alexander, 'Reserves of Te Tau Ihu (Northern South Island)', report commissioned by the Crown Forestry Rental Trust, 1999 (doc A60), pp 694-697; 'Schedules of Native Reserves in the Provinces of Nelson, Marlborough and County of Westland', p 337

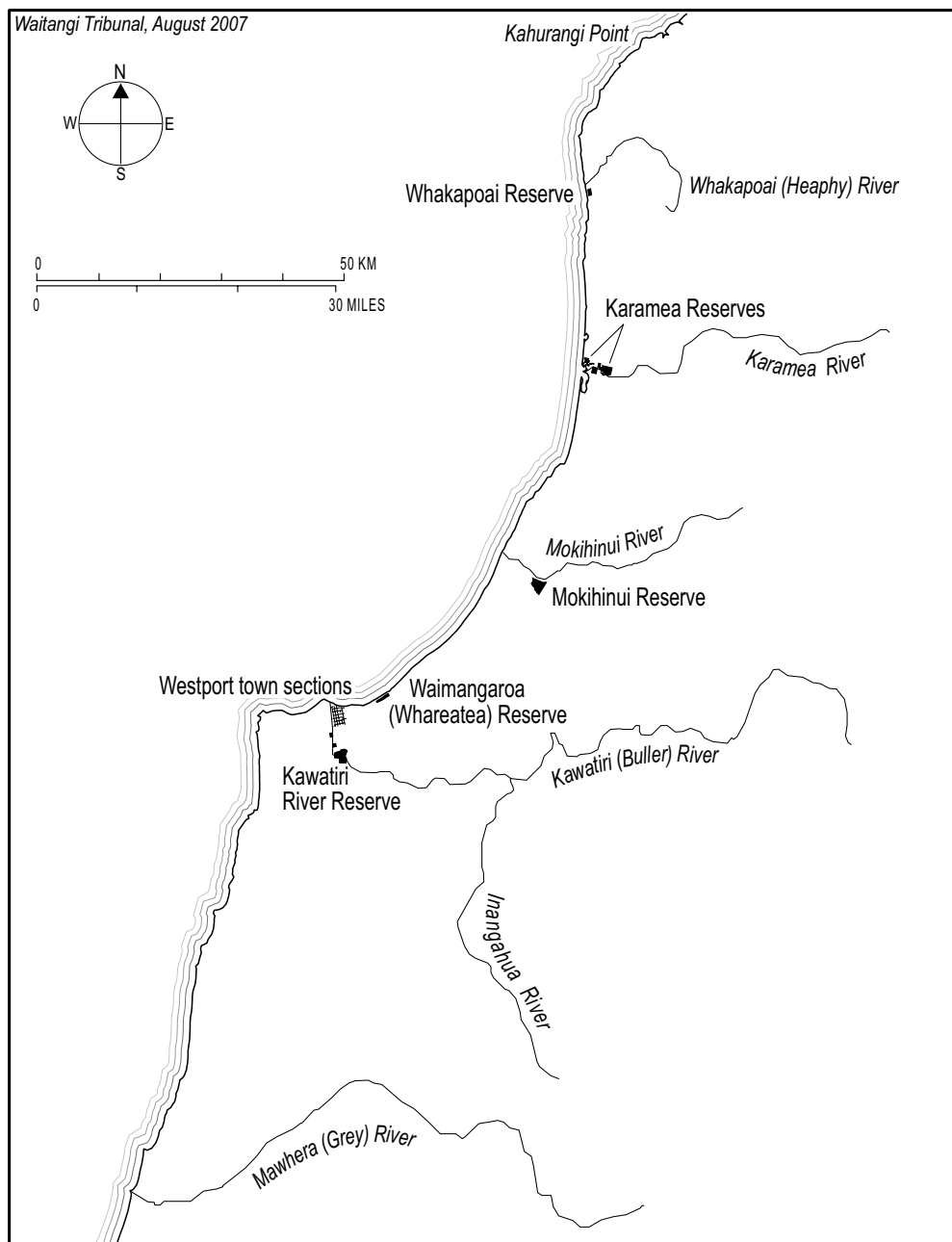


Map 11: West Coast occupation reserves

A number of people with affiliations to tribes other than Ngai Tahu were awarded interests in the reserves created as part of the Arahura purchase. As we have seen, Puaha Te Rangi 'and a few other Ngatihapa Natives' were allocated 'some reserves' at Kawatiri, although it is not easy to determine precisely how much land and which of the 11 scattered reserves in that locality (totalling 674 acres in all) were allocated to the people identified as

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Map 12: West Coast endowment reserves

Ngati Apa; they also received a reserve near Karamea. In our final report we will discuss the question of whether the Kawatiri and Karamea occupation reserves were adequate and what happened to them in later years (about 45 per cent of the total acreage is still in Maori ownership). In our discussion below, we consider the significance of the inclusion of non-Ngai Tahu people in the West Coast reserves. This does not apply to Ngati Apa only, since

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people of three other iwi (Ngati Tama, Ngati Rarua, and Te Atiawa) also featured in the ownership lists of reserves in many parts of the Arahura purchase area.¹²⁰ It has been stated by the Mitchells that at least 22 of the occupation reserves created in 1860 had ownership lists that included (as part or sole owners) people who were of Ngati Apa, Ngati Rarua, or Ngati Tama descent.¹²¹ In the area north of the Mawhera River, only five of the 15 occupation reserves were allocated to Ngai Tahu owners (and one of these was transferred to a Ngati Rarua owner soon afterwards when its Ngai Tahu owner died). The Kararoa reserve was allocated to Poharama Hotu of Te Atiawa; seven of the 11 Kawatiri reserves went to people associated with iwi other than Ngai Tahu (four to Ngati Apa; one to Ngati Tama; two, later three, to Ngati Rarua); one of the reserves further up the Kawatiri River was allocated to a Ngati Rarua owner, and the other to Ngai Tahu; and the Karamea reserve was awarded to Ngati Apa persons. The six individually awarded town sections in Westport were allocated to Tamati Pirimona Marino of Ngati Tama; Mata Nohinohi, Puaha Te Rangi, and Hoani Mahuika of Ngati Apa; and a Ngai Tahu owner.¹²² Interests in the endowment reserves were not finally determined until later – 1926 in the case of the schedule B reserves and 1948 in the case of the Westport town sections – and were the subject of much dispute and litigation, which we will discuss later in the chapter.

(1) Claimant submissions

(a) Ngati Rarua, Ngati Tama, and Te Atiawa: Ngati Toa did not make any submissions relating to the Arahura purchase, but the three other northern tribes involved in the West Coast claims made brief mention of it, mainly concerning the reserves created as part of the transaction.

In Ngati Rarua's submission, the Arahura purchase was a final stage in the buying out of claims to the West Coast, or a continuation of the Waipounamu purchase. The submission drew attention to the acceptance of this point by the Crown historian Macky under cross-examination. The creation of reserves was a normal feature of Crown purchases but had not been part of the Waipounamu phase of the transaction process. In 1860, it was attended to, and the reserves were thus not a Ngai Tahu matter only. The purchase included Ngati Rarua people among the resident right-holders who were allocated reserves. In their submission Ngati Rarua used evidence from Walzl to give the Te Piki whanau, who based their claim on Niho's raupatu, as an example of those who successfully presented Mackay with a case for being given reserves.¹²³ This allocation of reserves to Ngati Rarua was described as 'one

120. Claimant historians have studied these entitlements in detail. For all non-Ngai Tahu owners of schedule A reserves, see Hilary Mitchell and Maui John Mitchell, 'West Coast of the South Island', report commissioned by Te Runanganui o te Tau o te Waka a Maui and the Te Atiawa Manawhenua ki te Tau Ihu Trust in association with the Crown Forestry Rental Trust, 2002 (doc K4), p 70, table 9.21. For Ngati Rarua, see the list in Walzl, p 48.

121. Mitchell and Mitchell, 'West Coast of the South Island', p 74

122. Alexander, 'Reserves of Te Tau Ihu', pp 694–697

123. Counsel for Ngati Rarua, closing submissions, pp 162–163

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of the rare moments of Crown conduct consistent with the Treaty principles' that protected the tribe's land rights on the West Coast.¹²⁴

Ngati Tama submitted that the reserves set aside for them as part of the Arahura purchase did not adequately reflect the extent of the tribe's rights on the West Coast: there were only two grants, both in the Kawatiri area. The reserves were small and were granted to individuals rather than to Ngati Tama as an iwi.¹²⁵

Te Atiawa mentioned several reserves in which they had interests, and alleged that the Crown failed to provide an adequate land base for them on the West Coast, but admitted that they had not been able to develop their case fully.¹²⁶

(b) Ngati Apa: In their amended statement of claim, Ngati Apa said that the Crown had concluded the Arahura purchase with an inadequate and token recognition of the tribe's interests, a recognition made only when Puaha Te Rangi demanded it. The extent of the Ngati Apa resource use had not been determined. The purchase deed failed to define the interests being purchased from them, inadequate compensation was paid, and 'hopelessly inadequate' reserve provision was made.¹²⁷

These assertions were greatly expanded in the tribe's closing submissions. The recognition given in Arahura was described as 'niggardly', and as a 'sidewind' at the very end of Crown purchasing in the northern South Island. Puaha Te Rangi's demand in 1860 was a 'last agonised cry' at the last moment of the purchase programme, and even then the outcome was not recorded on a separate deed, and the reserves promised were 'uncertain and unquantified' and 'inadequate'.¹²⁸

The submissions on the Arahura purchase focused on the evidence relating to Puaha Te Rangi's demand and the response made to it. Counsel rejected as unconvincing what Ngai Tahu and the Crown said about this evidence and placed great weight on the succinct account provided at the time by James Mackay, who had no cause to misrepresent the exchange of views by Puaha and the senior Ngai Tahu speakers. His report could therefore be accepted as accurate. The words Mackay used were 'crucial': Puaha was 'demanding' provision for his people, and Poutini Ngai Tahu were 'agreeing to the justice' of his demand. In other words, Ngai Tahu at the time, speaking with authority and knowledge, recognised and agreed to:

- ▶ the 'existence of Ngati Apa as a separate iwi on the West Coast';
- ▶ a 'differentiation between Ngati Apa and Ngai Tahu people in the northern West Coast area';
- ▶ the 'justice of recognising a customary rights claim by Ngati Apa people in that area';

124. Ibid, p 122

125. Counsel for Te Atiawa, closing submissions, p 104

126. Counsel for Te Atiawa, closing submissions, pp 42–43

127. Ngati Apa, amended statement of claim, 14 February 2003 (claim 1.10(a)), pp 4, 9

128. Counsel for Ngati Apa, closing submissions, pp 3, 22, 28

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- the appropriateness of Puaha's receiving part of the purchase money; and
- the appropriateness of Puaha's involvement in the allocation of the occupation reserves, 'not for himself as an alleged Ngai Tahu, but as Ngati Apa and for Ngati Apa people'.

Counsel submitted that the counteracting Ngai Tahu evidence amounted only to 'weak efforts to rewrite Maori customary history, ignoring whakapapa linkages from Ngati Apa and seeking to elevate Ngai Tahu linkages to a level which their forebears did not seek to do'.¹²⁹ If Puaha had been Ngai Tahu, he would not have needed to make a claim, since the deed already provided for them, but the fact remains that he made his claim for Ngati Apa, and Ngai Tahu agreed at the time, with the result that a payment and reserves were arranged. Counsel argued that there would have been no need for Ngati Apa occupation reserves at Kawatiri if none of that iwi had an occupational presence there.¹³⁰

The allegations made in respect of the Crown's Te Tau Ihu purchasing programme as a whole were partly applicable to the Arahura purchase specifically – that the Crown failed to conduct a full inquiry into customary rights before concluding its purchases. On the West Coast, this resulted in only a limited recognition of Ngati Apa interests, which were inadequately defined in the deed. Inadequate compensation was paid, and inadequate reserves created.¹³¹

The Crown is said to have imposed artificial boundary lines that did not relate to customary rights (but which assisted Ngai Tahu to claim a northern boundary that was wrongly upheld by the Maori Appellate Court in 1990). Counsel stated that Kahurangi featured in the Arahura deed not because it had anything to do with customary resource use but because it was the boundary of the land at Te Tai Tapu excepted from the Waipounamu purchase. The inland boundary ran inland from Kahurangi across high alpine catchment areas and again had nothing to do with customary resource use; it was always 'a European non-customary line and boundary'.¹³²

(2) Ngai Tahu submissions

Ngai Tahu was limited by its particular role in this inquiry and did not make submissions about all the matters raised by the claimants, including many of those concerning the Arahura purchase. In their submissions concerning generic issues, however, Ngai Tahu said that, while the Crown did not carry out an adequate inquiry into customary rights before conducting its major purchases in Te Tau Ihu, it eventually did so in the Arahura purchase.¹³³ The implication was that no injustice was done to any iwi by failing to recognise

129. Counsel for Ngati Apa, closing submissions, pp 30–31

130. Ibid, p 38

131. Ibid, pp 46–48

132. Ibid, pp 37, 48

133. Counsel for Ngai Tahu, memorandum concerning generic issues hearings, 30 August 2002 (paper 2.358), p 3

its interests in the West Coast transaction of 1860. Ngai Tahu made closing submissions about customary rights, denying that Ngati Apa had any such rights on the West Coast south of Kahurangi and asserting that the claims of the raupatu tribes were based only on a limited period of occupation before their withdrawal prior to 1840. We summarised these submissions in chapter 2.

Ngai Tahu did make a response to the claims of Ngati Apa in respect of the Arahura purchase. Ngai Tahu's view of the place of this tribe in the purchase is that they were not a group with rights based on a history of occupation, but 'a small group describing themselves as Ngati Apa' but closely related to Ngai Tahu, who had recently 'established themselves, with Ngai Tahu, in the Kawatiri area'.¹³⁴ The first direct self-identification of some of the people at Kawatiri as Ngati Apa was by Puaha Te Rangi during the Arahura negotiations of 1860. In the agreement reached by Ngai Tahu and the Crown (not Ngai Tahu, Ngati Apa, and the Crown), Ngai Tahu accepted that this 'Ngati Apa' group should receive some reserves at Kawatiri, as well as a share in the payment.¹³⁵

With regard to the tribes whose claims were based on what Ngai Tahu saw as a limited period of occupation that came to an end before 1840, counsel submitted that there was no evidence that any members of the three northern tribes 'who remained in the region did so to maintain their tribal mana. There is no evidence that they constituted a separate community, held any power over Ngai Tahu, or had been deputed as representatives of their tribe.' Those who remained had married into Ngai Tahu. Consequently, there was no tribal mana of these iwi or of Ngati Toa on the West Coast by the time of the Arahura purchase.¹³⁶

(3) *Crown submissions*

As we said earlier in this chapter, the Crown submitted that the evidence concerning customary rights on the West Coast was indeterminate and inconclusive, and that therefore it had difficulty in responding in any detail to allegations that it had not recognised the mana and interests of Te Tau Ihu iwi in the takiwa.¹³⁷ The only response made to Ngati Apa's allegations concerning the Arahura purchase was in regard to the adequacy of the Kawatiri reserves.¹³⁸ This is a matter we are not directly concerned with here, although we will address it in our final report. With regard to the complaints of Ngati Rarua, Ngati Tama, and Te Atiawa that there was a failure to provide for them adequately in reserves, the Crown argued that their right to inclusion depended on the existence of customary rights, for which the Crown considered the evidence to be 'indeterminate'. Counsel also pointed out that even if there were rights, full participation of these iwi in the Arahura purchase was

134. Counsel for Ngai Tahu, closing submissions, pp 64–65

135. Ibid, pp 55–56

136. Ibid, pp 59–60

137. Crown counsel, closing submissions, p 130

138. Ibid, pp 127–128

not necessarily required, since the Waipounamu deeds could be seen as extinguishing their rights on the West Coast.¹³⁹

(4) Tribunal discussion and findings

(a) Was there an adequate inquiry into Te Tau Ihu iwi rights in the western part of the takiwa prior to completing the Arahura purchase? Until the 1860s, the West Coast was only infrequently visited by Pakeha and was very little known. The Crown's inquiry into customary rights there in the period leading up to the Arahura purchase was limited to what was learned by James Mackay during his three visits to the region. From the perspective of the Crown there was no need to inquire extensively, since the rights of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa had already been acquired (in the Waipounamu purchase), and there had long been an intention to extinguish what was regarded as the only other remaining claim, that of Poutini Ngai Tahu. Mackay was sent with instructions to accomplish this objective, but he did discuss recent West Coast history with Ngai Tahu (he was an accomplished Maori speaker), and satisfied himself that their claim was valid despite their defeat in what he called the 'partial conquest' occurring before 1840. He accepted that Ngai Tahu had the right to offer land up to Kahurangi, though of course he was thinking more about the boundary with Te Tai Tapu than the extent of customary rights. He accepted Ngai Tahu claims up to Kahurangi just as McLean had accepted the northerners' claims down past Arahura; that is, as claims to be extinguished.

In the eyes of Ngai Tahu, this was an adequate inquiry, since it validated their claim to ancestral rights along the whole stretch of coast and accepted that their interests had not been extinguished by the incursion of the northern tribes. It had the defect, however, of being based solely on discussions with Ngai Tahu. Mackay learned nothing from Ngai Tahu about the historical presence of Ngati Apa in the northern part of the region, and did not think of exploring this matter himself. We do not know whether Puaha Te Rangi talked to him about it during their many months of travel to and around the West Coast, but it was only when publicly faced with Puaha's intervention at Poerua in 1860 that he was compelled to make a decision on the issue. Even then, he did not 'inquire' further but simply accepted the legitimacy of his associate's demand for recognition and Ngai Tahu's recommendation that it be granted.

In our view, Ngati Apa have a strong case for their assertion that the Crown failed to conduct an adequate inquiry into customary rights on the West Coast before making its agreement with Ngai Tahu in 1860. We concluded in chapter 2 that Ngati Apa had, along with Ngai Tahu, made customary use of the border lands in Kawatiri and northwards, but, after the interests of the raupatu tribes had been acquired, the Crown made no attempt to

139. Crown counsel, closing submissions, p 129

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ascertain whether Ngai Tahu were the only remaining right holders in the region. It was due solely to Puaha Te Rangi's demand that Mackay was forced to consider Ngati Apa's rights at all. As we said earlier in the chapter, the Crown did not claim that its inquiries in Te Tau Ihu had been adequate, but it submitted that the customary rights were not settled at the time and were thus not easily discerned. We do not reject this view altogether, but point out that no effort at all was made to find out what rights existed, other than to explore Ngai Tahu's view of the matter. It is not surprising in these circumstances that Ngati Apa's rights did not emerge until they were presented publicly by Ngati Apa themselves. We note also that, because no inquiry was made at the time, we cannot now be fully certain about the history of this iwi on the West Coast and whether it should have received more acknowledgement than was given in 1860.

(b) *Were the customary rights of Te Tau Ihu iwi fully considered in the Arahura purchase?*

With regard to the rights of the northern raupatu tribes, the Crown had already dealt with them before undertaking the purchase from Ngai Tahu. In the course of negotiating the Arahura transaction, the Crown did not accept the strongly worded protests of Ngai Tahu against the earlier recognition of the northerners' rights. In fact, the Waipounamu purchase was used to some extent as a bargaining tool, and the Crown did not depart from its view that the claims of Ngati Toa and associated tribes on the West Coast were valid and had been recognised. Its objective in 1859–60 – to recognise and extinguish Ngai Tahu rights – did not mean that recognition of the rights of the northern tribes had been withdrawn.

It is in this context that attention has been drawn to the presence of two prominent Golden Bay chiefs in Mackay's entourage in 1860. The Mitchells say that Tamati Pirimona (Marino) (Ngati Tama, Ngati Rarua, and Te Atiawa) and Hori Te Karamu (Ngati Tama) were not just expeditionary guides and were present at the negotiations to watch over the northerners' interests and to see that the mana of their tribes was maintained – a mana that had already been acknowledged in the Waipounamu purchase and could now be displayed in the chiefs' role as witnesses sanctioning the sale by Ngai Tahu.¹⁴⁰ We believe, as we explained in chapter 2, that the northern tribes still had rights on the West Coast in the 1850s (although they were not as strong as they had been before 1837, and were probably continuing to weaken), and a role of this kind in the Arahura purchase is consistent with a continuing northern presence in the region.

Certainly, it is a fact that a number of Ngati Rarua, Ngati Tama, and Te Atiawa people were included in the ownership lists of the reserves created in connection with the Arahura

140. Hilary Mitchell and Maui John Mitchell, 'Boundary Issues: West Coast of the South Island', report commissioned by Te Runanganui o te Tau Ihu o te Waka a Maui, 1990 (doc A82), p 37; Hilary Mitchell and Maui John Mitchell, statement of response on behalf of Ngati Tama concerning evidence of Ngai Tahu, 26 September 2003 (doc Q21), pp 23–24

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purchase. As we noted earlier, according to the Mitchells the lists for at least 22 of the 47 occupation reserves included the names of people descended from those tribes (and Ngati Apa). Precisely how this happened is not recorded (although Walzl gives the example of the Te Piki whanau of Ngati Rarua, who successfully presented Mackay with their case for being given reserves at Kawatiri, where they were living in 1860).¹⁴¹ The Mitchells suggest that Pirimona and Te Karamu were instrumental in seeing that their relatives on the West Coast were included in the reserves.¹⁴² In the words of these authors, 'our clients argue that Ngai Tahu can scarcely claim exclusive manawhenua to as far north as Kahurangi Point, when from one end of the purchase area to the other, northern Maoris have ownership rights on a very significant proportion of the reserves'.¹⁴³ It should be noted too, as further illustration of the northerners' presence and authority on the West Coast, that Pirimona, Te Karamu, and other chiefs of the northern tribes were leaders in the Kawatiri gold rushes in the years following 1861. Pirimona was prominent there for years (and owned land there), and Te Karamu died and was buried there.¹⁴⁴ Most of the Maori who purchased land at Karamea in the 1860s were Ngati Tama.¹⁴⁵

It has been suggested that the inclusion of members of the northern tribes in the West Coast reserves was not merely an indication of their continuing assertion of rights in the region, but a final stage of the Waipounamu purchase. We have already mentioned the Ngati Rarua submission to this effect. The Crown historian Michael Macky accepted that the Arahura purchase was a continuation of the Waipounamu transactions.¹⁴⁶ It is true that no reserves had been created for the northern tribes on the West Coast when they relinquished their interests to the Crown in the 1850s. The Mitchells argue that the Waipounamu vendors now took the opportunity of obtaining the reserves they had not received before.¹⁴⁷ We accept that the Arahura purchase was a continuation of the Waipounamu purchase in the sense that it completed the extinguishment of claims on the West Coast, but we do not consider that this extended to the creation of reserves for tribes whose interests had already been bought. The northern tribes did still have rights in the region, but few members of these tribes resided there by 1860. It could hardly be said that there were communities of Ngati Rarua, Ngati Tama, and Te Atiawa on the West Coast by this time. People of these tribes were awarded interests in the reserves, which led to Ngati Rarua's submission that this was a 'rare moment' of Crown adherence to the Treaty. The interests were usually not substantial, however, which led to the submissions of Ngati Tama and Te Atiawa that the reserves set

141. Walzl, pp 47, 59, 61

142. Mitchell and Mitchell, 'Boundary Issues', p 35

143. Ibid, p 52

144. Mitchell and Mitchell, 'West Coast of the South Island', pp 49–58

145. Ibid, pp 81–82, table 10.4

146. Michael Macky, eighth hearing, 17–19 February 2003 (transcript 4.8, pp 216, 218–219)

147. Mitchell and Mitchell, 'Boundary Issues', pp 35, 52

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aside for them did not adequately reflect the extent of their tribal rights on the West Coast. (The Crown followed its usual pattern here by arguing in its submission that the extent to which these tribes were entitled to be included in the reserves depended on the extent of their customary rights, for which the evidence was considered to be ‘indeterminate’.)

We consider that the rights of the northerners included in the reserve ownership lists were not those of a Ngati Rarua, Ngati Tama, and Te Atiawa community operating independently of Ngai Tahu but those of individuals enjoying rights of residence by means of post-raupatu occupation and marriage into Ngai Tahu. The Crown had already dealt with Ngati Rarua and the other northern tribes as ‘tribal’ entities in the Waipounamu purchase. Over the years, northerners had established individual residential interests and married into the host community. Ngai Tahu was apparently willing to allow residence rights to individuals who belonged to other tribal groups and who usually also had ancestral or marriage connections with Ngai Tahu. Such people, perhaps especially when their rights were championed by the northern chiefs accompanying Mackay, were thus considered in the Arahura purchase and a good number of them found their way into the reserve allocations, but the question of iwi rights does not arise here.

The situation of Ngati Apa was rather different. We repeat that no inquiry had been made to ascertain the rights of this tribe, but that as a result of Puaha Te Rangi’s ‘demand’ during the negotiations, a Ngati Apa claim had entered the public arena. Despite the lack of inquiry, then, their customary rights had been asserted and to some extent were recognised in the form of participation in the signing of the deed, a share of the payment, and the granting of some reserves. The Crown recognised the existence of Ngati Apa as a separate iwi on the West Coast and acknowledged the claim of Ngati Apa people to customary rights in the region. Ngai Tahu also recognised Puaha’s claim, and in fact recommended that the Crown accept it. This was the first and only time in which Ngati Apa rights were recognised in the Crown’s nineteenth century purchasing programme in the South Island, but it was a limited recognition. Ngati Apa were not mentioned in the deed. We agree with Ngati Apa’s submissions that the acknowledgement was belated and was given only because Puaha demanded it, that it was not recorded on a deed separate from Ngai Tahu’s, that it did not define the interests that were being recognised, and that the reserves resulting from it were ‘uncertain and unquantified’ and by no means generous.

Who was Puaha Te Rangi? He first enters the story as one of Mackay’s travelling companions from Nelson to the West Coast in 1860. Unlike Pirimona and Te Karamu, the other two Maori associates on that journey, Puaha had not previously figured publicly in Te Tau Ihu affairs, although he was of chiefly rank. The Mitchells explain that he was of Ngati Apa descent and married to the sister of the late Ngati Apa chief Te Rato (Te Kotuku). He was a brother (or maybe cousin) of Mata Nohinohi (Ngati Apa and Ngai Tahu), who was the mother of Kehu (Heaphy’s guide in the 1840s). By a later marriage to Mahuika (Ngati

Apa), she was the mother of the Mahuika whom Heaphy encountered at Kawatiri.¹⁴⁸ The Mitchells and Armstrong have written in their research reports that Puaha usually lived at Te Tai Tapu and, together with Mata and Mahuika, at Kawatiri, where Puaha had ‘reached an accord’ with the northern tribes, and that he often travelled between the two areas.¹⁴⁹ Puaha’s Ngati Apa ancestry is undoubted, but we are not sure that the evidence for this account of his life history is strong. In later evidence, presented during our hearings, the Mitchells state that Puaha appears on the 1857 electoral roll as a resident of Collingwood, but they admit that there is no documentary record of him until then. Perhaps, they suggest, he was living somewhere remote, such as Kawatiri or Karamea, before this time, but ‘if that was the case it is surprising that Mackay made no reference to it on their 1860 journey’. Another possibility is that he had been a slave of the northerners at Aorere in Golden Bay.¹⁵⁰ Armstrong suggests that Mackay brought Puaha with him in 1860, not because he needed a guide but because he then knew that Ngati Apa possessed rights at Kawatiri and realised that ‘the presence of senior and representative Ngati Apa chiefs at the purchase negotiations was an essential prerequisite if the land was to be acquired.’¹⁵¹ This is probably going too far, although it is true that we have no information about what Mackay knew or had been told about the Ngati Apa presence at Kawatiri. Whatever Puaha had been doing in the previous 20 or 30 years, and whatever the reason for his accompanying Mackay in 1860, it is clear that he belonged to the Ngati Apa tribe and asserted their Kawatiri claims during the Arahura negotiations, and that he and his wife Ramari, together with his sister or cousin Mata Nohinohi and her Mahuika sons, were named as owners of several occupation reserves and town sections at Kawatiri and an occupation reserve at Karamea.

We do not ignore Ngai Tahu’s view of what happened – that the people represented by Puaha, far from being a group with traditional rights, were persons ‘describing themselves as Ngati Apa’ but actually close relations of Ngai Tahu and recent settlers in Kawatiri as part of a Ngai Tahu move there. During our inquiry, the present-day Ngai Tahu emphasised that the Arahura deed was between their Poutini ancestors and the Crown, and that the ‘Ngati Apa’ group received a payment share and some reserves because the Ngai Tahu of the time agreed that this should happen. We do not agree that Ngai Tahu’s acceptance of Puaha’s demand in 1860 is irrelevant to the existence or otherwise of customary rights (the view of Ngai Tahu now being that Ngati Apa had no rights on the West Coast other than those of residents there with the permission of Ngai Tahu). Indeed, we place a good deal of weight on it, since it is one of a number of instances in which a separate Ngati Apa community

148. Mitchell and Mitchell, ‘Boundary Issues’, p 32. In a later report, these authors describe Mata as Puaha’s sister, though a whakapapa they attach shows them as being cousins: Mitchell and Mitchell, ‘West Coast of the South Island’, p 72, and accompanying document bank, p 123.

149. Mitchell and Mitchell, ‘Boundary Issues’, pp 8, 32

150. Mitchell and Mitchell, statement of response on behalf of Ngati Tama, pp 20–21

151. David Armstrong, ‘Ngati Apa ki te Ra To’, report commissioned by the Ngati Apa ki te Waipounamu Trust Claims Committee, 1997 (doc A29), p 71

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was named and recognised by all parties at the time. We have already questioned the Ngai Tahu view of the identity of the Kawatiri people whose interests were being advocated by Puaha (see sec 2.5.2). Also, we place some weight on the fact that Puaha signed the deed and received payment as a Ngati Apa representative, and we think the actual words used by Mackay in his account are important. The Crown's official had not considered Ngati Apa's claims before, but now he described Puaha's intervention as a 'demand' (not a plea or a request, and made to him rather than to Ngai Tahu), and he could see that Tarapuhi and the other Ngai Tahu present 'admitted the justice of these claims' and 'pressed' him to 'award compensation for them'. He decided it would be 'expedient' to agree: that is, he accepted the claims as valid in order to avoid trouble that might arise later from allegations that Ngati Apa rights had not been recognised. Such a recognition of Ngati Apa had not been made elsewhere in Te Tau Ihu, though it might have been if Crown officials had ascertained the tribe's rights by inquiry and had deemed it 'expedient' to recognise them. On this occasion the existence of their rights did emerge, and the Crown found it useful to acknowledge them. It does not seem to us that Puaha would have asserted Ngati Apa identity and demanded the recognition of Ngati Apa claims if the interests of the Kawatiri people were going to be acknowledged anyway (as Ngai Tahu interests). We are mindful here too of the statement of the Ngai Tahu chief Wereta in 1849 that there was a 'settlement at Kawatiri inhabited mostly by members of the Ngatiapa hapu' (as discussed in chapter 2).

The recognition of Ngati Apa rights at Kawatiri, limited though it was, throws strong doubt on the idea that Ngai Tahu rights on the West Coast, especially in the northern area from Kawatiri to Kahurangi, were exclusive. The Crown did recognise Ngai Tahu rights in the area now described as the Ngai Tahu takiwa, but it also recognised that Ngati Apa had rights in this area too. In our view this belated and limited recognition accorded with the reality that rights in the northern part of the takiwa were shared.

(c) To what extent were the boundaries of the takiwa portion of the Arahura purchase adequately explained? The boundaries of the Arahura purchase in 1860 were the same as those described in considerable detail by Ngai Tahu when they offered to sell in 1857, and the same as those used in the unsuccessful 1859 negotiations. The boundaries were used again in 1860, and were clearly shown on the map accompanying the deed. There are no grounds for saying that the Crown and Ngai Tahu differed in their understanding of what area was covered by the purchase. We do not disagree, however, with Ngati Apa's submission that the boundary running inland from Kahurangi Point was artificial, a Pakeha line drawn without reference to customary resource use. This raises the issue of whether the placing of the northern coastal boundary at Kahurangi was determined with reference to customary rights, as Ngai Tahu say, or simply because previous land transactions had established a boundary there, as Ngati Apa say. Our understanding is that Ngati Apa customary rights extended south of Kahurangi into a zone where rights were shared with Ngai Tahu. Although Ngai

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Tahu did nominate Kahurangi as their northern border in the 1857–60 negotiations, the Arahura purchase boundary was placed there not because Ngai Tahu had exclusive rights up to that point but because the Te Tai Tapu land excepted from the Waipounamu purchase had its southern boundary there.

(d) *The 1990 Maori Appellate Court decision to award Ngai Tahu exclusive rights in the statutory takiwa on the basis of the Arahura purchase:* The decision of the Maori Appellate Court in 1990 was to award Ngai Tahu sole rights on the West Coast up to Kahurangi Point. As on the east coast, this award was made on the ground that at the time of the final Crown purchase, Ngai Tahu was the only iwi that had valid customary rights in the territory defined by the deed of purchase. Our conclusions in chapter 2 about customary rights in the northern part of the West Coast region were quite different to this, in respect of both Ngati Apa and the northern tribes. The decision of the Maori Appellate Court mentioned Ngati Apa's claimed rights in the area, but did not discuss the issue of what rights existed before the northern invasion. The judgment focused on the nature of the rights possessed by Ngati Apa at Kawatiri after they were defeated throughout Te Tau Ihu by the northern tribes. Ngati Apa argued that their rights on the West Coast had been acknowledged by Ngai Tahu's acceptance of Puaha Te Rangi's participation in the Arahura purchase, and by the inclusion of Ngati Apa members in the Kawatiri reserves. Ngai Tahu argued that the Kawatiri people were 'remnants' who sought and were granted refuge with Poutini Ngai Tahu after their defeat by the northerners, and that they were 'a few individuals rather than a tribal entity'. They also argued that Puaha was Ngai Tahu as well as Ngati Apa. The court found no evidence to support any Ngati Apa rights greater than 'a mere right of residence'.¹⁵² This decision was a rejection of the much greater rights claimed by Ngati Apa – a claim that we have found is valid. The decision was in favour of Ngai Tahu rights that we have found were not exclusive but which were the only ones being considered when the Crown set out to conduct the Arahura transaction. The Crown did not inquire into who had rights south of Kahurangi and did not base its purchase boundary on rights. In 1989, however, the Maori Appellate Court was asked to consider what rights existed within an area defined by the most recently created purchase boundary, one that was agreed with one tribe only in the final negotiations undertaken by the Crown (in 1860). The court thus focused on Ngai Tahu rights, the only ones considered to be unextinguished at that time.

(e) *Tribunal findings on the Crown's consideration of Te Tau Ihu iwi rights in the takiwa during the Arahura purchase:* Our review and discussion of the Crown's treatment of the rights of the iwi of Te Tau Ihu in its execution of the Arahura purchase lead us to several findings.

152. *In the Matter of a Claim to the Waitangi Tribunal*, pp 19–24

We find that the Crown did not conduct an adequate inquiry into customary rights on the West Coast before concluding the purchase. It was not regarded as necessary to make such inquiries, since the objective was simply to extinguish the claims of the only tribe thought still to have such claims in the region. The Crown official responsible for the purchase, James Mackay, did satisfy himself that Ngai Tahu's claims were valid, but he gave no consideration to the possibility that other tribes might also have rights in the area. Consequently, the rights of Ngati Apa did not emerge until a member of that tribe publicly claimed them. Even then, Mackay made no inquiry but simply accepted the claim along with Ngai Tahu's. This failure to inquire into and properly identify the customary rights of the tribes in the area amounted to a breach of the Treaty principles of active protection, partnership, and reciprocity. In so far as Ngai Tahu's rights were investigated but Ngati Apa's were not, a breach of the principle of equal treatment had occurred.

The recognition of Ngati Apa rights on the West Coast was a first for this tribe in the whole history of Crown dealings with Maori in Te Tau Ihu. We find, however, that the rights of Ngati Apa, though belatedly acknowledged, were recognised only to a limited degree. They had not been investigated, and while the tribe received a payment and some reserves, this was done not as a separate agreement but as part of a transaction with Ngai Tahu. The procedure followed by the Crown meant that Ngati Apa had no real option other than to acquiesce in the sale and to accept the reserves as the limit of their interests. The northern boundary of the purchase area was determined by previous Crown purchase arrangements rather than by the existence and extent of tribal rights, but, because it was set out in a deed with Ngai Tahu that made no reference to Ngati Apa, it permitted a later misapprehension that Ngai Tahu's rights up to the boundary had been recognised as exclusive. Again, these actions and omissions of the Crown breached the principles of active protection, partnership, and equal treatment.

We do not make specific findings in respect of the Crown's treatment of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa in the Arahura purchase, since their rights had already been dealt with in the Waipounamu purchase. Members of these tribes were included in the reserves created in accordance with the Arahura purchase, but we see this as a recognition of individual residential rights rather than of tribal rights.

3.3.4 The Young commission, 1879

Although the Arahura transaction conducted with Ngai Tahu in 1860 had to some extent recognised the rights of other tribes and individuals on the West Coast, especially by including non-Ngai Tahu people as sole or part owners of occupation reserves situated in many parts of the region, this recognition was modified when the reserve ownership lists were put under scrutiny in 1879. In evidence and submissions from the Te Tau Ihu iwi, it is

alleged that the Crown did not protect the rights of these tribes in respect of their reserve entitlements.

In 1878, when the Ngai Tahu owners of the Grey River reserve requested the Government to issue Crown grants for their land as a way of protecting it from alienation, the Native Minister appointed Thomas Young as a commissioner to investigate the ownership of all the West Coast occupation (schedule A) reserves. He was asked to ascertain the names of all 'individual Natives beneficially entitled' to the reserves, and to determine their respective shares. In the style of the Native Land Court, Young conducted hearings at Greymouth in January 1879, receiving evidence from claimants and witnesses. Alexander Mackay (the commissioner of native reserves) was also present, contributing his opinions on several cases and otherwise taking an active part in the proceedings. The Young commission presented its report in February 1879. It stated that it had identified 'as nearly as possible the different interests of the persons found to be owners', and 'ascertained by careful enquiry' the persons entitled to succeed to the interests of owners who had died. The decisions made and reported were in effect an adjustment of the entitlements that had been determined previously.¹⁵³

Evidence presented by the non-Ngai Tahu claimant iwi stated that the outcome of this inquiry was the unfair exclusion of some of their ancestors from interests in the reserves. According to the Mitchells, the decisions made by the Young commission sometimes confirmed the interests of people who were not of Ngai Tahu affiliation but also sometimes removed such people from the entitlements altogether, or diluted their interests by the insertion of Ngai Tahu people into the lists of owners. The Mitchells' detailed research indicated to them that the commission's procedure was very defective in several ways, including its acceptance of what they regard as the dubious evidence of prominent Ngai Tahu participants. They conclude that the Crown-appointed commissioner failed to protect the rights of non-Ngai Tahu owners, and that Mackay was implicated in this questionable outcome.¹⁵⁴

In their report, the Mitchells give particular attention to what the commission decided about the interests of Wikitoria Te Piki, who was the daughter of Riria Te Piki (Ngati Rarua) and Rawiri Koka. They identify Koka as Ngati Apa, the son of Te Rato [Kotuku] and thus nephew of Ramari, the wife of Puaha Te Rangi.¹⁵⁵ Riria and her children, Wikitoria and Hakaraia, between them originally had interests in four reserves. The Young commission permitted Wikitoria to succeed to five reserves originally owned by her father's brother, Karitopira, three originally owned by her mother or her brother (or both), two originally partly or wholly owned by her great-aunt on her father's side (Puaha's wife, Ramari), and one originally solely owned by Mata Nohinohi (described by Ngai Tahu at the time and

153. Alexander Mackay, 'Native Reserves, Nelson and Greymouth', AJHR, 1879, sess II, G-3, p 1; Thomas Young, 'Native Reserves on the West Coast, Middle Island', AJHR, 1879, sess II, G-3B, pp 1-22

154. Mitchell and Mitchell, 'West Coast of the South Island', pp 59-75, 87

155. Ibid, pp 60-61

also by the Mitchells as Puaha's sister, though a whakapapa provided by the Mitchells shows Puaha and Mata as cousins).¹⁵⁶ In all these interests, as well as in a reserve of which Wikitoria was sole owner, the name of Ihaia Tainui (son of Wereta Tainui and grandson of Tuhuru, chiefs of Ngai Tahu) was inserted as joint owner. The Mitchells describe the way in which Tainui and Teoti Mutu (his brother-in-law) persuaded Young to make these decisions as 'subterfuge', and 'blatant deceptions', since they had no authority over Wikitoria's interests.¹⁵⁷ It seems that none of the Te Piki whanau or their close relatives was present at the hearings. Alexander Mackay explained to Young that Tainui was 'a near relative' of Wikitoria, but the Mitchells say there is no evidence for this, and that such a relationship was a 'fiction'.¹⁵⁸ Mutu, a prominent Ngai Tahu witness at the hearing, claimed to be the 'nearest relative' of Koka's brother Karitopira (Wikitoria's uncle).¹⁵⁹

This situation was also examined by Walzl, who agrees that the Young commission reduced the interests of the Te Piki whanau by accepting Tainui as spokesman for Wikitoria Te Piki on the grounds of relationship – asserted but not demonstrated – and by inserting him as a joint tenant in Wikitoria's interests.¹⁶⁰ Walzl goes on to trace the long history of Tamihana Te Huirau's protests against this outcome. Wikitoria died soon after the commission's hearings, and her husband, Te Huirau, who was also her cousin on her Ngati Rarua side, was told by Alexander Mackay that her next of kin were Ngai Tahu. Later, the Native Land Court confirmed that Wikitoria's interests had reverted to Tainui on her death, and had since passed to Tainui's heirs. Te Huirau's further efforts in the 1890s were met with an official unwillingness to revisit the Young commission's determinations, but he continued his attempt to be recognised as heir. His letters and his petition to Parliament in 1920 were of no avail, and when he died in 1922 the case lapsed.¹⁶¹ Walzl does not explore the genealogical uncertainties of the Te Piki case, though he does record the information given by Te Huirau in 1920 that Riria Te Piki's husband Koka, the father of Hakaraia and Wikitoria, was Ngai Tahu.¹⁶² Evidence given by Tuirirangi Martin of Ngati Rarua also tells the story of the 'crusade' mounted over so many years by Te Huirau (to whom this witness is related), and asserts that the Crown did not protect his legitimate interests.¹⁶³ In a whakapapa attached to Mr Martin's evidence, Wikitoria Te Piki's father Koka is identified as Ngati Tumatakokiri.¹⁶⁴

In a later paper, the Mitchells refer again to the Young commission. This time, they include Ngai Tahu in the ancestry of Wikitoria and Hakaraia Te Piki's father Rawiri Koka,

156. Young, p 12; Mitchell and Mitchell, 'West Coast of the South Island', p 72, and accompanying document bank, p 123

157. Mitchell and Mitchell, 'West Coast of the South Island', pp 62–63, 67

158. Young, p 11; Mitchell and Mitchell, 'West Coast of the South Island', pp 63, 66

159. Young, p 4

160. Walzl, pp 50–54, 67–68

161. Ibid, pp 54–64, 68

162. Ibid, p 29

163. Tuirirangi Martin, brief of evidence, 31 July 2003 (doc Q12), pp 3–12

164. Ibid, app 2

whom they describe as Ngati Apa and Ngai Tahu, or 'Ngai Tahu (possibly also Ngati Apa)'.¹⁶⁵ At our hearings, they referred to him as 'probably Tumatakokiri and Ngai Tahu'.¹⁶⁶

Other iwi also featured in the Young commission's decisions. Interests in two reserves had been allocated to Poharama Hotu, a chief of Te Atiawa. In one of these, at Kararoa, he was listed as the sole owner. The commission heard from Mackay that it had not been intended that Hotu and his family should own the reserve permanently (he had been allowed to have it by Ngai Tahu as 'an act of grace'), and it decided that, now that he was dead, the reserve should go to Ngai Tahu rather than to Hotu's heirs. His name was also removed from the list of owners of the other reserve (on the Mawhera River).¹⁶⁷

In the case of Hone Kaiaia of Ngati Tama, however, his ownership of one of the Kawatiri reserves was confirmed (with his grand-daughter added, at his request, as joint tenant), even though he lived at Collingwood. This may have been the only case in which a non-Ngai Tahu owner was consulted.¹⁶⁸ Six reserves in South Westland originally allocated to Wi Te Naihi of Ngati Rarua, who married a Ngai Tahu woman, were confirmed in the ownership of that whanau.¹⁶⁹

Ngati Apa's interests were treated in a variety of ways, as the Mitchells show. Armstrong's report for Ngati Apa mentions these findings but does not extend them. Henare Mahuika was confirmed as the owner of one reserve, and in another he and his brother Hoani were named as successors to their late uncle Puaha Te Rangi. But a reserve originally in the name of Puaha's widow, Ramari, went to Wikitoria Te Piki and Ihaia Tainui, and Ramari's share in the Karamea reserve also went to them, although it was not demonstrated to the commission how they could be Ramari's closest relatives. The other owner of the Karamea reserve was Mata Nohinohi, whose sons (the Mahuika brothers) were named as her successors, but Mata had been the sole owner of another reserve to which Wikitoria and Tainui now succeeded. The Mitchells find these decisions inconsistent and sometimes 'baffling'. Tainui's name had been inserted into several reserves to which he had no obvious entitlement and into some to which neither he nor Wikitoria Te Piki seemed to be entitled. In this way, some of the Kawatiri and Karamea reserve interests that had originally been allocated to Ngati Apa people (Puaha Te Rangi, his wife, Ramari, and Mata Nohinohi) were 'alienated from the Mahuika family'.¹⁷⁰

In the view of the Mitchells, the tribes affected negatively by the Young commission (Ngati Rarua, Te Atiawa, and Ngati Apa) deserve to have these events investigated. Many of the commission's decisions were 'inappropriate', especially the insertion of Tainui into

165. Mitchell and Mitchell, statement of response on behalf of Ngati Tama, p 18; Hilary Mitchell and Maui John Mitchell, accompanying documents to statement of response, various dates (docs Q21(a)–(e))

166. Hilary Mitchell and Maui John Mitchell, seventeenth hearing, 13–17 October 2003 (transcript 4.17, p 390)

167. Mitchell and Mitchell, 'West Coast of the South Island', pp 64–65

168. Ibid, p 67

169. Ibid, p 62

170. Ibid, pp 66–73

so many titles. The Mitchells say that the failure of the commission's officers, Young and Mackay, to protect the rights of non-Ngai Tahu owners was a failure of the Crown. In their opinion, this failure occurred when Young and Mackay did not ensure that the original owners or their descendants were present at the hearings or were consulted on the transfer of their interests; did not question the submissions of Tainui and Mutu; gave approval of Tainui's insertion into the reserves without whakapapa evidence and, in some cases, with an original sole owner still living; and allocated interests outside clear succession lines on little or no whakapapa evidence.¹⁷¹ At the heart of the Mitchells' case is their contention that customary rights were disregarded and whakapapa relationships misrepresented. In particular, they say, many 'Ngai Tahu' seemed to have claims which 'seem more attributable to their Ngati Apa connections than their Ngai Tahu roots'.¹⁷² In this way, much of the evidence presented to the Young commission 'distorted the relationships' that 'probably' existed before the Arahura purchase.¹⁷³

In evidence presented for Ngai Tahu, however, McAloon makes no criticism of the Young commission's decisions, which in his view were consistent with the situation pertaining at the time of the Arahura purchase, when Ngai Tahu had been willing to allow residence rights to individuals who belonged to other tribal groups. He adds that 'apparently all the individuals described as Ngati Apa also had Ngai Tahu ancestry'.¹⁷⁴ McAloon suggests that Poharama Hotu's heirs were not given his reserves by Young because the land had been a *tuku* to him personally, that Wikitoria Te Piki's interests passed eventually to Ngai Tahu because her father was Ngai Tahu, and that the claims of the Mahuika whanau were based on the Ngai Tahu rights of their mother Mata Nohinohi.¹⁷⁵ In the report by Tau, too, the West Coast claims of the Mahuika whanau are explained as being through Mata Nohinohi and her Ngati Wairangi and Ngai Tahu ancestry. Tau refers to the acknowledgement of this ancestry by Mahuika representatives in the Native Land Court in 1926.¹⁷⁶

(1) Claimant submissions

In their amended statement of claim, Te Atiawa mentioned the Young commission's removal of Poharama Hotu from the ownership of two reserves and asserted that the commission's failure to investigate Te Atiawa interests was a Treaty breach. However, this claim was not referred to in the iwi's closing submissions.¹⁷⁷

171. Ibid, pp 74–75

172. Ibid, p 59

173. Mitchell and Mitchell, statement of response on behalf of Ngati Tama, p 25

174. McAloon, p 140

175. Ibid, pp 87–90

176. Te Maire Tau, 'The Oral Traditions Concerning the Areas in Dispute [Ngai Tahu]', revised ed, report commissioned by Te Runanga o Ngai Tahu, [2003] (doc Q5(a)), pp 146–149

177. Te Atiawa, statement of claim, 14 February 2003 (claim 1.14(c)), pp 8–10, 12

3.3.4(2)

Only one claimant iwi made a submission about the Young commission. In their closing submissions, Ngati Rarua outlined the case of the Te Piki whanau, whose ownership status in a number of reserves was diluted by the addition of Ngai Tahu grantees, who later succeeded to the whole of the interests. It was alleged that Crown officials refused to consider that an injustice had occurred, or even to investigate matters, with the result that Ngati Rarua's reserve ownership on the West Coast 'was brought to an end by Crown action'.¹⁷⁸

No submissions on this matter were received from Ngai Tahu or the Crown.

(2) Tribunal discussion and findings

We are concerned here with the extent to which the Crown-appointed Young commission carried out a fair and proper inquiry into reserve titles on the West Coast. It appears to us that the way in which the commission hearings were conducted was defective. In particular, it seems that not all those with interests in the reserves had representatives present. Many people did attend and made submissions, but nothing was heard from the Te Piki or Mahuika families. Great reliance was placed on the representations of Ihaia Tainui, which were often accepted without question. Commissioner Young did not inquire into Tainui's authority to speak for the Te Piki whanau, and put confidence in Mackay's assertion that such authority existed. The relationships hinted at were not explored, or at least were not recorded as publicly presented evidence. Later, the Crown declined to revisit the commission's decisions or to make a proper investigation of claims that they were unfair.

Te Atiawa allege that the heirs of Poharama Hotu were disadvantaged by his exclusion from the two reserves he had been allocated in the 1860s. It might well be, however, that he had indeed been allowed them originally as a *tuku* from Ngai Tahu, as the commission was told. We do not have enough evidence about this to come to a firm conclusion.

In the case of the Ngati Rarua and Ngati Apa whanau whose interests were diluted or terminated by the commission, it appears on the face of it that they did indeed lose their rights in some of the reserves as a result of the Crown's actions. This looks like a failure to protect their rights. The whakapapa of the Te Piki whanau is still somewhat obscure, however. Clearly, they were Ngati Rarua on their mother Riria's side, but the tribal identity and family history of Riria's husband Koka have not been clearly explained to us. He has been variously described as Ngati Apa, Ngati Tumatakokiri, and Ngai Tahu. We have not been given enough information to be sure about the complex whakapapa relationships that appear to have underlain the commission's decisions about the rights of this whanau. The identity of Puaha Te Rangi, his wife Ramari, and the Mahuika brothers is more clearly Ngati Apa, as they themselves asserted. We have already discussed the way in which a distinct Ngati Apa community was accepted in the Arahura negotiations of 1860 as having rights at Kawatiri, and we believe these rights were customary ones based on traditional use of the area along

178. Counsel for Ngati Rarua, closing submissions, pp 171, 174

with Ngai Tahu. We accept, however, that there were whakapapa relationships between Ngai Tahu and the Ngati Apa people we are concerned with here, and again we do not have enough information to be able to say confidently that the decisions of the Young commission distorted these relationships.

Our finding, therefore, is that the Crown breached the Treaty principles of partnership and active protection by carrying out an inquiry that purported to be an investigation of ownership rights in the West Coast occupation reserves but that was not conducted in an appropriately transparent manner. Not everyone with interests in the reserves was represented, and it was not publicly demonstrated why so much reliance was placed on the evidence of prominent Ngai Tahu witnesses. This failure was compounded later when the Crown declined to entertain complaints that the commission's decisions were unfair.

Whether the rights of certain people of Ngati Rarua and Ngati Apa were wrongly removed from them as a result of the commission's activities depends on fuller information than we have been given, and we do not make a finding on that particular issue.

3.3.5 Cases in the Native Land Court, 1921–48

It was not until 60 years after the Arahura purchase that the determination of beneficial rights in the West Coast endowment reserves (schedule B) began. The iwi of Te Tau Ihu have not claimed that the decisions of the Native Land Court on this matter breached the principles of the Treaty. It is necessary, however, for us to review what happened as a background for some of the late twentieth century events we deal with in the next chapter

Of the 3500 acres set aside in 1860 between the Heaphy and Arawhata Rivers as schedule B reserves ('for Religious, Social and Moral purposes'), 1780 acres were located in the northern part of the area (north of the Buller River). This land consisted of six separate reserves: one just south of the mouth of the Heaphy River (not to be confused with another reserve that was later created in this vicinity under the landless natives scheme, which we will discuss in our final report), a large and a small block at Karamea, a block at Mokihinui, another at Waimangaroa north of the Buller River, and one on the river itself. There were also 40 town sections at Westport, with a total area of 10 acres. As endowment reserves, these blocks were all put under the Native Reserves Act from the beginning, and made available for leasing. Apart from 270 acres taken from the Buller River reserve for river works in 1881, and a small area sold at Karamea, all of the endowment land in this area is still in Maori ownership (since 1976, under the Mawhera Incorporation). We will consider the administration of this estate by the Public Trustee and Native (later Maori) Trustee in our final report, but here we are concerned with beneficial rights in the reserves.

The process of determining ownership rights began in 1914 with an application by some Ngai Tahu to the Native Land Court in respect of the reserve at Cobden (on the Mawhera River). The case was completed in 1920, when the interests were awarded to Tuhuru's

descendants.¹⁷⁹ In 1921, the process was extended to the other endowment reserves. The Native Land Court began hearings in relation to all the remaining schedule B reserves (except the Westport town sections), with Ngai Tahu's JHW Uru asking that they all be awarded to Tuhuru's descendants, as had been done for the Cobden block. The outcome of this case was that in 1923 the court awarded two-thirds of the interests to the Tuhuru family and the remaining third to other Ngai Tahu claimants.¹⁸⁰

In his account of the case, Armstrong states that Uru mentioned the demand made in 1860 by Puaha Te Rangi for reserves at Kawatiri and said that Ngati Apa people there should get lands as compensation. Armstrong regards this as a Ngai Tahu acknowledgement that the Kawatiri lands were more closely associated with Ngati Apa and, in effect, a Ngai Tahu recognition of Ngati Apa rights there.¹⁸¹ This view is expressed in Ngati Apa's closing submissions.¹⁸² McAloon, however, disputes this interpretation of what Uru said: in his view, the statement about Puaha was no more than a repetition of the published record of what Mackay had written on this matter in the 1860s, and cannot be seen as a Ngai Tahu admission of Ngati Apa rights at Kawatiri.¹⁸³ We tend to agree. Uru certainly referred to the acknowledgement in 1860 of Ngati Apa rights at Kawatiri, but his words should not be unquestionably taken as a Ngai Tahu recognition in the 1920s of those rights.

The 1923 decision drew a response from Hoani Mahuika and eight others, who described themselves as 'Natives of the Maori Race living as Natives in the Land District of Kawatiri'. They petitioned Parliament that the Native Land Court's award, made in favour of the descendants of 'Kaiapoi Maoris' and without the knowledge of the petitioners, had seriously disadvantaged the petitioners in respect of six of the eight blocks in question ('those north of Cobden and up to the Heaphy River'). Mahuika and the others mentioned that their ancestors had made use of the resources of this district for generations.¹⁸⁴ McAloon points out that the petition is phrased in terms of rights deriving from long residence, and that it mentions the descent of the petitioners from Ngati Wairangi, an older line than Tuhuru's. In his view, their complaint is against the Native Land Court's award in favour of the descendants of Tuhuru.¹⁸⁵ Hoani Mahuika died the following year aged 89, but his daughter, Hinemoa McDonnell, continued to protest. In 1926, the Native Appellate Court ruled that the matter should be referred back to the Native Land Court, where the case of those who were petitioning had never been heard.¹⁸⁶

179. Armstrong, 'Ngati Apa ki te Ra To', p 84

180. Ibid, pp 85–88

181. Ibid, pp 85–86

182. Counsel for Ngati Apa, closing submissions, p 32

183. McAloon, p 105

184. Armstrong, 'Ngati Apa ki te Ra To', pp 88–89

185. McAloon, pp 108–109

186. Armstrong, 'Ngati Apa ki te Ra To', pp 89–91

The Mahuika family's case was heard by the Native Land Court in 1926. Hinemoa McDonnell and her brother, Hone Mahuika, acknowledged their Ngai Tahu connections and that Tuhuru's people also had rights at Kawatiri. Mahuika stated that they were claiming through both Ngai Tahu and Ngati Apa.¹⁸⁷ Armstrong argues that their emphasis on their Ngai Tahu connections probably sprang from a feeling that 'the exigencies of the situation required this', in view of Ngai Tahu's dominance on the West Coast as a whole and the appellants' own previous claims elsewhere in the South Island through their Ngai Tahu connections.¹⁸⁸ McAloon rejects this explanation, however, arguing that the Ngai Tahu affiliations being mentioned were through Mata Nohinohi (Ngati Wairangi and Huirapa), and not Tuhuru.¹⁸⁹ Much evidence from traditional history was given during the hearings, and we have referred to this in chapter 2. The claimants spoke of their Ngati Apa roots and the history of that tribe's presence in Karamea and Kawatiri. Their rights under Ngati Apa, they said, 'extend from Kawatiri to Heaphy'. They stated that 'Old Mahuika got his right from Ngati Apa . . . through conquest and continuous occupation'. On the other hand, Hone Mahuika said that his father and uncle (descendants of 'Old Mahuika') 'got into Westland land through [their mother] Mata Nohinohi'. The counter-claimants asserted that the Mahuika whanau had 'no original rights' in the area and that they had merely been allowed to live there on sufferance.¹⁹⁰

The Native Land Court found that the applicants had 'some sort of right from the Ngati Apa side', as well as a claim through Mata Nohinohi to Ngati Wairangi. In the judge's view of the evidence, 'Ngai Tahu were the main occupants but not the sole owners' of the West Coast. As descendants of the Ngati Apa participants in the 1860 sale, the applicants had 'some rights' in the schedule B reserves. Accordingly, the judge awarded them a one-tenth interest in each of the six reserves in question.¹⁹¹ Armstrong sees this as 'less than a generous acknowledgement of Ngati Apa rights', but he emphasises that the Native Land Court had acknowledged that Ngai Tahu did not have sole rights to the Kawatiri and other northern West Coast reserves.¹⁹²

A few years later, the focus moved to the 40 Westport town sections. Evidently, this case was initiated by members of Ngai Tahu in 1930, but nothing came of it until after a petition was submitted in 1933 by Parata Pita Kere and others, who asked for a determination of the beneficial rights in the land. A series of letters also came from Hinemoa McDonnell, all of this eventually leading to a Native Land Court hearing in 1937. No representatives of the Mahuika whanau were present. Counsel for the Ngai Tahu claimants asked for an award

187. Ibid, p 91

188. Ibid

189. McAloon, p 111

190. Armstrong, 'Ngati Apa ki te Ra To', pp 91–93; McAloon, pp 110–124

191. Armstrong, 'Ngati Apa ki te Ra To', pp 93–94; McAloon, pp 124–125

192. Armstrong, 'Ngati Apa ki te Ra To', p 94

on the same basis as had been made for the Cobden reserve in 1920 and the other schedule B reserves in 1923, ignoring the fact that in respect of the six northern reserves there had been a successful appeal against the 1923 award. The Native Land Court decided accordingly, awarding a two-thirds interest to the descendants of Tuhuru and the rest to the non-Tuhuru claimants.¹⁹³

Very soon, a petition was sent to Parliament, drawn up by members of the Mahuika whanau and disaffected sections of Ngai Tahu. The petitioners argued against ‘the principle of ascertaining the ancestral rights of the Maoris to the territory as a whole’, in entire disregard of ‘the rights by occupation and residential qualifications of particular sections or families to the reserves in their particular localities’. They sought and eventually obtained a hearing in the Native Appellate Court. Their claim was that the descendants of all those who signed in 1860 (not just the descendants of Tuhuru, who was only one of the signatories) should be given awards. Ngai Tahu submitted that Puaha Te Rangi had been included in the 1860 payment and reserve allocation through aroha, not because he possessed customary rights.¹⁹⁴ The rehearing took place at Kaiapoi in 1939. For the appellants it was argued that Ngati Apa rights derived from unbroken occupation since at least the mid-1840s, and had been recognised in 1860. Mahuika had not claimed at Kawatiri through his Ngai Tahu connections. Counsel for the Tuhuru claimants said that Arahura was a Ngai Tahu sale and that the Mahuika whanau’s rights at Kawatiri were ‘only through aroha’, since they were ‘strangers living there by permission of Tuhuru and his people the real owners’. The 1926 ruling was thus incorrect.¹⁹⁵

The 1939 judgment stated that this had not been an investigation of customary interests based on conquest and occupation, but of the reason why the reserves had been created – for the benefit of those residing in the vicinity. The decision was that nine-tenths of the interests should be awarded to the descendants of the Ngati Apa and other Maori who lived at Kawatiri in 1860, and one tenth to the Tuhuru people.¹⁹⁶ This, says Armstrong, was a correct verdict, although unfortunately it was based on criteria connected to residence in 1860 rather than on the usual land court criteria of occupation and conquest. In his opinion, however, the result probably would not have differed, since Ngati Apa rights went back to the very early nineteenth century.¹⁹⁷

In 1948, the Native Land Court’s judgment on the Westport town section was the subject of an appeal by Ihaia Weepu and other Tuhuru descendants. In the then renamed Maori Appellate Court, the appellants stated that the occupation pattern of 1860 was a wrong basis

193. Armstrong, ‘Ngati Apa ki te Ra To’, pp 95–100

194. Ibid, pp 101–103; McAloon, pp 127–130

195. Armstrong, ‘Ngati Apa ki te Ra To’, pp 103–104; McAloon, pp 131–132

196. Armstrong, ‘Ngati Apa ki te Ra To’, pp 104–105

197. Ibid, pp 105–106

for decision, since Ngai Tahu under Tuhuru owned and occupied the whole Arahura purchase area, and, in fact, Tuhuru was particularly associated with the northern part of the area.¹⁹⁸ In their decision, the judges reiterated that their task had been not to investigate customary title but to determine who had been intended in 1860 to benefit from the reserves. Nevertheless, they reviewed the historical record and cast doubt on the claims that Tuhuru had enjoyed uninterrupted and exclusive rights – those rights had been disturbed by Niho's invasion and by Tuhuru's capture by the northern tribes, and the situation was very unsettled in 1840. In any case, it was 'an undisputed fact that there were others beside N'Tahu who had remained in occupation in the area covered by the deed of sale and [were there] presumably as of right, permissive and or otherwise'. The judges found it hard to see why Puaha Te Rangi and the 10 non-Tuhuru Ngai Tahu who signed the deed would have been permitted to do so if they had possessed no legitimate customary rights. The finding was that the appellants had failed to establish either that Tuhuru had paramount rights or that 'the Ng Apa group represented by Puaha Te Rangi' had no customary rights. The appeal was dismissed.¹⁹⁹

Armstrong regards this as 'an excellent result' for Ngati Apa, but McAloon remarks that in essence the dispute of which this was the culmination had not been between 'Ngai Tahu' and 'Ngati Apa', but 'between the descendants of Tuhuru on the one hand and [on the other] all other descendants of those who had rights in the West Coast reserves, whether they called themselves Ngai Tahu or Ngati Apa'.²⁰⁰ This is the position taken in Ngai Tahu's closing submissions, in which counsel emphasised the close relationship between the Kawatiri reserve owners and Ngai Tahu. It was submitted that the rights of those who had been allocated reserves, including 'people who whakapapa to various groups including Ngati Apa', were based on residence, not on any other rights.²⁰¹ In Ngati Apa's closing submissions, however, it was stated that the Ngai Tahu claim to exclusive rights up to Kahurangi Point, which they see expressed in the case put to the Maori Appellate Court in 1948 by the Tuhuru section of Ngai Tahu, was 'utterly undermined' by the court's decision.²⁰²

Our consideration of West Coast customary rights in chapter 2 leads us to the view that this decision and that of 1926 rightly recognised the existence of rights (in Kawatiri and the northern districts) that were distinct from Ngai Tahu rights. They were possessed by people who certainly had whakapapa connections with Ngai Tahu but who also drew on long-held Ngati Apa rights in the area.

198. Ibid, pp 107–108

199. Decision of Maori Appellate Court, 19 May 1948 (Mitchell and Mitchell, 'West Coast of the South Island', accompanying document bank, p 171); Armstrong, 'Ngati Apa ki te Ra To', pp 108–109

200. Armstrong, 'Ngati Apa ki te Ra To', p 110; McAloon, p 141

201. Counsel for Ngai Tahu, closing submissions, pp 67–68

202. Counsel for Ngati Apa, closing submissions, pp 32–33

3.3.6 The Mawhera Incorporation

These issues were to be raised again in the 1990 Maori Appellate Court case, which we will discuss in chapter 4. A development that occurred before that, however, should be briefly noted. Following the 1975 report of the Sheehan commission's national inquiry into Maori reserved land, the schedule B endowment reserves on the West Coast, together with those occupation reserves that had been administered by the Maori Trustee, were transferred in 1976 to the new Mawhera Incorporation and have been administered by it ever since.

Ngati Apa view this body as effectively a Ngai Tahu entity, and one that takes no account of non-Ngai Tahu rights to the land concerned. Ngati Apa's amended statement of claim alleged that, in allowing this vesting in the Mawhera Incorporation, and thus the removal of the reserve interests from Ngati Apa, the Crown had failed to protect Ngati Apa's interests, despite the Sheehan commission's identification of their interests as being separate from those of Ngai Tahu.²⁰³ In their closing submissions, Ngati Apa repeated these claims and asserted that the vesting of the reserves in 'an Incorporation owned by Ngai Tahu people' meant the loss of their 'ownership rights as Ngati Apa'.²⁰⁴ Kath Hemi, giving evidence for Ngati Apa, told us of the distress caused by this loss, 'because with the land goes the mana'.²⁰⁵ Another witness for Ngati Apa said that, although his family still retained their shares in the Westport reserves now administered by the Mawhera Incorporation, that body was dominated by Ngai Tahu, and 'we feel as though it [the land] was taken away from us, . . . it went to Mawhera, instead of staying with us Ngati Apa people'.²⁰⁶ Counsel for Ngai Tahu rejected this claim on the ground that, although some people with interests in these lands had whakapapa links with other tribes, Ngati Apa as an iwi did not have customary rights on the West Coast. He submitted also that, at the time of the transfer to the incorporation, no one with interests in the lands concerned sought to have them excluded from the incorporation.²⁰⁷

It was also Ngati Apa's contention that control of the reserves by the Mawhera Incorporation had implications when the perpetual leases under which they were rented out were reviewed as an outcome of the Maori Reserved Land Amendment Act 1997. In 2002, the Crown reached a settlement with the legal owners of Maori reserved land throughout the country. Ngati Apa submitted that beneficial owners who were Ngati Apa were excluded from this settlement, which included an ex gratia payment of \$8,199,925 to the proprietors of the Mawhera Incorporation.²⁰⁸ This matter, together with the whole issue of Ngati Apa's role in the Ngai Tahu-controlled incorporation, were raised in our hearings, but we did not receive enough information for us to make findings on the subject.

203. Ngati Apa, amended statement of claim, p 10

204. Counsel for Ngati Apa, closing submissions, p 45

205. Kath Hemi, cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, p 95)

206. Albert McLaren, cross-examination, twelfth hearing, 26–29 May 2003 (transcript 4.12, pp 111, 112)

207. Counsel for Ngai Tahu, closing submissions, p 68

208. *The Owners of Maori Reserved Land and the Crown: Deed of Settlement*, July 2002; counsel for Ngati Apa, closing submissions, February 2004, p 49

CHAPTER 4

THE 1990 MAORI APPELLATE COURT DECISION AND THE SUBSEQUENT NGAI TAHU LEGISLATION

In this chapter, we examine the claims of Te Tau Ihu iwi relating to the 1990 Maori Appellate Court decision and the legislation which was enacted as a result of it, culminating in the Ngai Tahu Claims Settlement Act 1998. We consider the referral of the boundary issue to the Maori Appellate Court, the Crown's role at the court hearing, and whether the Crown was in breach of its Treaty obligations to Te Tau Ihu iwi when it enacted the legislation which was based on the court's findings. In carrying out this examination, we consider the Maori Appellate Court decision, which formed the basis for the Te Tau Ihu grievance against the Crown.

The chapter opens with a narrative of these events. We then consider the issues raised by Te Tau Ihu claimants, notably Ngati Toa and Ngati Apa, who made the most detailed submissions on this question. We conclude with our assessment of whether or not the Crown breached its Treaty obligations to Te Tau Ihu iwi.

4.1 BACKGROUND TO THE ESTABLISHMENT OF THE NGAI TAHU STATUTORY TAKIWA

4.1.1 The background to the 1990 decision

In chapter 1, we briefly outlined the reason for referring the competing claims of Ngai Tahu and the Kurahaupo Waka Society to the Maori Appellate Court. In this section, we give a more detailed explanation of the background to the 1990 Maori Appellate Court decision.

The Tribunal's primary responsibility is to inquire into and make recommendations regarding allegations of Treaty breach by the Crown, not to adjudicate on disputes between iwi. In 1987–88, in order to settle the competing claims of Ngai Tahu and the Kurahaupo Waka Society, the Ngai Tahu Tribunal recommended that legislation be introduced to allow the Waitangi Tribunal to state a case to the Maori Appellate Court when tribal boundaries or customary title were at issue.¹ Amending legislation adopting this recommendation was introduced by Peter Tapsell on behalf of the Minister of Maori Affairs. Tapsell stated that:

1. Waitangi Tribunal, 'Preliminary Decision of Tribunal on Kurahaupo Waka Claim', unpublished paper, 26 November 1987 (Wai 27 RO1, doc D9), p 6

The tribunal's essential role is to adjudicate claims between Maori people and the Crown. It does not necessarily have the experience or the expertise to determine disputes between Maori people that may arise during a hearing. The Maori Land Court and the Maori Appellate Court do have that expertise and experience. Such a case-stated procedure will enable the tribunal to concentrate on its primary role while the technical and investigative matters are dealt with by the Maori Land Court.²

In 1988, the Treaty of Waitangi Act 1975 was accordingly amended with the insertion of the following section:

6A. Power of Tribunal to state case for Maori Appellate Court or Maori Land Court—

- (1) Where a question of fact,—
- (a) Concerning Maori custom or usage; and
 - (b) Relating to the rights of ownership by Maori of any particular land or fisheries according to customary law principles of 'take' and occupation or use; and
 - (c) Calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries—
- arises in proceedings before the Tribunal, the Tribunal may refer that question to the Maori Appellate Court for decision.

The way was now open for the Ngai Tahu Tribunal to refer the boundary issue to the Maori Appellate Court for determination. The Tribunal called for submissions from the parties to the case, the Ngai Tahu Maori Trust Board and the Crown, to assist in formulating the case stated. Te Tau Ihu iwi were not parties to the case and were not involved in preparing the questions to be put to the court.

On 17 March 1989, the Tribunal asked the Maori Appellate Court to determine who held rights of ownership with respect to the land purchased by the Crown in the Kaikoura and the Arahura deeds, dated 29 March 1859 and 21 May 1860 respectively. The case stated asked:

1. Which Maori tribe or tribes according to customary law principles of 'take' and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective Deeds at the dates of those Deeds?
2. If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?³

2. Peter Tapsell, 'Treaty of Waitangi Amendment Bill', 5 May 1988, NZPD, 1988, vol 488, p 4018

3. *Case Stated on a Question to Determine Maori Land and Fisheries Tribal Boundaries* unpublished, 17 March 1989, McHugh MLCJ, Maori Appellate Court (Wai 27 r01, doc Q33)

4.1.2 The 1990 Maori Appellate Court decision

The substantive proceedings came before the Maori Appellate Court at Christchurch on 18 June 1990. There were four claimant parties represented:

- ▶ Rangitane ki Wairau;
- ▶ Runanganui o te Ihu o te Waka a Maui representing Ngati Apa ki te Ra To; Ngati Kuia, Ngati Koata, Ngati Rarua, Ngati Tama, Ngati Toarangatira ki Waipounamu, Ngati Wai-kauri, Rangitane ki Wairau, and Te Atiawa;
- ▶ Ngati Toa; and
- ▶ the Ngai Tahu Maori Trust Board.

After hearing evidence from these parties over a nine-day period, the court issued its decision in favour of Ngai Tahu's exclusive rights in all the area encompassed by the two deeds.⁴

Norman Smith's influential study *Maori Land Law* was extensively quoted by counsel for Ngai Tahu and was taken by the court as its basic authority. Smith's analysis, based largely on Native Land Court writings and judgments, outlines four 'take' or rights – discovery, ancestry (take tupuna), conquest (take raupatu), and gift (take tuku). All these rights, he argues, must be supported by actual occupation to give rights akin to ownership in land. In Smith's view, as cited by the court, various principles are to be considered when weighing those rights. These include consideration of whether occupation is either complete and continuous for three generations (in the case of a claim based on ancestry or gift) or complete and absolute in the case of conquest ('it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest').⁵ Other situations might arise. In particular, purported 'owners' might be absent but have their rights kept alive by relatives; they might have occupied but been absent at 1840; or occupation may have been very recent in its origin, even though the take argued was one of ancestry.

Having outlined these principles, the court discussed its findings on the 1840 rule, which had earlier been considered in an interim decision. In August 1989, the court had found that the 1840 rule was established to prevent the continuation of inter-tribal warfare and imposed an exception to customary law by excluding take raupatu following the acquisition of sovereignty by the Crown. The rule left the rest of Maori customary law intact.⁶ Reiterating these findings in its 1990 decision, the court also commented on cases where an iwi had demonstrated one of the customary take, supported by occupation, but had been absent in 1840. The court found that 'they could revive their ahi kaa, as long as the reoccupation was peaceful and within three generations of leaving the area.'⁷

4. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court minute book 4, fol 672

5. *Ibid*, fol 675

6. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, August 1989, South Island Appellate Court minute book 3, fols 264–266

7. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 676

The court then tackled the historical questions as they affected questions of custom and title, beginning with an outline of the various deeds that the Crown had signed with different parties on the east coast. The court concluded that these deeds were ‘questionable’ evidence of ownership and that ‘clearly, Ngati Toa received favoured treatment at the hands of the Crown’. It then described Rangitane’s claim and their evidence regarding ‘the sacred boundary’ at Waiau-toa, before turning to Ngai Tahu’s account of the history of the area prior to 1828. The court proceeded to describe the impact of the northern invasions in the decades just prior to 1840 and outlined the questions that needed to be addressed in order for the court to come to its final decision. They were as follows:

- ▶ What was the ‘title situation’ prior to the invasion?
- ▶ What was the effect of the invasion?
- ▶ What was the situation in and around the 1840s?
- ▶ What was the situation at 1859–60, when the deeds defining the area under consideration were actually signed?⁸

The court concluded that the invasions had resulted in the conquest of the Kurahaupo tribes but that the northern tribes had failed to follow up their incursions into Ngai Tahu territory with occupation. In the court’s consideration, the question of how far south the rights of Ngati Apa and Rangitane extended was rendered largely irrelevant by those tribes’ thoroughgoing defeat. And, while the question of who held the dominant hand – Ngai Tahu or the northern iwi – was unsettled at 1840, Ngai Tahu were seen as able to fully recover their position in the 20 years after, as demonstrated by the Crown’s recognition of their rights in the Kaikoura and Arahura purchases.

With respect to the Kaikoura deed, the court found that, while Rangitane had undoubted cultural associations with sites within that area, they could not show that the tribal boundary lay at the Waiau-toa, which Rangitane had argued was the southerly extent of their traditional association. The northern tribes had conquered the area but had failed to remain in occupation south of the Wairau. Ngai Tahu had been defeated, but their subsequent military resurgence and return to their settlement at Kaikoura meant that they had revived their ahi ka and that, according to customary law principles, they had ownership rights vested in them at the time of the signing of the deed in 1859.⁹

The court then dealt with the Arahura deed, first considering Ngati Apa’s argument that their ownership rights to land, particularly at the Kawatiri (Buller River), had been recognised at the time of sale by the inclusion of members of their iwi in payments and provision of reserves. The Maori Appellate Court rejected Ngati Apa’s case on the ground that they were post-1840 arrivals and able to occupy the land only with the permission of Ngai Tahu. Ngati Toa were deemed to have no ‘cultural tradition’ relating to the area other than

8. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 677

9. *Ibid*, fol 691

a leading role in the early stages of the invasion with their allies and the court found no interest on their part 'sufficient to satisfy the criteria to establish ahi kaa'. Having outlined Ngai Tahu's case – the battles fought against Ngati Wairangi, Ngati Tumatakokiri, and a large Ngati Toa taua in about 1820, as well as their history of working pounamu – the court turned to the question of the impact of the Ngati Rarua invasion. Their case, along with that of their allies, was also rejected. In the view of the court, Ngati Rarua had occupied temporarily but had withdrawn completely from the area by 1840. As on the eastern side, the deeds signed with non-Ngai Tahu for the West Coast were rejected as insignificant, an indication only of the Crown's willingness 'to deal with any Maori other than those living in the area'. In contrast, Mackay, who was the first Crown official to visit the area, after long meetings with the people then in occupation, was 'convinced that it was proper for the Crown to deal with Ngai Tahu in respect of lands as far north as Kahurangi Point'. The court thus found that, while Ngati Apa and possibly 'other northern tribe remnants' were occupying land along the Kawatiri, there was no evidence of 'a customary take to support something more than a mere right of residence'.¹⁰

In conclusion, the Maori Appellate Court found that:

The Ngai Tahu tribe according to customary law principles of 'take' and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.

The second question of the case stated, 'If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?', did not require an answer because 'Ngai Tahu only is entitled'.¹¹

4.1.3 The Ngai Tahu Report 1991 and subsequent legislation

The decision of the Maori Appellate Court set out above was binding on the Ngai Tahu Tribunal, and in its 1991 report, the Tribunal found that Ngai Tahu's grievances arising from the Crown's South Island land purchases were well founded. More specifically, in respect to the Arahura and Kaikoura purchases, the Tribunal found that the Crown had not acted honourably in its negotiations to purchase the land blocks and had not provided sufficient reserves for the existing and future needs of Ngai Tahu.¹²

Following the release of the *Ngai Tahu Report 1991*, the Tribunal issued a short supplementary report which recommended that legislation be introduced to create a tribal structure with the power to undertake a settlement with the Crown on Ngai Tahu's behalf. In

¹⁰. Ibid, fols 691–696

¹¹. Ibid, fol 672

¹². Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 1, pp 115–127

1996, the Te Runanga o Ngai Tahu Act was passed to enable the establishment of a representative tribal body to fulfil that responsibility.

The Te Runanga o Ngai Tahu Act 1996 adopted the boundaries described by the Maori Appellate Court, which in turn had adopted those of the Crown's purchase deeds with Ngai Tahu in Kaikoura (in 1859) and in Arahura (in 1860), as set out in the case stated. Under section 5 of the 1996 Act, the Ngai Tahu takiwa is defined as follows:

The Takiwa of Ngai Tahu Whanui is all the area of Te Waipounamu south of the northernmost boundaries described in the decision of the Maori Appellate Court in *Re a claim to the Waitangi Tribunal by Henare Rakiihia Tau*, 12 November 1990.¹³

Section 5 then sets out a detailed survey description of the Ngai Tahu takiwa boundaries, as illustrated in map 1.

Following the Te Runanga o Ngai Tahu Act 1996, the Crown and Te Runanganui o Ngai Tahu entered into a deed of settlement in which the Crown acknowledged that Ngai Tahu had suffered grave injustices which had significantly impaired their economic and social development. The deed also recorded the steps required to give effect to a settlement of all Ngai Tahu's historical claims. The result was the Ngai Tahu Claims Settlement Act 1998, which also adopted the Maori Appellate Court boundaries and confirmed Ngai Tahu's authority within them. Section 6(7) of that Act states:

The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.¹⁴

Further, sections 461 and 462 state that the settlement of Ngai Tahu claims was to be final and that the Waitangi Tribunal had no jurisdiction to inquire further into or make findings or recommendations in respect of Ngai Tahu claims.¹⁵ As we noted in chapter 1, this did not prevent the Waitangi Tribunal from hearing and reporting on Te Tau Ihu iwi claims within the Ngai Tahu statutorily defined takiwa.

4.2 THE CLAIMS OF TE TAU IHU

We now turn to consider the Te Tau Ihu claims against the Crown which relate directly to the Maori Appellate Court decision and the Ngai Tahu legislation that followed. These grievances encompass the following issues:

13. Te Runanga o Ngai Tahu Act 1996, s 5

14. Ngai Tahu Claims Settlement Act 1998, s 6(7)

15. Ibid, ss 461, 462

- ▶ the Treaty of Waitangi Amendment Act 1988 and the reference of the boundary issue to the Maori Appellate Court;
- ▶ the role of the Crown in the Maori Appellate Court; and
- ▶ the Crown's treatment of Te Tau Ihu iwi rights in the course of negotiations with Ngai Tahu and in the enactment of the Ngai Tahu legislation in 1996 and 1998.

4.3 THE TREATY OF WAITANGI AMENDMENT ACT 1988

4.3.1 Te Tau Ihu submissions

We received submissions on the impact of the 1988 amendment to the Treaty of Waitangi Act 1975 from Ngati Toa and Ngati Apa. Ngati Toa argued that the hastily devised amendment had limited the Maori Appellate Court's inquiry into which Maori tribe or tribes had rights of ownership in respect of all or any portion of the land contained in the Arahura and Kaikoura deeds at the date of those deeds. Ngati Toa counsel also submitted that section 6A 'did not permit Ngati Toa or any other Te Tau Ihu iwi to participate in the formulation of the Case Stated, although their interests were to be adjudicated upon'.¹⁶

Furthermore, section 6A made no provision for appealing the appellate court's decision. In their closing submissions, Ngati Toa cited Matiu Rei's statement that 'you should have the right to appeal. That there should never be legislation constructed so that you only get to go once, and that's it. Ngati Toa had been casualties of the legislation and the circumstances surrounding the case had been 'grossly unfair' both to them and to the other Te Tau Ihu iwi.¹⁷ They claimed that the Crown had enacted the amendment to resolve problems it was facing with the Ngai Tahu claim but that this came at the expense of Te Tau Ihu iwi.¹⁸

Ngati Apa was also critical of the Act, but on somewhat different grounds. Their counsel argued that the 1988 amendment to the Treaty of Waitangi Act breached the Treaty because it required 'European-style boundaries to be fixed by the Maori Appellate Court when such boundaries were artificial in terms of traditional Maori custom'.¹⁹ In counsel's view, the idea that deed boundaries could show tribal boundaries was particularly problematic. The line described in the Arahura deed at Kahurangi was not customary at all but was upheld by the court 'as a customary line because of inadequate evidence, and in the absence of the types of evidence and submissions now before the Tribunal'. Counsel also pointed out that the Ngati Awa Tribunal had later rejected an application to use section 6A, deeming it an inappropriate mechanism by which to determine customary rights.²⁰

16. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 123

17. Ibid, pp 123–124

18. Ibid, pp 126–127

19. Counsel for Ngati Apa, closing submissions, [February] 2004 (doc T3), p 35

20. Ibid, pp 36–37

4.3.2

4.3.2 Ngai Tahu submissions

Ngai Tahu submitted that the issues raised by Te Tau Ihu concerning the introduction of section 6A of the Treaty of Waitangi Act lay between Te Tau Ihu and the Crown. Ngai Tahu was 'not responsible for defending the actions of the Crown' with respect to introducing the amendment to the Treaty of Waitangi Act so that the Maori Appellate Court could determine the case stated. The legislation had been amended following representations from the Tribunal, and the case stated went to the Maori Appellate Court from the Tribunal as a result of the amendment. In Ngai Tahu's view, the appellate court's decision was correct.²¹

4.3.3 Crown submissions

Crown counsel submitted that, in supporting the referral of the question of customary title to the Maori Appellate Court, it had acted within the standards required by the Treaty. In fact, the Crown had been acting in compliance with the wishes of the Tribunal:

When the cross-claim issue first emerged at the start of the Wai 27 inquiry in 1987, the Crown supported the introduction of amending legislation to enable the Waitangi Tribunal to state a case to the Maori Appellate Court. The Crown did so because it was in agreement with the Tribunal's view that the Maori Appellate Court was better placed than the Tribunal to consider and determine intra Maori disputes concerning historical customary interests.²²

4.3.4 Tribunal discussion and findings

In our view, section 6A was poorly conceived but was not in breach of the Crown's Treaty obligations to Te Tau Ihu iwi.

The Tribunal's role is to inquire into and report on claims by iwi against the Crown. It may be required to investigate customary rights, but it does not inquire into and adjudicate upon disputes between iwi groups. In these circumstances, the Ngai Tahu Tribunal requested the enactment of powers to allow it to refer such matters to the forum that at the time was considered to have the appropriate experience and expertise – the Maori Appellate Court. We therefore agree with the Crown that it cannot be held in breach of its Treaty obligations by setting in place legislation intended to allow the determination of a customary question.

Nor was the exclusion of Te Tau Ihu in the formulation of the case stated a result of the legislation. This outcome was not demanded by the legislation itself but resulted from the decision of the Wai 27 (Ngai Tahu) Tribunal to call for submissions only from Ngai Tahu

21. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 24–25

22. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 131–132

and the Crown in formulating the questions to the Maori Appellate Court. It chose not to include Te Tau Ihu iwi to assist in formulating those questions.

The main focus of the Wai 27 Tribunal was to inquire into alleged Treaty breaches by the Crown against Ngai Tahu. To achieve this goal, it determined that it did not require Te Tau Ihu iwi to participate in formulating the questions to the Maori Appellate Court. In terms of the Wai 27 inquiry, that may have led to the answer it was seeking in its inquiry.

In contrast, our inquiry focuses on the Crown's treatment of Te Tau Ihu iwi rights. From our perspective, the decision of the Ngai Tahu Tribunal not to involve Te Tau Ihu iwi in formulating the case stated had serious consequences for them. The result was that the questions put to the Maori Appellate Court were framed entirely in terms of the Crown's engagement with Ngai Tahu in the late 1850s, rather than in terms of who held customary rights in the area. Crown purchase deeds should not be the context to determining who held customary rights. The last two Ngai Tahu deeds and the dates on which they were signed were adopted as setting the parameters of the Maori Appellate Court's determination.

This was crucial to the way the court looked at the question of 'rights of ownership', and we consider that it placed Te Tau Ihu iwi at a disadvantage. Their customary rights became secondary to those of Ngai Tahu, and only rights of ownership at the date of the Ngai Tahu deeds were to be considered. This allowed the court to set aside other types of rights as irrelevant to the question and to ignore the possibility of a shift in right-holding as a consequence of 20 years of Crown dealing since 1840.

The Maori Appellate Court's jurisdiction was restricted to the Kaikoura and Arahura deeds in the case stated. This Tribunal can range widely over all relevant Crown purchases and set them in the context of Crown policy and its application by its land purchasing agents. As demonstrated in our earlier chapters, we see the Kaikoura and Arahura purchases as a culmination of a succession of blanket purchases, starting with the Wairau in 1847, whereby the Crown purchased the interests of one iwi after another. The Arahura and Kaikoura transactions represented the final acquisition of Ngai Tahu rights, after the rights of the northern invaders and some Kurahaupo iwi had previously been acquired over much the same territory by means of the Wairau and Waipounamu deeds. To award exclusive title to the last sellers was to ignore the interests of the first sellers – and those of the Kurahaupo iwi not recognised in the earlier purchases.

While we have found that the legislation was not in breach of the Treaty, we do consider that the legislation was poorly conceived. It represents an uneasy mix of customary and non-customary concepts. It assumes that principles of 'take' confirmed by use and occupation, as developed through the Native Land Court, are the only ones that apply. The Act identified 'rights of ownership' as the only sort of right to be determined, and it presumes that tribes consistently occupied areas encompassed within set tribal boundaries. As we have discussed in chapter 2, this has not been the view of the Tribunal in other inquiries, nor the view of most historians. The Ngati Awa Tribunal emphasised the overlapping

nature of customary rights and viewed the concept of exclusive tribal boundaries as one that had arisen from ‘colonial influence’. In the opinion of that Tribunal:

the essence of Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations.²³

Moreover, when the Ngati Awa Tribunal faced a similar issue to the one faced by the Ngai Tahu Tribunal, it rejected an application for referral to the Maori Appellate Court under section 6A. The Tribunal stated:

Section 6 may itself not be consonant with custom for it assumes that the applicable customary law principles are exclusively those of “take” and occupation or use, that the relevant rights were exclusively ‘rights of ownership’, that ‘tribal boundaries’ were a norm and that there were prescribed tribes that consistently [inhabited] the area within them.²⁴

Notwithstanding our reservations about section 6A, we confirm that the Crown was not in breach of its Treaty obligations to Te Tau Ihu iwi by introducing section 6A of the Treaty of Waitangi Act 1975, and nor was the section itself in breach. In our view, the problem lay primarily with the way the questions referred to the Maori Appellate Court were formulated and, in particular, the misleading emphasis on what was really only the final stage of a long drawn-out process of Crown extinguishment of rights in the region. The Act did not preclude the involvement of the Te Tau Ihu claimants in the formulation of the case stated, nor was there any necessary equation with boundaries set by sale deeds or any requirement that the court find only one tribal group in possession of ‘rights of ownership’.

The final issue raised by Te Tau Ihu iwi with respect to section 6A was that it did not permit an appeal against the Maori Appellate Court’s decision. This was said to be ‘grossly unfair’. On its face, if a question is referred from a Tribunal panel to the Maori Appellate Court pursuant to section 6A, there are no appeal rights and the court’s decision is binding on that panel. However, as will be discussed in the following section, there is scope for judicial review in relation to the procedural correctness of such a decision. Also, prior to the establishment of the New Zealand Supreme Court in 2003 and providing there were no statutory limitations, a prerogative right to petition the Crown for leave to appeal to the Judicial Committee of the Privy Council existed.²⁵ Therefore, notwithstanding that section 6A says that the decision of the Maori Appellate Court is binding on the Tribunal, avenues did exist to challenge that decision.

23. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 133

24. Waitangi Tribunal, memorandum concerning procedure, evidence, and issues in the Wai 46 (Ngati Awa raupatu) inquiry, 11 November 1994 (Wai 46 ROI, paper 2.59), p 19

25. *Re the Will of Wi Matua* [1908] AC 448. We note that *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC) distinguished the *Wi Matua* case. However, those comments are obiter dicta in the context of cases stated to the Maori Appellate Court.

4.4 THE ROLE OF THE CROWN IN THE MAORI APPELLATE COURT HEARING

The submissions we received from claimant counsel on the role of the Crown in the Maori Appellate Court hearing asked us to focus on two matters:

- ▶ whether the procedures adopted by the court were in breach of Treaty principles; and
- ▶ whether the Crown's role in the case breached Treaty principles.

4.4.1 Were the procedures adopted by the Maori Appellate Court in breach of Treaty principles?

We will deal briefly with the matter of whether the procedures adopted by the Maori Appellate Court were in breach of Treaty principles. Te Tau Ihu claimants made submissions on the procedural impropriety in the court. These included alleged disparities of funding between themselves and Ngai Tahu and alleged breaches of the rules of natural justice in respect to adequate notice and a reasonable opportunity to be heard. We do not detail the submissions here because these matters have already been extensively litigated in the High Court, Court of Appeal, and Privy Council.²⁶ All these courts found that the Maori Appellate Court did not breach the rules of natural justice, that Te Tau Ihu iwi did have a reasonable opportunity to be heard, and that Te Tau Ihu iwi were represented in the Maori Appellate Court proceedings.

On this issue, Ngai Tahu submitted that we cannot substitute the decisions of these courts with our 'own view on the legality or propriety of procedures followed' by the Maori Appellate Court.²⁷ We agree. This matter has been determined by the courts and will not be revisited by this Tribunal.

However, the issue of whether the Crown's role in the Maori Appellate Court hearing breached its Treaty obligations to Te Tau Ihu iwi has not been determined by the courts and falls within our jurisdiction.

4.4.2 Did the Crown's role in the Maori Appellate Court breach its Treaty obligations to Te Tau Ihu iwi?

(1) Te Tau Ihu submissions

Counsel for Ngati Toa submitted that the Crown, having given the Maori Appellate Court the power of deciding customary title on terms inherently favourable to one of the contending parties, then stood aside and did not disclose evidence that may have altered the court's view of Ngai Tahu rights as being exclusive in the region. It was submitted that:

²⁶ *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779; *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA); *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2006] UKPC 49; [2007] 2 NZLR 80 (PC). The latter decision was not available at the time we concluded our hearings in 2004.

²⁷ Counsel for Ngai Tahu, closing submissions, p 25

TE TAU IHU O TE WAKA A MAUI: PRELIMINARY REPORT 2

4.4.2(1)

The Crown was instrumental in the passage of Section 6A, and did participate in the formulation of the Case Stated. Yet it did not participate in the Maori Appellate Court case itself, despite having for the Ngai Tahu inquiry commissioned extensive relevant expert historical evidence . . . had this evidence been accessible to the Court it would have been highly influential.²⁸

Ngati Apa's counsel also argued that the Crown had deliberately withheld important evidence from the Maori Appellate Court, giving a number of instances in which documents in the possession of the Crown had not been brought to its attention. These were identified as:

- ▶ Wereta Tainui's 1849 account to Walter Mantell of 80 Ngai Tahu living in the West Coast region, south of Mawhera with 20 Ngati Apa people residing at Kawatiri;
- ▶ Wereta Tainui again recounting that position in 1878 in his petition to the Smith and Nairn Commission;
- ▶ The acknowledgement to the Native Land Court in 1921 by the Ngai Tahu rangatira Mr Te Uru of Ngati Apa rights in the Kawatiri area;
- ▶ The Native Land Court decision of 1926 when Judge Gilfedder which awarded Ngati Apa a beneficial interest in six schedule B reserves between Kawatiri and the Heaphy River totalling 179 acres.²⁹

Ngati Apa argued that the Crown possessed and knew of all this evidence and that it was the Crown's duty to all the parties – Ngai Tahu, Ngati Apa, and the court – to ensure that any evidence relevant to the customary boundary issue was made available. Ngati Apa argued that they were also unlikely to have been able to produce the archival documents in support of their claim, documents that the Crown already had in its possession. Ngati Apa maintained that, in not providing this information and in failing to take an active role in the proceedings, the Crown breached its duty of protection to Ngati Apa.³⁰ As a result of this failure to actively protect, the Maori Appellate Court largely heard 'Ngai Tahu's detailed partisan history' rather than a balanced account of customary rights.³¹

Ngati Rarua also submitted that the Crown failed to give evidence, failed to meet its obligation to inquire, and failed to ensure that Ngati Rarua were properly protected and represented.³²

28. Counsel for Ngati Toa Rangatira, closing submissions, p 123

29. Counsel for Ngati Apa, closing submissions, p 37

30. Ibid, pp 35–36

31. Ibid, pp 38–39

32. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 126–127

(2) Ngai Tahu submissions

Ngai Tahu submitted that this Tribunal had received little more than the Maori Appellate Court had received in 1990. Wereta Tainui's petition was the 'only significant material relating to Ngati Apa that was presented to the Wai 785 Tribunal'. In Ngai Tahu's view, this petition did not show that 'the people of Ngati Apa descent had anything other than residence rights at Kawatiri' and it would therefore not have altered the Maori Appellate Court's decision.³³

(3) Crown submissions

The Crown maintained that there was no evidence to show that it had knowingly withheld documentary evidence from the Maori Appellate Court. Counsel argued that the Crown was not a 'keeper of the archives' and it was for the parties concerned to bring evidence to support their case, while non-archival material of a more recent nature could be accessed through the Official Information Act 1982. The Crown referred to the High Court's finding (outlined below) that the information not seen by the Maori Appellate Court was 'not of such relevant or probative value as to give rise to procedural impropriety, particularly in light of the Maori Appellate Court's reasoning in its decision'.³⁴

(4) Tribunal discussion and findings

As we have noted, the Crown did not wish to enter into disputes between iwi. As a result it did not actively participate in the Maori Appellate Court hearing, holding a 'watching brief' only and abiding the final decision of the court. In our view, this approach would have been acceptable if the Crown had no information or evidence which had the potential to assist the court. But the Crown was clearly not in that position. Not only had it assisted in formulating the questions to be answered by the Maori Appellate Court, but it also possessed evidence which was, in our view, crucial to the establishment of rights in this area.

Furthermore, as the Crown held a 'watching brief' and was involved in the proceedings, we consider that it had a positive duty to assist the court. The evidence held by the Crown was not made available to the court and therefore the Crown failed in its duty.

We note here the Crown's submission that there is no evidence that the Crown knowingly withheld documentary evidence from the court. It was shown, however, that the Crown had actively considered one of those pieces of evidence, the Wereta Tainui petition, by having it translated just prior to the court case in 1989. It may be that the failure to bring this evidence to the attention of the court was the result of an oversight, rather than a deliberate decision to not make the evidence available to the court, but in our view this does not alter the case. When considering whether the Crown has breached the Treaty, we examine

33. Counsel for Ngai Tahu, closing submissions, pp 37-38

34. Crown counsel, closing submissions, pp 133-134

its acts and omissions rather than its intentions per se (although these may exacerbate the prejudice inflicted). Whether the failure of the Crown to provide the evidence it held was done in innocence or ignorance does not excuse it of its duty to the Maori Appellate Court or of its obligations under the Treaty.

The result was that an opportunity for the Crown to balance the partisan history as presented by Ngai Tahu was lost. We thus find that the Crown failed in its duty to protect Ngati Apa and breached the principle of equal treatment. That failure is exacerbated by the Crown's awareness of the nature of its duty, and we cite here the Crown's own statement in closing submissions:

The Crown does not consider itself in the position of an orthodox defendant whose task is to 'defend' itself against claims made. In responding to the historical claims made by Maori, the Crown recognises a duty to assist the Tribunal to try and get to the truth of the matter. This includes a responsibility to test the claimant evidence and put forward alternative ways of considering the historical events at issue. It also includes a duty to put before the Tribunal relevant material of which the Crown is aware that would assist the Tribunal, whether such material affects adversely on the Crown's historical actions or not.³⁵

In an inquiry such as the one that the Maori Appellate Court was conducting, which was instigated by the Ngai Tahu Tribunal to assist it to find the truth about customary relationships between the Ngai Tahu and Te Tau Ihu claimants, we consider that the Crown had a similar duty to place all known relevant information in its possession before the court.

By failing to make this evidence available, we consider that the Crown was in breach of its duty not only to protect all parties who would be affected by the decision but also to act fairly as between Ngai Tahu and Te Tau Ihu iwi. This was a breach of the Treaty principles of active protection and equal treatment.

4.5 THE CROWN'S TREATMENT OF TE TAU IHU IWI RIGHTS IN ITS NEGOTIATIONS WITH NGAI TAHU AND IN THE ENACTMENT OF THE NGAI TAHU LEGISLATION IN 1996 AND 1998

4.5.1 Te Tau Ihu submissions

Claimant submissions on this issue focused on the Crown's failure to protect the rights and interests of Te Tau Ihu iwi when it followed the 1990 Maori Appellate Court decision and enacted the Ngai Tahu Claims Settlement Act 1998. In their view, the decision of the Maori Appellate Court was flawed. They would be prejudiced by the subsequent statutory recognition of that decision if this meant that Te Tau Ihu iwi claims would be rejected outright

35. Crown counsel, closing submissions, p 8

when they came to negotiate their own settlement with the Crown in respect to parts of the takiwa. It should be emphasised that none of the Te Tau Ihu submissions sought exclusive rights or interests south of the border, or to interfere with the Ngai Tahu settlement with the Crown. However, the claimants did seek an acknowledgement from the Crown of their independent rights and interests, and of breaches of the Treaty in certain aspects of its purchase and reserve policy within the Ngai Tahu takiwa.

Accordingly, Ngati Apa counsel argued that:

Unless this Tribunal takes a very strong stance on the nature of rights in the Kawatiri to Kahurangi Point area, then when Ngati Apa go to treat for compensation with the Treaty Settlements Division of the Crown, it will meet the answer '*The Crown is entitled to rely upon the decision of the Maori Appellate Court.*' . . . Ngati Apa have already been shown the door in 1997 by the Minister of Treaty Negotiations on one occasion and that will simply recur.

The Crown's formal response is a rejection entirely of Ngati Apa claims on the West Coast. The decision of the Maori Appellate Court gave exclusive rights to Ngai Tahu. For the Crown to say '*it is entitled to rely upon the decision of the Maori Appellate Court*' is another way of saying, yet again, that Ngai Tahu have exclusive rights to Kahurangi Point, and Ngati Apa will receive nothing by way of compensation. [Emphasis in original.]³⁶

Ngati Apa submitted that the Crown had breached its Treaty obligations to them in giving effect to the 1990 decision, in failing to accept, listen, or act on Ngati Apa's representations with respect to the injustices of the decision, and in failing to act on or heed the Tribunal's views on boundaries, as expressed in the Muriwhenua and Ngati Awa inquiries.³⁷

Also, Ngati Apa maintained that the Ngai Tahu Claims Settlement Act 1998 impinged on Ngati Apa's ability to seek redress in their claim with respect to the perpetual leases issue. In Ngati Apa's view, this demonstrated the result of the Crown's reliance on the 1990 decision. The idea of exclusive rights on the part of Ngai Tahu has become entrenched in Government policy.

Ngati Apa also argued that the Crown misled them into believing that the settlement with Ngai Tahu would not impact on any future negotiations between themselves and the Crown. This was clearly not the outcome of the binding settlement with Ngai Tahu, which 'effectively removed assets and resources from any future settlement with Ngati Apa'. The Crown failed to adequately consult with Ngati Apa during its negotiations with Ngai Tahu. Ngati Apa stated that the Crown refused to meet, negotiate, or hear submissions from Ngati Apa, with only one exception – a 10-minute hearing at the select committee stage of considering the Ngai Tahu Settlement Bill.³⁸ The Crown's settlement with Ngai Tahu had also

36. Counsel for Ngati Apa, closing submissions, pp 42–43

37. Ibid, p 36

38. Ngati Apa, amended statement of claim, 14 February 2003 (claim 1.10(a)), p 9

‘effectively removed all potential assets and resources south of Kahurangi Point that were being vested in Ngai Tahu from any recourse in the course of any subsequent Ngati Apa Waitangi Tribunal claim.’³⁹

Ngati Toa submitted that the Crown breached its Treaty obligations by relying exclusively on the 1990 decision in its statutory definition of the Ngai Tahu takiwa. Ngati Toa argued that the Maori Appellate Court specifically stated that its decision was related only to a limited question: namely, customary interests in a specific area at a specific time. The court had not intended its decision to be an authoritative guide on tribal boundaries in general. The Crown was wrong to rely on the decision to set the boundary in the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Settlement Act 1998. Ngati Toa argued that the Crown’s reliance on the 1990 decision breached the principle of active protection.⁴⁰

Ngati Toa also stated that the Crown failed to consult with them during negotiations with Ngai Tahu. The Crown was not apprised of the extent and nature of Ngati Toa’s interests or the effect that the settlement would have on Ngati Toa’s rights. Ngati Toa claimed that the Ngai Tahu settlement prejudicially affected them. Some of the areas vested in Ngai Tahu or subject to special statutory entitlements in favour of Ngai Tahu were areas that Ngati Toa claim as lying within their rohe.⁴¹

Ngati Rarua also pointed to the Crown’s failure to take notice of subsequent protests from Te Tau Ihu iwi. Ngati Rarua’s amended statement of claim pointed to the failure of a petition to the New Zealand House of Representatives from Te Tau Ihu iwi in 1999. The petitioners sought a Government inquiry into whether the 1990 decision was correct, given the new evidence then available; whether or not section 6A should be repealed; and what was the most appropriate procedure to follow to ensure that Te Tau Ihu iwi could proceed with their claims without further delay.⁴² Kathleen Hemi and various trusts representing Te Tau Ihu iwi interests submitted the petition in 1996.⁴³ In 1998, the petition was referred to the Justice and Law Reform Committee and was then passed on to the Maori Affairs Select Committee. On 18 February 2000, the clerk of the committee informed Mrs Hemi that the petition’s requests were ‘declined at this time’ because ‘the matters raised in the petition are before the Court of Appeal and as such, [are] *sub judice*’. Two years later, the Maori Affairs Select Committee reconsidered the petition. The committee’s report of 21 February 2002 merely stated that ‘We have no matters to bring to the attention of the house.’⁴⁴

39. Counsel for Ngati Apa, closing submissions, p 45

40. Ngati Toa Rangatira, second amended statement of claim, p 47; counsel for Ngati Toa Rangatira, closing submissions, pp 122–126

41. Ngati Toa Rangatira, second amended statement of claim, pp 47–48

42. Ngati Rarua, amended statement of claim, 14 July 2000 (claim 1.13(a)), pp 28–29

43. The petitioners were Kathleen Hemi, the Ngati Apa ki te Waipounamu Trust, the Te Atiawa Manawhenua ki te Tau Ihu Trust, the Te Runanga o Ngati Kuia Trust, the Ngati Rarua Iwi Trust, Te Runanga o Rangitane o Wairau Incorporated, and the Ngati Tama Manawhenua ki te Tau Ihu Trust.

44. *Inquiry into the Petition of Kathleen Hemi QSM and the Ngati Apa ki te Waipounamu Trust (and Others)*, MA/02/09, Parliamentary Library, Wellington

We also received submissions from Rangitane and Te Atiawa on access to their ‘landless native reserves’, granted to them in the late nineteenth and early twentieth centuries, which lay within the Ngai Tahu takiwa. Rangitane claimed that the Ngai Tahu Claims Settlement Act 1998 prevents them from accessing their landless native reserve on Stewart Island.⁴⁵ Te Atiawa’s claim also concerned a landless native reserve: Whakapoai, on the Heaphy River, which was originally granted to Ngati Apa and Te Atiawa. The Crown allegedly breached its Treaty obligations to Te Atiawa by including the reserve in the Ngai Tahu deed of settlement.⁴⁶

4.5.2 Ngai Tahu submissions

Ngai Tahu submitted that they had no responsibility in this matter. However, they contended that the Maori Appellate Court decision was correct and thus, it was implied, the Crown could not be faulted for having relied on it in passing subsequent laws.

4.5.3 Crown submissions

The Crown argued that it was entitled to rely on the recommendations of the Tribunal and the findings of the Maori Appellate Court. Crown counsel stated:

Following the 1990 Maori Appellate Court decision, the Wai 27 Tribunal adopted the findings of the Maori Appellate Court and the findings of that Tribunal were an important consideration in the subsequent negotiation and settlement of the Ngai Tahu claims. The Maori Appellate Court finding had been incorporated into the legislation giving effect to the Ngai Tahu settlement. The Crown was entitled to rely on the decisions of a Court of competent jurisdiction.⁴⁷

Crown counsel also submitted that ‘The Crown is honour-bound to respect and uphold its settlement with Ngai Tahu.’⁴⁸

4.5.4 Tribunal discussion and findings

The Te Tau Ihu claimants contended that the Maori Appellate Court decision was flawed and that the Crown was wrong to rely on it.

45. Rangitane, sixth amended statement of claim, 14 February 2003 (claim 1.1(f)), pp 47, 51

46. Ngai Tahu subsequently opted for the reserve to be vested in the descendants of the original grantees, so it was not actually transferred to Ngai Tahu by the 1998 Act. As at 2004, the Crown had not investigated the ownership of the reserve: Te Atiawa, statement of claim, 14 February 2003 (claim 1.14(c)), p 20; counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 212–214.

47. Crown counsel, closing submissions, pp 134–135

48. Ibid, p 122

We have reached a very different conclusion from that of the Maori Appellate Court. As we pointed out earlier, our starting perspective was very different to that of the court. There, the Ngai Tahu case against the Crown provided the context for the questions posed to the court by the Tribunal. The questions set the date of Ngai Tahu sales with the Crown as the point to determine customary ownership and were instrumental to the manner in which the court considered rights of ownership. This placed Te Tau Ihu iwi at a disadvantage, as their customary rights and rights admitted by earlier Crown purchases became secondary to rights of ownership as at the dates of the Arahura and Kaikoura sale deeds with the Crown.

The parameters set for the court enabled it to arrive at its decision that Ngai Tahu had exclusive rights south of the statutorily defined boundary.

By contrast, our starting point was to consider whether Te Tau Ihu iwi also had customary rights within the Ngai Tahu takiwa. In undertaking this inquiry, it should be made very clear that this Tribunal is not an appellate body. Our role is not to consider whether the Maori Appellate Court decision was right or wrong. Our role is to examine all the evidence submitted to us by Te Tau Ihu iwi and arrive at our own conclusions based on that evidence.

In chapter 2, we set out our conclusions as to the customary rights of iwi within the Ngai Tahu takiwa. We found that, in the critical period between 1840 and 1860, Ngai Tahu did not have exclusive rights in the area in dispute.

There was intermarriage, the sharing of resources, and a fluidity of movement that existed between Ngai Tahu to the south and Te Tau Ihu to the north. On the east coast, Rangitane claimed ancestral associations with special features of the land (Tapuae-o-Uenuku, Waiautoa, and Kaporatehau) well within the territory claimed by Ngai Tahu. On the West Coast in the 1840s, an identifiable community of Ngati Apa were living within what subsequently became the Arahura block. In both cases, we considered the tangata heke to have created rights to lands formerly under the control of Rangitane and Ngai Tahu on the Kaikoura coast and Poutini Ngai Tahu and Ngati Apa on the West Coast. At 1840, none of these iwi could demonstrate exclusive rights in these lands, and the question of where any boundary lay between these iwi remained unsettled after the disruption caused by the invasion from the north. In any case, in these rugged coastal stretches, the boundary between different iwi was thought of in terms of access to, and use of, resources, not as exclusive possession of a whole area.

It is fair to say that thinking has changed on the nature of customary rights since the Maori Appellate Court decision. It has moved from a reliance on a set of hard and fast rules, formulated in the Native Land Court, to demonstrate ownership to a greater appreciation of the importance of marriages between different groups and of the ongoing nature

of ancestral association, despite conquests. We are more alive to the possibility that customary society might operate on rules other than those founded solely in force or conquest and that associations with the land might be intangible as well as physical.

As has been stated previously in this report, the Waitangi Tribunal has been reluctant to fix boundaries for any one iwi. The Tribunal now thinks in terms of ‘overlapping’ rather than ‘cross’ claims, and its methodology has shifted from investigating the claim of a single tribal entity to inquiring into those of all claimant groups within a particular area of inquiry. Many Tribunal panels and historians have accepted that it was possible for more than one iwi to exercise rights in the same land, the same mountain, the same river, or the same battle site. With customary tenure, there exists an intricate system of overlapping and competing rights held by members of different kinship groups. This was particularly the case where territory was subject to disputes and migration over time.⁴⁹

As we have shown in chapter 2, this view is appropriate when considering the intricate web of whakapapa relationships between Te Tau Ihu and Ngai Tahu iwi.

In our opinion, the straight line boundary determined by the 1990 Maori Appellate Court decision was not appropriate when considering the overlapping rights of Te Tau Ihu iwi and Ngai Tahu in this area. The boundary had the effect not only of drawing a line directly through whakapapa but also of driving a wedge between some of the whakapapa relationships. Rights and interests derived from shared whakapapa cannot be extinguished or modified by drawing a straight boundary line on a map – the practical effect of the 1990 Maori Appellate Court decision.

We now turn to consider the legislation which followed that decision.

The courts have made it clear that neither the Te Runanga o Ngai Tahu Act 1996 nor the Ngai Tahu Claims Settlement Act 1998 prevents the Crown recognising and settling claims of other iwi. The legislation adopts the boundaries of the Maori Appellate Court’s decision but not the notion of exclusivity. The Court of Appeal in the Ngati Apa case was clear on this point. Justice Keith stated:

the references to the 1990 decision in the 1996 and 1998 Acts . . . do not incorporate the notion of exclusivity over the whole of the area within the takiwa with the consequence that no claims by other tribes were still possible. To repeat, so far as the 1990 decision is concerned, the Acts make direct use only of the boundary it indicates.⁵⁰

Nor do sections 461 and 462 of the Ngai Tahu Claims Settlement Act have this effect. Justice Keith wrote:

49. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from 1769 to c1945* (Wellington: Victoria University Press, 1998), pp194–200

50. *Ngati Apa ki te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, 682 (CA)

I do not see either s 461 or s 462 as preventing in any absolute way the presentation of Ngati Apa claims to a Court or tribunal and in particular to the Waitangi Tribunal. The main purpose of s 461 is to provide for a Crown release in respect of claims made by Ngai Tahu . . . As well, in terms of s 461(3) of the Settlement Act and s 6(9) of the Treaty of Waitangi Act, the deed of settlement and the Act can not be challenged, for instance, before the tribunal.⁵¹

And Chief Justice Elias stated:

It is significant that these provisions do not preclude claims or inquiries except in respect of the 'Ngai Tahu claims'. It is those claims only which are finally settled by the Settlement Act. The s 10 definition of Ngai Tahu claims is explicitly limited to claims made by any Ngai Tahu claimant. It would have been easy for the legislation to provide that no claim by any tribal group might be brought in respect of the breaches of the Treaty arising out of the tribe's use or occupation or ownership of land within the takiwa of Ngai Tahu, if that had been intended. For reasons given below, it is inconceivable that Parliament could have intended by implication to preclude a Ngati Apa claim to the Waitangi Tribunal that the Crown has breached its Treaty promises of protection of properties of Ngati Apa.⁵²

We agree that the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Claims Settlement Act 1998 apply only to Ngai Tahu. They do not preclude the Te Tau Ihu iwi from making claims or having their claims determined. We are of the view that the principle of non-exclusive redress, if coupled with the provision of redress to others later in good faith, is an acceptable way to settle claims in areas of overlap.⁵³ In this respect, the legislation in our view does not breach the Crown's duty of protection to Te Tau Ihu iwi.

Even non-exclusive redress has to be delivered in such a way as to not prejudice the legitimate claims of others. The next question is whether this has been the case. Has the Crown interpreted and acted on this legislation in a manner consistent with its Treaty duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu? Some of the evidence presented to us suggests that the Crown has failed in this duty and has treated exclusively with Ngai Tahu within that part of the Ngai Tahu takiwa in which Te Tau Ihu iwi claim to have customary interests.

An example of the Crown dealing exclusively with Ngai Tahu can be seen in relation to the Parinui o Whiti conservation lands. In chapter 2, we found that Rangitane and Ngati Toa held customary rights in this area. By section 121 of the Ngai Tahu Claims Settlement Act 1988, the Crown has vested the sole ownership of this land in Ngai Tahu. Te Tau Ihu iwi interests in this land have been lost.

51. *Ngati Apa ki te Waipounamu Trust v The Queen*, p 683

52. *Ibid*, p 670

53. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), pp 18, 22–23

In incorrectly interpreting the legislation to give Ngai Tahu an exclusive interest in the takiwa, the Crown has limited the assets available for settlement with Te Tau Ihu iwi. Land vested in Ngai Tahu is now privately owned within the meaning of the Treaty, and it would be inappropriate – and, in any case, outside our powers – to make a recommendation to reopen that question. It should also be emphasised that none of the Te Tau Ihu claimants has sought to interfere with Ngai Tahu's settlement with the Crown.

The opportunity to include assets in the takiwa in any future settlement with Te Tau Ihu iwi has been lost. Instead, we recommend that the Crown negotiate with Te Tau Ihu iwi to agree on equitable compensation.

There was also no consultation with Te Tau Ihu iwi during the Crown's negotiations with Ngai Tahu, with the exception of a 10-minute hearing before the select committee, notwithstanding the protests that it had received.

In our view, the Crown's fault lay in following the Maori Appellate Court decision, which created exclusivity for Ngai Tahu within its takiwa, rather than following the legislation, which did not. As a result of the Crown's actions, Te Tau Ihu iwi have lost interests in land that cannot be recovered. Moreover, the Crown's refusal to negotiate with Te Tau Ihu iwi in relation to rights within the Ngai Tahu takiwa has been prejudicial to the mana of Te Tau Ihu iwi. The loss of mana can be recovered, but it will need positive action by the Crown to educate Government departments and local authorities that the Ngai Tahu Claims Settlement Act does not give Ngai Tahu exclusive rights within their takiwa.

As demonstrated, Te Tau Ihu iwi have rights, and these rights must be acknowledged and protected by the Crown. Unfortunately, this has not been the case. The Crown by its actions has failed in its duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu, notwithstanding that the Ngai Tahu legislation does not provide for exclusivity. In our view, the Crown has continued a common theme of not dealing with all iwi in an equal manner. This policy was evident in the nineteenth century and continues today.

In breaching the principle of equal treatment, harm has resulted for Te Tau Ihu iwi. This prejudice will be increased if our findings and recommendations on this issue are ignored on the ground that claims within the Ngai Tahu takiwa have been settled. They have been for Ngai Tahu, but have not yet been for Te Tau Ihu iwi.

We find that the Crown has not breached its Treaty obligations to Te Tau Ihu iwi by the passing of, or the content of, the Te Runanga o Ngai Tahu Act 1996 or the Ngai Tahu Claims Settlement Act 1998. However, in dealing with Ngai Tahu exclusively within the Ngai Tahu takiwa, the Crown has breached the principles of active protection and equal treatment, and Te Tau Ihu iwi have been prejudiced as a result. We strongly recommend that the Crown take urgent action to ensure that these breaches do not continue. If the Crown does not accept this recommendation, it will not only perpetuate the breaches set out above but will also add unnecessary and increased tension to the relationships between Ngai Tahu and Te Tau Ihu iwi.

CHAPTER 5

SUMMARY OF FINDINGS

The purpose of this preliminary report is to assist the negotiations of the parties by providing our findings on Te Tau Ihu iwi customary rights within the statutorily defined Ngai Tahu takiwa and the Crown's treatment of them. In this chapter, we summarise our analysis and findings.

5.1 DID TE TAU IHU IWI HAVE CUSTOMARY RIGHTS IN THE NGAI TAHU TAKIWA?

In 1990, the Maori Appellate Court found that Ngai Tahu had sole rights of ownership in the Kaikoura and Arahura blocks when they were purchased by the Crown in 1859 and 1860. The northern boundaries of these blocks, at Parinui o Whiti on the east coast and Kahurangi on the west, became the northern boundary line of the Ngai Tahu takiwa, defined by legislation in the 1990s.

Te Tau Ihu iwi submitted that they also had customary rights in the Kaikoura and Arahura blocks, and thus in parts of the statutorily defined takiwa. They argued that Ngai Tahu's rights were not exclusive and they claimed that the Crown's treatment of the interests of Te Tau Ihu iwi within the takiwa had breached the Treaty and its principles. Such breaches had resulted from the Crown's actions and omissions in the course of its purchases and allocation of reserves in the nineteenth century, and in its negotiation and settlement of the Ngai Tahu claim in the late twentieth century. Argument regarding the impact of the Maori Appellate Court decision on the Crown's treatment of the interests of Te Tau Ihi iwi during that settlement process with Ngai Tahu was an important component within their submissions.

To assess these claims, it was necessary for us to first establish whether Te Tau Ihu iwi did, in fact, have customary interests in the takiwa. In chapter 2, we outlined our view on this matter. We prefaced our discussion with a caution on the difficulties of reconstructing traditional history. We noted that it is possible for different versions of the same event to be held within the traditions of one or several iwi. We stressed that the emphasis in these traditions on war and conquest obscured the significance of peace making and intermarriage in relations between iwi, and in establishing and maintaining rights in lands and resources.

As in our first preliminary report, we have viewed customary rights in terms of ‘bundles’ of rights. An iwi’s rights were comprised of a bundle of elements, such as raupatu, occupation, and resource use, and were not dependent on one factor alone. The importance of different elements within the bundle changed over time. The size of the bundle held by an iwi could also expand or contract as time passed.

In our view, the notion of fixed tribal boundaries was not customary but one that was introduced to Te Wai Pounamu during transactions undertaken by New Zealand Company and Crown officials. Maori thought in terms of places of significance, not of the lines connecting them, which the Crown often used for its purchase boundaries. Under Maori customary law, iwi and hapu had core territories, edged by zones of overlapping rights. Control over these buffer zones could be, and was, contested; but so, too, resource use by one side could continue for long periods without apparent challenge from the other. Tribal boundaries were not necessarily exclusive.

We concluded that, at 1820, both Ngai Tahu and Rangitane had interests in land and resources between Parinui o Whiti and Waiau-toa and that neither could claim exclusive rights in this part of the takiwa. Both iwi held traditions associated with the region, could demonstrate whakapapa links to tupuna, and could recall significant battles that had taken place there. In our view, ancestral associations must be respected as long as such memories are held. We specifically rejected the argument that Rangitane had no independent traditions concerning that area and had borrowed and misused those of Ngai Tahu.

The interests of Ngai Tahu and Rangitane were disrupted but not displaced by the Ngati Toa-led taua from the north in the 1820s and 1830s. We stressed that Ngai Tahu counter-attacks in the early 1830s included several on Rangitane kainga along the east coast from Waipapa northwards, indicating that Rangitane were still in occupation after their defeat at the hands of Ngai Toa and their allies. We acknowledged that Ngai Tahu’s military retaliation demonstrated that their ‘conquest’ by Ngati Toa was far from complete, despite defeats at Kaiapohia and elsewhere. Although Ngai Tahu withdrew from the east coast and did not reoccupy the area around Waipapa until the 1850s, they strongly challenged the right of Ngati Toa to dispose of those lands. In any event, we do not think that ancestral rights could be sundered in the short time between the northern invasions and the coming of British rule at 1840. This conclusion applies equally to Rangitane and Ngai Tahu, even though the impact of those invasions was greater for Rangitane, whose core territory around Wairau and the sounds had been occupied.

Ngati Toa began consolidating their rights in the takiwa on the east coast, more particularly at Kaikoura in the latter part of the 1830s, with ‘takawaenga’ or peacemaking marriages with Ngai Tahu. They were not particularly visible in the northern part of the east coast takiwa, but we need to remember that this was an area of seasonal resource use that was not necessarily permanently settled. Moreover, Ngati Toa preferred to live in the more fertile area of the Wairau Valley and around the whaling entrepôts in the sounds rather than

SUMMARY OF FINDINGS

5.1

establish kainga along the inhospitable coast south of Parinui o Whiti. In our view, neither iwi was able to establish unchallenged occupation, and the history of attack, counter-attack, and peace arrangements in the 1830s left neither side in ascendancy.

Ngati Toa failed to respond to the raids mounted by Ngai Tahu, but we were of the opinion that this was largely because of their engagements to the north, on both sides of Raukawa Moana. Their more general withdrawal from the region was not in fear of attacks from Ngai Tahu, who themselves had withdrawn to Kaiapoi. But just as insufficient time had elapsed to extinguish the rights of Ngai Tahu – or those of Rangitane – so, too, had insufficient time passed to fully establish that Ngati Toa had abandoned this outer zone of their influence. There was a latent right available to Ngati Toa which the Crown foreclosed when it purchased their interests in the eastern side of the island as far as Kaiapoi in 1847.

Thus, we concluded that all three iwi – Ngati Toa and Rangitane, as well as Ngai Tahu – had legitimate overlapping customary rights in the area between Parinui o Whiti and Waiau-toa. None of these rights had been completely lost by the time of that first Crown purchase within the takiwa in 1847. Though none of the three iwi was in occupation in any force as a community, all were probably using resources in the district. None could demonstrate exclusivity of interest.

We also concluded that Ngai Tahu could not demonstrate exclusive rights on the western side of the takiwa between Kawatiri and Kahurangi (the northern boundary point). A similar situation applied as on the east coast. The northern part of the takiwa was inhospitable, with few resources, and occupation was migratory and seasonal. It was the pounamu at Arahura to the south and the knowledge held by the local people that were valued. For tangata whenua, the remoteness of the hinterland provided a measure of safety in times of warfare.

Prior to 1820, Ngati Apa had established rights in the district, beginning with their raupatu against Ngati Tumatakokiri and intermarriage with them. How far south those rights extended and exactly when they began was disputed in the evidence presented to us. Neither Ngati Apa coming from the north nor Ngai Tahu coming from the south (and subsuming Ngati Wairangi) was particularly visible in this portion of the takiwa. The area was a borderland where the exercise of rights was intermittent and left little trace. Neither Ngai Tahu nor Ngati Apa could show exclusive control of the area between Kahurangi and Kawatiri in the period before occupational patterns were disturbed by the northern taua. Nor could either group demonstrate an exclusive connection to the whakapapa associated with it.

Again, we consider that the raupatu and subsequent migrations of the 1820s and 1830s did not displace the customary rights of Ngai Tahu and Ngati Apa. There is no doubt that Ngati Apa's influence in western Te Tau Ihu was severely affected, but the iwi was not completely wiped out and some of its members later emerged in the West Coast districts. For Ngai Tahu Poutini, the consequences were far less severe, although they had been obliged to

share their kainga and resources for a time. The victors' control became far less certain after 1837, when one of their most senior rangatira (Te Puoho) was himself defeated and killed far to the south in Murihiku. Thereafter, the area between Mawhera and Kahurangi remained unoccupied and the exercise of rights a matter of insubstantial resource use. However, a small mixed community of Ngati Apa and Ngai Tahu (and some members of the northern tribes) was to resettle the Kawatiri area in the mid-1840s.

Ngati Rarua rangatira Niho and Takerei had led the migration to the western side to its most southerly reach, supported in that venture by Ngati Tama and Te Atiawa. The three iwi initiated their right by means of raupatu over Ngati Apa and Ngai Tahu Poutini, which they then developed through occupation (including settlement and resource use at Mawhera) up until the late 1830s. We place considerable significance on the high-ranking marriage that was undertaken with Poutini Ngai Tahu and the fact that Niho and Takerei protected the community at Mawhera from further taua. These rights were diminished following a withdrawal of many of them after the defeat of Puoho and Ngati Tama in 1837. Their claims were not entirely abandoned, however, being maintained by ongoing resource use and continued residence by individuals. Their right to occupy – or the freedom to return and take up that right – had not terminated by 1840.

Ngati Toa also had a claim that needed to be considered by the Crown when it set about purchasing the district. They had not been directly involved in the taua that had established the occupation of their northern allies in the western Te Tau Ihu and on the West Coast. Nonetheless, Ngati Toa claimed that the mana of Te Rauparaha, and their leadership in the taua and subsequent heke to Te Wai Pounamu, also gave them rights in lands to the full extent of their strategic control. They maintained, in the context of Crown efforts to purchase land there in the 1850s, that their allies were obliged, on the West Coast as elsewhere, to acknowledge the 'overriding mana and authority of Ngati Toa'.

Those allies – Te Atiawa, Ngati Tama, and Ngati Rarua – rejected such claims and with increasing vigour as time passed. Nor do we endorse Ngati Toa's argument of an 'overlordship'. 'Conquerors' had to live on the land or exercise other acts of 'ownership' to develop rights in it. Although a claim might ultimately trace back to raupatu, it was sustained occupation that gave recognised rights. While we agree that occupation need not be based on permanent residence to have effect (as was the case on the east coast), it did need to be of a more tangible character than that of a strategic control of the West Coast exercised from a stronghold in the North Island. This was a very small stick in the bundle indeed – a recognition of Te Rauparaha's mana and Ngati Toa's participation in the wider campaigns that had successfully established new homelands for the northern iwi. We have described this as a notional or potential right. That such a right existed was backed by evidence that the Poutini Ngai Tahu rangatira Tuhuru had been brought to Te Rauparaha when he was

at Rangitoto. While this was insufficient to establish that Te Rauparaha had a claim, it does indicate that the other northern rangatira might have respected it had he chosen to make one at the time. There was, however, little further opportunity for Ngati Toa to begin adding to the bundle or to make any demand to participate in Niho's capture of the pounamu trade. They certainly evinced no interest in residing anywhere along the western side, but insufficient time had lapsed by 1840 to entirely negate this latent right.

Our overall conclusion was that Te Tau Ihu iwi had customary rights in the takiwa, which overlapped the acknowledged rights of Ngai Tahu. At 1840, Rangitane and Ngati Toa held customary interests in the east coast portion of the takiwa north of Waiau-toa that had been included in the Kaikoura purchase. Ngati Apa, Ngati Rarua, Ngati Tama, and Te Atiawa held continuing customary rights in the West Coast portion, from Kawatiri northward, that had been included in the Arahura deed. We were of the view that Ngati Toa had a latent right in that area, but the opportunity was not developed and it remained notional only.

5.2 THE CROWN'S TREATMENT OF RIGHTS: CROWN PURCHASES AND WEST COAST RESERVES

Having established that Te Tau Ihu iwi did have customary rights within the statutorily defined Ngai Tahu takiwa, we then considered the Crown's treatment of such rights. In chapter 3, we examined the Crown's purchase of the northern takiwa lands in the mid nineteenth century, which extinguished the bulk of these interests, and the subsequent experience of Te Tau Ihu iwi in the West Coast reserves.

The Crown acquired interests throughout the South Island in a series of purchases from the 1840s through to 1860. This process did not involve a proper prior investigation and weighing up of relative customary interests. Rather, the Crown dealt separately with any iwi or hapu it considered to have valid claims, in a series of overlapping 'blanket' purchases, beginning with the 'Wairau' from three Ngati Toa rangatira. This purchase purported to extend as far south as Kaiapoi, and the Crown soon found it necessary to deal with others as well. A series of different 'Waipounamu' deeds were signed between 1853 and 1856 by various parties of Ngati Toa, Rangitane, Te Atiawa, Ngati Tama, and Ngati Rarua. Ngai Tahu interests were extinguished by a separate series of overlapping Crown transactions: Canterbury (1848), North Canterbury (1850), and Kaikoura (1859) on the east coast; Canterbury (1848), and Arahura (1860) on the West Coast. In the course of that final purchase at Arahura, Ngati Apa rights also received a measure of Crown recognition.

We deal with the east coast and West Coast separately, although some of these transactions spanned both districts.

5.2.1 Crown purchases on the east coast**(1) *The Wairau purchase, 1847***

Our discussion of the Wairau purchase here supplements that of the first preliminary report, where we concluded that there had been a wholly inadequate inquiry into the customary interests before Governor Grey completed his purchase with just three non-resident Ngati Toa chiefs. He did so behind closed doors at Government House in Wellington, without community consent and in the coercive context of the Crown's detention of Te Rauparaha and other senior rangatira. Grey proceeded on Commissioner Spain's pronouncement that Ngati Toa had sole possession of the Wairau, even though Spain had not conducted any inquiry into this side of the region. Other advice had also been available. Early in 1846, Grey had sent his Surveyor-General, Charles Ligar, to inquire into the extent of land available, estimate the population, and find out whether they would be willing to sell. Ligar had reported back that there were 13 chiefs and 'many others' who had rights. While Ligar's report was flawed – he wrongly identified all the rangatira he named as Ngati Toa – at the least it ought to have served to caution Grey that the consent of more than three chiefs would be required. But Grey had already decided that Ngati Toa were the owners and he refused to heed Ligar's advice.

Grey thus knowingly violated the rights of other senior leaders of Ngati Toa and of the tribe as a whole. He also failed to take into account the interests of resident right-holders, including Ngati Toa and Rangitane. Moreover, Rangitane (and other residents) protested their exclusion after the deed had been signed, and as settlers began to intrude on the ground, but they were ignored. They had not been allowed any say in whether the Wairau and the Kaikoura Coast would be sold; nor did they receive any payment.

These matters are discussed more fully in our first report. In this report, we focused on the Crown's incorporation of land down to Kaiapoi within the Wairau boundaries. The account provided by Grey's interpreter, Servantes, suggests that the initiative came from the Ngati Toa rangatira: that they were 'asked to dispose of the Wairau Valley only, but they themselves proposed to cede all their lands as far as Kaiapoi . . . to which point they stated the property to which they had sole title extended'. The Kaiapoi specified here was the old Kaiapohia Pa, claimed by Ngati Toa because Te Pahi Kupe and other senior northern rangatira had lost their lives in a major battle there. Servantes saw no difficulty with the claim down to Kaikoura, but he admitted that there were doubts whether an exclusive Ngati Toa right extended so far as Kaiapoi. He acknowledged that Ngai Tahu had a claim also. Still, it was thought advisable to include the area in the purchase from Ngati Toa in order to extinguish whatever claims they might have and to preclude their certain challenge to the right of any other tribe who might want to dispose of it.

Other sources put the initiative with Grey. As H T Kemp, who was also present, described it, Grey wished to 'throw a halo of peace' over the Wairau disaster (where New Zealand Company settlers had lost their lives) and made the initial connection between payment

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5.2.1(1)

for the land and compensation, or utu, for the dead. This version of events was, in our view, also supported by Ngati Toa accounts. Grey willingly conceded this request for utu since it allowed a huge extension of the land to be handed over – a cynical exploitation of the custom of utu, in our opinion. Eventually, the Crown would find it similarly expedient to purchase Ngai Tahu's claimed rights in the same area. We also concluded that this extension of boundaries was not supported by an adequate inquiry into customary interests. There was no consultation with other Ngati Toa or Rangitane (or Ngai Tahu) about the southern boundary or the Crown's purchase of that extent of land.

In general, there was an inadequate explanation of the boundaries of the takiwa portion of the purchase. The inland boundary was not described in the deed and the southern extremity was subsequently moved, in the course of the Canterbury purchase, to a different Kaiapoi further north.

We reiterated the findings of the first preliminary report, that as far as Ngati Toa were concerned, the closed deal with three chiefs was an absolute and deliberate breach of article 2 and the principles of reciprocity, partnership, active protection, and equal treatment. This finding applies to the whole of the area purchased, including the portion in the takiwa. We also considered that this action was compounded, especially in the takiwa, by the Crown's exploitation of Maori custom in its own expedient interests, in breach of the principles of reciprocity, partnership, active protection, and equal treatment.

In failing to consult with Rangitane, the Crown breached article 2 and the principles of reciprocity, partnership, active protection, and equal treatment. This was compounded by the failure to investigate Rangitane's subsequent protests about the sale and to satisfy their undoubted rights at this point.

As we stated in the first preliminary report, we find that the Wairau purchase did not extinguish the rights of those who were not a party to it. For the land within the Ngai Tahu takiwa, this included the majority of Ngati Toa and Rangitane, as well as Ngai Tahu themselves. This was in violation of the plain meaning of article 2 of the Treaty and the principles of reciprocity, partnership, and active protection. The subsequent Waipounamu and Kaikoura deeds did not mitigate the failures of Wairau: they could not and did not make willing sellers of those whose rights had been granted to others. Although they later entered into their own arrangements with the Crown, the other right-holders effectively had no choice but to sell.

Additionally, we found that the Wairau purchase did not measure up to the required standard for a valid Crown purchase under the Treaty. Its failings included the failure to properly describe the inland boundaries and the shifting of the southern 'Kaiapoi' boundary without the consent of the signatories and other right-holders. These actions were in breach both of article 2, which provided for the alienation only of 'such land as the proprietors thereof may be disposed to alienate', and of the principles of active protection and partnership.

(2) *The Waipounamu purchase, 1853–56*

With the Waipounamu ‘purchase’, which was in fact a series of purchases, the Crown again dealt first with Ngati Toa. The 1853 deed (signed at Porirua) extinguished ‘all our [Ngati Toa] lands in this island’ and established the framework for the deeds that followed, purporting to extinguish Te Tau Ihu interests in both the eastern and western takiwa. The first Ngati Toa deed acknowledged that resident tribes – including the defeated peoples – claimed the land ‘conjointly’ with Ngati Toa. The Crown considered Ngati Toa to have an undeniable primary right to sell based on their claim of ‘overlordship’ but conceded that the concurrence of those conjoint owners was required before the sale could be considered valid.

We were mainly concerned, in the eastern takiwa, with the position of Rangitane. In our view, the deed that was signed with Rangitane in 1856 did not include lands on the right bank of the Wairau River and the east coast. In our understanding of the deed, the vague phrase ‘all our claims on the land’ was qualified by the remainder of the sentence: ‘that is for all the lands of Rangitane from the Wairau to Arahura.’ The right bank and east coast lands had already been included in the Wairau purchase without Rangitane’s consent.

Our first preliminary report was critical of the Crown for the failure to properly investigate rights before proceeding with the Waipounamu purchase. This had been initiated through absentee Ngati Toa (at a time when their traditional leadership and rangatiratanga had been undermined) and to the disadvantage of residents in Te Tau Ihu. We showed that the Crown exploited its recognition of Ngati Toa paramountcy in order to obtain the interests of other tribes without their full and free consent. Our view was that the Ngati Toa deed of 1853, while not ignoring the rights of other tribes, enabled the Crown to regard the land as sold from that time on. During our inquiry, the Crown conceded that resident right-holders were pressured into sales because prior dealings had been made with non-residents.

We reiterated our findings in the first preliminary report that the Crown accepted a claim at face value that it knew to be contested in order to put through a purchase of almost the entirety of the northern South Island, including lands in the eastern takiwa. This was a deliberate and calculated breach of enormous prejudice to Te Tau Ihu iwi.

We add that the Crown failed to properly extinguish the rights of Rangitane in the eastern portion of the takiwa. They received no payment when the Wairau block was purchased from Ngati Toa in 1847, nor were they to receive any when the east coast portion was purchased again, as the Kaikoura block, from Ngai Tahu in 1850. Our findings here are the same as they were for those two purchases: that this was in breach of both the plain meaning of article 2 and the principles of reciprocity, partnership, and active protection.

(3) *The North Canterbury and Kaikoura purchases, 1856, 1859*

The Kaikoura purchase overlay the North Canterbury purchase, representing the Crown’s response to the claims of Ngai Tahu (who were also named in the 1853 deed as conjoint

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5.2.2(2)

claimants) to land north of Kaiapoi. In negotiations, the Crown did not consider the rights of Ngati Toa or Rangitane, which were thought to have been extinguished by means of the Wairau and Waipounamu purchases, although as we note above, this had not been the case for Rangitane.

We thus found the Crown's failure to consider and fairly extinguish Rangitane's rights during the Kaikoura purchase to be in breach of both article 2 and the principles of active protection, partnership, and equal treatment.

5.2.2 Crown purchases on the West Coast

(1) *Crown purchases and negotiations, 1848–52*

The Crown began negotiating with both the northern iwi and Ngai Tahu for the West Coast in the late 1840s and early 1850s. The Canterbury purchase deed (1848), signed with Ngai Tahu, did not specify how far north the transaction extended on the West Coast, but the attached map appeared to give the northern boundary as the river mouth at Kawatiri. It is not clear how this boundary marker was decided upon, and the negotiations did not include Ngai Tahu resident on the West Coast. As a result, the Crown found it necessary to negotiate a new agreement with Poutini Ngai Tahu in 1860 to extinguish their interests.

During the negotiations for Pakawau (within Te Tau Ihu) in 1852, the Crown also considered acquiring the interests of Ngati Rarua and Ngati Tama as far south as Murihiku. The price ultimately proved a stumbling block, and the purchase did not extend so far in the end. Other iwi asserted claims in the takiwa at the same time. As noted earlier, Ngati Toa asserted their pre-eminence over their northern allies and objected to these offers to sell without their involvement. Ngai Tahu expressed anxieties about the proposed deal. There is some evidence that one of their senior rangatira, Taiaroa, had consented to the northerners' undertaking such a transaction, but eventually the Crown had to acknowledge that he was not the primary party to deal with for the West Coast. Ngati Apa rangatira also sent a letter to McLean at this time, stating that they had customary rights in the north-western South Island districts formerly controlled by Ngati Tumatakokiri, including places from Te Tai Tapu down to Karamea and Kawatiri.

(2) *The Waipounamu purchase, 1853–56*

The first Waipounamu deed signed by Ngati Toa represented their 'full and true consent' to the transfer of their 'land at the Waipounamu'. The interests referred to were not otherwise defined, but it was stated that they consisted of 'all our lands on the said Island'. The receipt signed in December 1854 by Ngati Toa chiefs was more specific: this was for 'all the lands which we have not sold in former times', and Arahura was included in the several places and districts mentioned. A receipt signed by Te Atiawa in March 1854 and the November

5.2.2(3)

1855 deed with Ngati Tama and Ngati Rarua also mentioned Arahura and Kahurangi Point. The boundaries of these purchases were not precisely defined, the deeds merely referring to 'Arahura' without pinpointing what was meant by this term.

The Crown completed the Waipounamu purchase without an inquiry on the West Coast itself. The claims of non-resident Ngati Toa and their northern allies, who had invaded the region and still had a presence in it, were accepted and their interests acquired without investigation. Neither Ngai Tahu nor Ngati Apa were involved in the Waipounamu purchase, and while McLean stated the Crown's intention to deal with Ngai Tahu at Arahura at a later point, he said nothing of Ngati Apa. We did not accept the Crown argument that customary rights were so unsettled as to be incapable of definition. That such an inquiry was feasible was demonstrated by James Mackay's investigations in 1860 during the Arahura transaction.

We found, therefore, that the Crown's failure to properly inquire into customary interests in the western part of the takiwa undermined meaningful consent and was a breach of the principles of active protection, partnership, and reciprocity.

The Crown did not treat the rights of the various iwi equally. The northern iwi were prioritised over Ngai Tahu, and Ngati Apa's rights were entirely disregarded, despite their having written to McLean in 1852 outlining their interests. Ngati Apa's rights on the West Coast remained uninvestigated, they were not consulted, and they received no payment. As in the case of the east coast, the signing of subsequent deeds could not and did not make willing sellers of those whose rights had been granted to others and did not mitigate the failures of Crown in the conduct of its initial purchase.

This breached Ngati Apa's article 2 rights and the principles of reciprocity, partnership, active protection, and equal treatment.

We also found that Ngati Rarua, Ngati Tama, and Te Atiawa did not sell their interests freely and on the basis of an informed choice. The Crown used the deal with Ngati Toa, a non-resident tribe, to pressure others with a history of residence in the area into selling their interests. This breached the principles of partnership, equal treatment, and active protection.

We found that the Waipounamu deeds fell short of the standard required for the Crown to make a valid purchase under the Treaty, most particularly in the failure to properly define the boundaries of what was being sold. This breached article 2 and the principles of active protection and partnership.

(3) *The Arahura purchase, 1860*

Negotiations with Poutini Ngai Tahu opened in the late 1850s, Ngai Tahu protesting that the Waipounamu transactions with the northern iwi should have extended as far south as Arahura. When the people based at Mawhera were told that Ngati Toa and Ngati Rarua had sold the West Coast area, Tuhuru's son protested vehemently that they were 'thieves', whose

‘feet had never trodden on this ground’. Poutini Ngai Tahu then offered to undertake their own sale of the coast from Milford Sound to as far north as Kahurangi.

After an unsuccessful attempt to negotiate a sale in May 1859, James Mackay returned to Mawhera to negotiate with Poutini Ngai Tahu in January 1860. Mackay was accompanied by two rangatira from Golden Bay who were of Ngati Rarua, Ngati Tama, and Te Atiawa lineage, and by Puaha Te Rangi of Ngati Apa. Ngati Apa’s interests were acknowledged in the Arahura transaction following Puaha Te Rangi’s demand for their inclusion ‘for lands at the Kawatiri and Buller districts’ and Ngai Tahu’s acceptance of the ‘justice of their claims’. Following the completion of the agreement, Mackay spent several weeks arranging reserves. Ngati Apa were allocated reserves at Kawatiri and Karamaea, and Ngati Rarua, Ngati Tama, and Te Atiawa individuals were included in a number of those reserves and in others.

We concluded that, while the Crown adequately inquired into Ngai Tahu Poutini’s interests, its inquiry into other customary interests in Arahura was inadequate. The Waipouamu purchase was used to an extent as a bargaining tool (with Ngai Tahu) and was considered to have extinguished any interests on the part of the northern iwi. Although no proper inquiry had been held then, the Crown did not reconsider the rights of Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa during the Arahura negotiations. The Crown had never inquired into Ngati Apa’s customary rights at all, and did not do so now. Ngati Apa were included in the deed only because of Te Rangi’s demand, and even then Mackay made no inquiry into the extent of their interests but accepted them when they were endorsed by Ngai Tahu’s senior resident rangatira (and apparently accepted, too, by the northern rangatira who had accompanied him). This failure to make proper inquiry at the time obscured the existence of rights other than those held by Ngai Tahu and, most especially, those of Ngati Apa.

We found that, in failing to adequately inquire into the customary rights of Te Tau Ihu iwi in the Arahura purchase, the Crown breached the principles of active protection, partnership, and reciprocity.

The failure to investigate Ngati Apa’s rights was a breach of the principle of equal treatment. They cannot be regarded as willing sellers acting of their own volition. The Crown’s acknowledgement of Ngati Apa’s rights was both belated and limited, in breach of the principles of active protection, partnership, and equal treatment.

5.3 THE WEST COAST RESERVES

The final section of chapter 3 considered the Crown’s treatment of Te Tau Ihu interests in the West Coast reserves. We made no finding about the adequacy of those reserves and leave this matter to the overall assessment of the main report. We did, however, consider evidence regarding the ultimate disposal of those interests. In 1879, the Young commission revisited

the allocation of interests in the Arahura occupation reserves made at the time of purchase. The Government commission investigated in the style of a Native Land Court hearing, and Te Tau Ihu iwi claimants allege that some of their ancestors were unfairly excluded through this process. The issue that concerned us was whether the Crown had carried out a fair and proper inquiry into reserve titles on the West Coast and, if not, what prejudice had been suffered.

We did not have enough evidence to reach a conclusion about whether certain individuals were rightly or wrongly included as owners in the reserves held by particular whanau. We did conclude, however, that the hearing process appeared to be defective. Not all parties were represented and key witnesses were not called upon to give evidence. Great reliance was placed on the evidence of one witness in particular, on the assertion of Alexander Mackay (the commissioner of native reserves) that he had authority to speak for the whanau concerned. When the matter was subsequently protested, the Crown declined to revisit the commissioner's decisions or to investigate the claims that they were unfair.

Our finding, therefore, is that the Crown breached the Treaty principles of partnership and active protection by carrying out an inquiry that purported to be an investigation of ownership rights in the West Coast occupation reserves but that was not conducted in an appropriately transparent manner. Not everyone with interests in the reserves was represented and it was not publicly demonstrated why so much reliance was placed on the evidence of prominent Ngai Tahu witnesses. This failure was compounded later when the Crown declined to entertain complaints that the commission's decisions were unfair.

Whether the rights of certain people of Ngati Rarua and Ngati Apa were wrongly removed from them as a result of the commission's activities depends on fuller information than we have been given, and we did not make a finding on that particular issue.

We then considered the Native Land Court's investigation into the beneficial ownership of the endowment reserves in the mid twentieth century. We noted that the earlier findings of the court were in accord with our own assessment of customary rights on the West Coast. In 1926, the court found that the claimants concerned – the Mahuika whanau – had 'some sort of right from the Ngati Apa side' and that Ngai Tahu were not 'sole owners' of the West Coast. In 1948, the Maori Appellate Court found that the involvement of Puaha Te Rangi and others in the Arahura deed was also indicative of legitimate customary rights on the part of Ngati Apa. The Maori Appellate Court's decision in 1990 – that Ngati Apa did not have distinct iwi rights in Arahura – was a departure from these earlier decisions. This court history was important to our understanding of Te Tau Ihu claims in the takiwa but was not a matter on which we were called to make a finding.

5.4 THE MAORI APPELLATE COURT HEARING AND DECISION, 1990

In chapter 4, we considered the claims arising out of the Crown's involvement in the Maori Appellate Court hearing and decision of 1989–90. The case arose after Te Tau Ihu iwi sought to have their claims heard by the Ngai Tahu Tribunal. To resolve the competing claims, the Tribunal recommended that legislation be introduced to enable it to refer such questions to the Maori Appellate Court. Accordingly, section 6A of the Treaty of Waitangi Act 1975 was enacted in 1988. This allowed the Tribunal to refer to the Maori Appellate Court for decision questions of Maori custom or usage relating to rights of ownership and the determination of tribal boundaries.

On the basis of submissions from the Ngai Tahu Trust Board and the Crown, the Tribunal then prepared the case to be stated to the Maori Appellate Court. Te Tau Ihu claimants were not involved in the actual framing of the case stated for the court, although their evidence was later heard on the matters being considered.

The Maori Appellate Court was asked to determine who held rights of ownership in the land purchased by the Crown in the Kaikoura and Arahura deeds in 1859 and 1860. After a nine-day hearing in June 1990, the court found that the northern invasion had resulted in conquest, thereby extinguishing Rangitane and Ngai Apa rights, but that the northern iwi had then failed to follow up their incursions into Ngai Tahu territory with occupation. The court concluded that Ngai Tahu had 'sole rights of ownership' in Kaikoura and Arahura at the time of their sale to the Crown.

In assessing the Treaty claims arising out of this process, we emphasised that our role was not one of an appellate body. We were not attempting to revisit this decision, which was in effect answering a different set of questions to the one with which we were concerned. The Maori Appellate Court was considering the case as stated – namely, customary ownership after 20 years of Crown purchasing – and it thus focused on transactions dominated by Ngai Tahu, discounting the significance of earlier Crown transactions with other iwi. We were more concerned with the situation at 1840 – whether rights were fully developed, or fully lost by then – and how that situation evolved in the following two decades. Thus, we did not see the matter as so clear-cut. Kaikoura and Arahura were the last of a series of 'blanket' purchases and represented the last acquisition of overlapping interests of one iwi after another. We were not simply focused on those two final transactions and we did not think that the evidence generated on those occasions could negate that generated in other negotiations with Te Tau Ihu iwi. In our view, it would be possible to accord exclusivity to the last seller only if we impugned the title of the first seller, and we saw no cause to do that.

Also, we were able to take a different approach to the question of boundaries and were not tied to those set by the last two of several transactions, beginning with the one first undertaken with Ngati Toa by the New Zealand Company in 1839 and then by the Crown from 1847. We have concluded that the boundaries set by such purchases were both uncus-tomary and not very clearly defined in any case.

The Te Tau Ihu iwi claimants argued that the Crown had breached the Treaty in a number of ways. They alleged that the amending legislation of 1988 was in breach of the Treaty. In their view, section 6A prevented Te Tau Ihu iwi participation in formulating the case stated and provided no avenue by which to appeal the Maori Appellate Court decision.

We did not accept that argument and found that section 6A was not in breach of the Treaty and its principles. The legislation did not prevent Te Tau Ihu iwi involvement in the case stated (that was the Ngai Tahu Tribunal's decision) and there were, in fact, avenues for appeal.

We did see this attempt to establish ownership within tribal boundaries set by purchase deeds as poorly conceived. In our view, the legislation expressed an uneasy mix of customary and non-customary concepts. We discussed the shift in thinking since 1990 to a greater acceptance of more than one iwi exercising rights in the same land or resources, and we noted that interpretations of customary rights now place more emphasis on marriages and ongoing ancestral rights despite conquests. A boundary line as suggested within the legislation was not appropriate. It represented a straight line driving a wedge through whakapapa and between whakapapa relationships. However, there was no requirement that the boundary line be based on Crown purchase deeds, and the legislation acknowledged that the court could make such a determination only to the 'extent practicable'. Nor did the legislation require that the Maori Appellate Court find in favour of only one iwi to the exclusion of all others in the area defined by that boundary – the key objection of the Te Tau Ihu claimants to its decision.

Te Tau Ihu iwi also claimed that the procedures of the Maori Appellate Court breached the Treaty and its principles, a claim that we did not uphold. We noted that the High Court, the Court of Appeal, and the Privy Council have closely considered this question and have concluded that Te Tau Ihu iwi were represented and had reasonable opportunity to be heard at the 1990 hearing. The courts have found that the rules of natural justice had not been breached, and we did not think it is necessary to revisit this question.

We did agree with the claimants' allegation that the Crown failed to take a sufficiently active role in the Maori Appellate Court hearing. Although the Crown held a 'watching brief', it made no effort to provide evidence or information that would have assisted the court in assessing the rights of Te Tau Ihu iwi. The Crown had been involved in preparing the case stated and held evidence that was crucial to assessing customary rights in the northern takiwa. In particular, it failed to bring to the court's attention evidence that it held that supported Ngati Apa's claims in the West Coast.

In our view, it was not necessary for that omission to have been deliberate for it to have breached the Crown's obligations under the Treaty and we found that failure to be in breach of the principles of active protection and equal treatment.

5.5 THE CROWN'S TREATMENT OF RIGHTS DURING NEGOTIATIONS AND SETTLEMENT

Chapter 4 then turned to a consideration of the Crown's treatment of Te Tau Ihu iwi rights in the course of negotiations and settlement with Ngai Tahu.

After reporting its findings, which included that the Crown had breached the Treaty in its negotiations for Arahura and Kaikoura, the Ngai Tahu Tribunal recommended that legislation be passed to enable the establishment of a tribal structure to negotiate a settlement. Accordingly, Te Runanga o Ngai Tahu Act was passed in 1996. Section 5 of that Act defined the Ngai Tahu takiwa in terms of the boundaries defined by the Maori Appellate Court in 1990.

These boundaries were also adopted in the Ngai Tahu Claims Settlement Act 1998, which recognised Ngai Tahu 'as the tangata whenua of, and as holding rangatiratanga within, the takiwa of Ngai Tahu whanui'. Under the 1998 Act, the Waitangi Tribunal's jurisdiction to inquire further into Ngai Tahu claims was removed. The 1998 Act did not, however, prevent the Tribunal from inquiring into other claims in the area defined as the Ngai Tahu takiwa. This was clearly established by the Court of Appeal in 2000.

Te Tau Ihu iwi claimed that this legislation breached the Treaty because it enacted Ngai Tahu's exclusive customary rights in the Ngai Tahu takiwa. We did not agree that this was what the legislation provided for. The Court of Appeal has made it clear that the 1996 and 1998 Acts do not prevent the Crown recognising and settling the claims of other iwi in the takiwa. Thus, the legislation is not in itself in breach of the Treaty; rather, the breach lies in the way in which the Government has interpreted it. Te Tau Ihu iwi interests were ignored during the negotiation and settlement of the Ngai Tahu claim. The Crown failed to adequately consult with Te Tau Ihu iwi during this process, and assets that could potentially have been included in a future settlement with Te Tau Ihu iwi were vested in the sole ownership of Ngai Tahu. This exclusive treatment has continued post-settlement, to the detriment of the mana of Te Tau Ihu iwi.

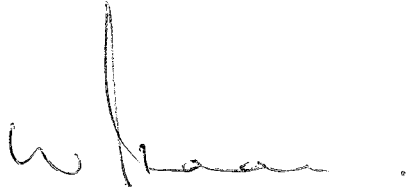
Accordingly, we found that the Crown was in breach of the principles of active protection and equal treatment and that Te Tau Ihu have been prejudiced as a result.

We also agreed with the argument of the Te Tau Ihu claimants that they will be further prejudiced by the statutory definitions based on the Maori Appellate Court's findings, if this should mean that their claims in the northern part of the takiwa are rejected outright, when they come to negotiate their own settlement.

Te Tau Ihu iwi have lost the ability to recover their interests in lands which have vested in Ngai Tahu as a result of earlier Crown settlement, and consequently we strongly recommend that the Crown take urgent action to ensure that these breaches do not continue.

We also recommend that appropriate compensation be made for the breaches of the Treaty that we have outlined above.

Dated at Wellington this 23rd day of August 2007



WW Isaac, presiding officer



J Clarke, member



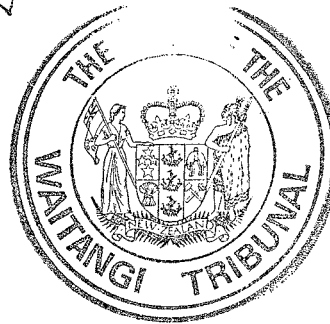
PE Ringwood, member



MPK Sorrenson, member



R Tahuparae, member



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